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ARCHBOLD'S

PLEADING, EVIDENCE, AND PRACTICE

IN

Criminal Cases.

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PLEADING, EVIDENCE, & PRACTICE

IN

Criminal Cases.

BY

SIR JOHN JERVIS,
LATE LORD CHIEF JUSTICE OF THE COURT OF COMMON PLEAS.

WITH THE

STATUTES, PRECEDENTS OF INDICTMENTS, &c.

THE TWENTY-THIRD EDITION.

BY

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PREFACE

TO THE TWENTY-THIRD EDITION.

SINCE the publication of the 22nd Edition, in 1900, there has not been very much legislation affecting the Criminal Law. Indeed the only new statutes are the *Money Lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *post*, p. 594; the *Larceny Act*, 1901; the *Poor Prisoners Defence Act*, 1903; the *Prevention of Cruelty to Children Act*, 1904; and *s.* 28 of the *Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *post*, p. 587, which deals with false statements by directors and officers of joint-stock companies.

The *Larceny Act*, 1901 (1 *Edw.* 7, *c.* 10), which is printed at pp. 575, 576 of this Edition, has had the effect of removing the many difficulties found in working *ss.* 75, 76 of the *Larceny Act*, 1861, which it repeals—difficulties which had been pointed out in *In re Bellencontre* [1891] 2 *Q. B.* 122.

The *Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15), which is in the main a re-enactment of the Act of 1894, will be found at p. 877, *et seq.* The chief changes effected by the new Act are the addition to the schedule of further enactments, to which the rules of the Act as to evidence and procedure are to be applied in the case of offences against children under sixteen; the provision allowing conviction for cruelty on an indictment for manslaughter, and the alteration from three to six months of the time limit on prosecutions for offences against girls of thirteen and under sixteen against *s.* 5 of the *Criminal Law Amendment Act*, 1885. In *R.* v. *Chandra Dharma*, 69 *J. P. Rep.* 39 (noted *post*, p. 913), a case was reserved on the question whether the prosecution for an offence against *s.* 5 of the Act of 1885, committed less than three months before October 1, 1904, when the *Prevention of Cruelty to Children Act*, 1904, came into force, was subject to the three months' limitation in the Act of 1885, or to the six months' limitation

in the Act of 1904. On March 18, 1905, the Court for Crown Cases Reserved decided (40 *L. J. Newsp.* 238; 21 *T. L. R.* 353) that the amendment effected by *s.* 27 of the Act of 1904 related to procedure only, and applied to offences committed before the section came into force, in respect of which the three months' limit imposed by the Act of 1885 had not expired on October 1, 1904.

The *Poor Prisoners Defence Act*, 1903 (3 *Edw.* 7, *c.* 38), will be found at p. 187, and the attorney-general's rules under it at p. 189; while the scales of costs for solicitor and counsel will be found at p. 255. Attention may here be drawn to the new scales of costs and allowances in criminal prosecutions made in June, 1904 (*see* pp. 249–255), superseding those of November, 1903, which had superseded all prior scales. In view of these changes, the chapter on costs has been almost wholly rewritten.

It has been thought more convenient to print the text of the *Criminal Evidence Act*, 1898, in full at p. 392, *et seq.*, and to add as notes the various decisions interpreting its provisions. There are still some unsettled difficulties as to its effect, *e.g.* whether in cases where the husband or wife of a prisoner may be called for the Crown without the consent of the prisoner, such a witness is now compellable or is competent only. In *R.* v. *Ellis*, Lewes Assizes, November 25, 1899 (*post*, p. 398), on a charge of abduction under 48 & 49 *Vict. c.* 69, *s.* 7, *Wills*, J., ruled, in accordance with the practice adopted at the Central Criminal Court, that *s.* 4 of the *Criminal Evidence Act*, 1898, rendered the husband or wife compellable witnesses in prosecutions under the statutes scheduled to that Act. He had proposed to reserve a case; but the prisoner was acquitted, and this difficulty still remains unsettled. So far as concerns cases within the *Prevention of Cruelty to Children Act*, 1904, or the first schedule to that Act, the difficulty is solved by *s.* 12 of that Act (*post*, p. 882), but it remains as to the other enactments referred to in *s.* 4 and the schedule to the Act of 1898 (*post*, p. 397); and it is to be presumed that in *s.* 4 of the Act of 1898 calling such a witness "for the defence" without the consent of the accused means calling the witness on behalf of a co-defendant.

The divergences of judicial opinion stated, *post*, pp. 319, 320, as to the scope and effect of the ruling in *R.* v. *Lillyman*, have been to a considerable extent removed by the judgment of the Court for Crown Cases Reserved in *R.* v. *Osborne*

[1905] 1 *K. B.* 551, which establishes that immediate complaints are admissible in the case of offences against women and girls, even where the question of consent is not an essential element in the crime charged, and that such complaints are admissible even if made in answer to questions, provided that the questions are not leading, suggestive, or of an intimidating character.

In the preface to the 22nd Edition it was stated that the title Treason had been revised in view of the probability that prosecutions for the offence might occur in the near future. During the South African War many prosecutions for treason took place in South Africa; but the offence is there governed by the Roman-Dutch law, and not by the law of England. However, in this country the trial of *R.* v. *Lynch* [1903] 1 *K. B.* 444, arising out of the same war, necessitated a careful examination of the English authorities on treason, and certain of the results of that investigation have been incorporated in the present Edition.

The title Libel reflecting on the administration of justice has been rewritten, and that of Contempt of Court added (*post*, p. 1094), in consequence of the decisions in *R.* v. *Tibbits and Windust* [1902] 1 *K. B.* 77: *R.* v. *Gray* [1900] 2 *Q. B.* 36: and *R.* v. *Parke* [1903] 2 *K. B.* 432, in which last case the powers of the High Court to prevent comments on cases committed for trial were fully considered. The chapters on compensation (p. 263), restitution of property (p. 268), and compounding offences (p. 1089), have been revised and, it is hoped, improved.

The title Bigamy (p. 1167) has been rearranged; the various forms of "Disorderly Houses" have been dealt with more fully than in previous editions and forms of indictment have been inserted; the substance of the various statutes relating to Lotteries has been inserted; and throughout the work the editors have made numerous alterations and additions; *e.g.* as to the law relating to the taking of the deposition of a dying person (p. 374), and to the admissibility of dying declarations (p. 322), and as to proof of guilty knowledge in cases of receiving stolen property (p. 552); and they have inserted at p. 1327 certain of the new Prison Rules relating to the classification of prisoners by the prison authorities. Certain of the indictments have been modernized; and the references have been rechecked throughout with the object of

eliminating so far as possible all incorrect citations of cases and text-books, and the Index has been revised and supplemented to meet numerous criticisms and suggestions received. The editors are obliged to Mr. B. O. Bircham and Mr. H. E. Jenkins, both of the South-Eastern Circuit, for help in correction of references and of the Index, and to Mr. Arthur Denman, Clerk of Assize on the South-Eastern Circuit, and Mr. J. B. Matthews, of the Oxford Circuit, for many valuable suggestions.

In the Addenda and Corrigenda (pp. cxxix., cxxx.) will be found some cases decided too late to be included in the text, and correction of certain mistakes discovered while the edition was going through the press.

W. F. C.
G. S.

TEMPLE, *May 18th*, 1905.

PREFACE

TO THE FIRST EDITION (1822).

In the year 1812, I collected all the authorities upon the Pleas of the Crown to be found in the text books, the books of reports, etc.; all that could elucidate the subject in Bracton, Britton, Fleta, and the Mirror; the substance of Hale, Hawkins, the Third Institute, Dalton, Foster, and East; all the cases upon the subject in the Year Books, the old reports, and in the modern and recent reports; and all the statutes upon the subject down to the period at which I made the collection. Of these materials I framed, with infinite pains, a Digest in three volumes, one of which was actually published in the year 1813.

When I contemplated the publication above mentioned, works upon the Pleas of the Crown were extremely scarce; those of repute, upon the subject, were rarely to be had, even at most extravagant prices. But immediately upon the publication of my First Volume, two other works were announced upon the same subject, one of which was published very shortly after it was announced: the other not for nearly two years afterwards. Their being announced, however, had the effect of deterring me from proceeding with my Work; I thought they would amply supply the deficiency of works upon the subject; and I felt too much diffidence in my own ability to enter into competition with the writers of them. Another, and a very elaborate work, (*a*) has since been added, which has fully confirmed me in my determination not to publish the work I originally contemplated.

As the subject of Evidence in criminal cases, however, had

(*a*) This is presumed to be Chitty's *Criminal Law*, a valuable work, numerous references to which have been inserted in the 23rd edition.

not been treated of by any of these writers, and as some book upon the subject was extremely desirable, I thought I might select from the Work I originally compiled such part of it as related to evidence in criminal cases, and publish it, without subjecting myself to the imputation of wishing to enter into any competition with the learned writers of the Works already extant upon the Pleas of the Crown. I have made this compilation; I have added to it all the cases since decided, and the statutes since enacted, upon the subject; and I have compressed the whole into the smallest compass that appeared to me to be practicable, consistent with perspicuity. I have also added precedents of indictments and other criminal pleadings —not from any idea that this part of the Work was required by the Profession, there being already one or two collections of great repute upon the subject—but merely because I found it impracticable to give the evidence in particular cases in the simplified form I was anxious to give it, without also giving, in each case, the particular indictment or pleading the evidence was intended to support. And as I was thus obliged to give the precedents, I thought it desirable, and indeed necessary, also to give such a summary of the law relative to pleading in criminal cases generally, as would enable the reader to frame an indictment in cases where he might not be able to find a precedent.

As to the arrangement of my materials, I have endeavoured to make it simple and perspicuous. The work consists of two books—the First Book, which treats of Pleading and Evidence in criminal cases generally, is divided into two parts: the first, treating of Pleading generally, namely, of indictments, informations, special pleas, demurrers, etc.; the second, treating of Evidence generally, namely, of evidence of records, of matters *quasi* of record, of private written instruments, and of parol evidence, the competency and credit of witnesses, etc., etc.

The Second Book, which treats of Pleading and Evidence in particular cases, is divided into four parts: the first treats of offences against the property and persons of individuals; the second treats of offences of a public nature, namely, offences against the King and his government, offences against public justice, offences against the public peace, offences against public trade, and offences against public police and economy; the

third treats of conspiracies; and the fourth of principals and accessories.

I have now apprised the reader of what he is to expect in the following Work. Trifling as it may appear, it has cost me much time and great labour. I have taken infinite pains to simplify my subject; to reject everything redundant or irrelevant; to compress the whole into the smallest possible compass consistent with perspicuity; and to clothe it in language plain, simple, and unadorned. In fact, my sole object has been to make this a practically useful book: I neither anticipate nor desire for it a higher commendation.

J. F. A.

Symonds Inn.

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ADDENDA ET CORRIGENDA.

Page 6, line 35, *for* '12 & 13 *Vict. c.* 49' *read* '39 & 40 *Vict. c.* 77, and *for* '1849' *read* '1876.'

„ 10, „ 23, *add* '*R.* v. *Coyne*, 69 *J. P. Rep.* 151, *Fulton*, Recorder.'

„ 118, last line, *for* '5 & 6 *W.* 4, *c.* 76' *read* '4 & 5 *W.* 4, *c.* 76.'

„ 129, line 10, *for* 'found as' *read* 'found or.'

„ 131, „ 19, *after* '*R.* v. *Boxall*' *read* '4 *A.* & *E.* 513.'

„ 146, „ 13 from bottom, *after* '*R.* v. *Opie*' *read* '1 *Wms. Saund.* 300 *k.*'

„ 198*n.* *after* '*R.* v. *Freeman*' *read* '6 *Queensland L. J.* 281.'

„ 215, line 1, *after* 'defendant' *read* 'In.'

„ 219, „ 4, *after* '*R.* v. *Catherall*' *read* '13 *Cox*, 109.'

„ 243, „ 7, *after* '*R.* v. *Chichester*' *read* '17 *Q. B.* 504*n.*'

„ 264, „ 10, *after* '*Marsh* v. *Keating*' *read* '1 *Mont.* & *A.* 592.'

„ 307, „ 8 from bottom, *after* '*R.* v. *Mean*' *add* 'now reported 69 *J. P. Rep.* 27.'

„ 320, „ 4, *add* 'The cases discussed on this page have been further considered in *R.* v. *Osborne* (1905), 1 *K. B.* 551 (*C. C. R.*).

„ 336, „ 31, *add* '*and see R.* v. *Knight*, 69 *J. P. Rep.* 108, *Channell*, J.'

„ 353, „ 19, *after* '*Doe* v. *Andrews*' *read* '15 *Q. B.* 756, 759.'

„ 395, „ 17, *after* '*R.* v. *Bridgwater*' *add* 'now reported (1905), 1 *K. B.* 131.'

„ 431, „ 11 from bottom, *at end of* '24 & 25 *Vict. c.* 96, *s.* 116' *add* '*and see Faulkner* v. *R.*, 21 *T. L. R.* 417 (*K. B. D.*).'

Pages 457, 465, cross-references to 4 *Edw.* 7, *c.* 10, should be to p. 575.

Page 574, „ 31, *after* '*R.* v. *Clarke*' *read* '69 *J. P. Rep.* 150 (*C. C. R.*).'

„ 589, line 7 from bottom, *for* '*post*, p. 589' *read* '*ante*, p. 587, *post*, p. 590.'

„ 591, „ 5 from bottom, *add* the following paragraph:—

'The defendant was a clerk in the employment of a firm of tailors who carried on business in London, with a branch establishment in Paris. The defendant was employed in Paris, and it was his duty to receive moneys on account of his employers at the establishment in Paris, and to pay the moneys into a bank in Paris, and on each day to enter the sums so received on a slip furnished to him for that purpose and to transmit the slip by post to the firm in London. A book called the Paris cash account book was kept in the office in London in which one of the partners of the firm entered the sums received from Paris from the slips sent over by the defendant. The defendant knew that the book was so kept, and that items omitted by him from the slips would

necessarily be omitted from the book. The defendant fraudulently omitted to enter on the slips three sums received by him in Paris on account of his employers. When in London the defendant went through the book and compared it with the slips after two of the three items had been omitted therefrom. The jury found him guilty of an offence against s. 1 of the *Falsification of Accounts Act*, 1875 (38 & 39 *Vict.* c. 24), viz. of having omitted and concurred in omitting the above three sums from the Paris cash account book kept in London. *Held*, *Alverstone*, C.J., *Lawrance* and *Ridley*, JJ. (*Kennedy* and *Channell*, JJ., doubting), that upon the above facts the defendant could be properly convicted. *R.* v. *Oliphant* (April 8, 1905), 21 *T. L. R.* 416 (*C. C. R.*).'

Page 610, line 14 from bottom, *after* '*R.* v. *Taylor*' *read* '457' *for* '547.'
„ 616, „ 5, *after* '*R.* v. *Smith*' *add* 'now reported 69 *J. P. Rep.* 51.'
„ 622, „ 27, *add* '*And see R.* v. *Stevenson*, 69 *J. P. Rep.* 84.'
„ 636, „ 11, *after* '*R.* v. *Kearney*' *read* '*Jebb* (*Circ. Ct. I.*), 99.'
„ 671, „ 19 from bottom, *after* 'prove' *insert* 'a total demolition.'
„ 692, „ 13, *add* 'In *R.* v. *Parry* (1900), 35 *L. J. Newsp.* 456, at Chester Assizes, *Lord Russell*, C.J., after consulting *Grantham*, J., *held* that a man could be convicted under this section for maliciously injuring an animal belonging to him.'
„ 701, „ 28, *for* 'in *R.* v. *Welch*' *read* 'And *R.* v. *Welch*.'
„ 701, „ 24, *for* '(*ante*, p. 693), where' *read* '(*ante*, p. 693). Where.'
„ 780, „ 25, *after* '*Commonwealth* v. *Bowen*' *read* '13 *Mass.* 356 (ed. 1816).'
„ 790, „ 23, *after* '*R.* v. *Brown*' *read* '1 *Leach*, 148.'
„ 886, „ 5, *after* '*Cole* v. *Turner*' *read* '6 *Mod.* 149.'
„ 888, „ 5, *for* '*Goddard* v. *Green*' *read* '*Green* v. *Goddard*.'
„ 885, „ 26 from bottom } *for* 'for' *read* 'from.'
„ 889, „ 13 „ }
„ 892, „ 21 „ *after* '*R.* v. *Linsberg*' *add* 'now reported 69 *J. P. Rep.* 107.'
„ 900, „ 21 „ *after* '*R.* v. *Biswell*' *read* '2 *Cox*, 279.'
„ 913, „ 16, *after* '*R.* v. *Chandra Dharma*' *add* 'affirmed by C. C. R., 21 T. L. R. 353.'
„ 920, „ 1, *for* '57 & 58 *Vict. c.* 41, *s.* 17' *read* '4 *Edw.* 7, *c.* 15, *s.* 17.'
„ 1051, „ 8 from bottom, *for* '4 & 5 *W. & M.* 4, *c.* 67' *read* '4 & 5 *W.* 4, *c.* 67.'
„ 1071, „ 18, *after* '*R.* v. *Johnson*' *read* '2 *Show.* 1.'
„ 1194, „ 19, *after* '*R.* v. *Westropp*' *read* '2 *Ir. C. L. Rep.* 217.'
„ 1132, „ 4 from bottom, *after* '*R.* v. *Skinner*' *read* '*Lofft*, 55.'
„ 1138, „ 6, *add* 'as to the meaning of the words "his property," *see It.* v. *Humphris* (1904), 2 *K. B.* 89.'
„ 1145, „ 2, *after* '*R.* v. *Creese*' *add* 'But see *R.* v. *Humphris* (1904), 2 *K. B.* 89.'
„ 1148, „ 21, *add* 'In *R.* v. *Coyne*, 69 *J. P. Rep.* 151, *Fulton*, Recorder, where the defendant induced persons to pay to him cash by way of premiums for apprenticeship (*which was not returnable*), it was held that he obtained money and not "credit."'
„ 1160, „ 4, *after* '*Glamorgan Coal Co.* v. *South Wales Miners' Federation*' *add* 'affirmed in H. L. April 14, 1905.'

BOOK I.

PLEADING, PRACTICE, AND EVIDENCE GENERALLY.

PART I.

PLEADING AND PRACTICE GENERALLY.

CHAPTER I.

INDICTMENT.

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SECT. 1.

INDICTMENT, WHAT, AND IN WHAT CASES IT LIES.

AN "indictment" is a written accusation of crime, made at the suit of the King, against one or more persons, and preferred to, and presented upon oath by, a grand jury; a "bill of indictment" is such written accusation before it is so presented.

It is the ordinary common law remedy for all treasons and felonies, for misprisions of treason and felony, and for misdemeanors of a public nature: 2 *Hawk. c.* 25, *ss.* 1, 4. In the case of treason and felony it is now the sole remedy except (1) that—rarely used—of impeachment, appeals of felony having been abolished in 1819 by 59 *Geo.* 3, *c.* 46: (2) that of a coroner's inquisition in cases of murder or manslaughter (*see post, Book I. ch. iii.*): (3) the summary remedy permitted in certain cases of felony and misdemeanor under the *Summary Jurisdiction Acts* of 1879 (42 & 43 *Vict. c.* 49) and 1899 (62 & 63 *Vict. c.* 22). In the case of misdemeanors, there is also an alternative remedy by way of information, *q.v. post, Book I. ch. ii.* p. 139.

Breaches of common law duty.]—An indictment lies at common law for a breach of duty, which is not a mere private injury, but an outrage on the moral duties of society. Perhaps the most important example is the neglect to provide sufficient food or other necessaries (as to medical aid, *see R.* v. *Smith*, 8 *C. & P.* 153: *Sellen* v. *Norman*, 4 *C. & P.* 80: *Wennall* v. *Adney*, 3 *B. & P.* 247; 6 *R. R.* 780: *R.* v. *Senior* [1899] 1 *Q. B.* 283; *Russell*, L. C. J., *at* p. 289) for a person unable to provide for himself, and for whom the defendant is obliged by duty or contract to provide, where such neglect injures the health of that person, whether the person injured be of extreme age (*R.* v. *Marriott*, 8 *C. & P.* 425: *R.* v. *Instan* [1893] 1 *Q. B.* 450), or of tender years (*R.* v. *Friend*, *R. & R.* 20: *R.* v. *Hogan*, 2 *Den.* 277; 20 *L. J.* (*M. C.*) 219: *R.* v. *Phillpot*, *Dears.* 179; 22 *L. J.* (*M. C.*) 113: *R.* v. *Chandler*, *Dears.* 453; 24 *L. J.* (*M. C.*) 109; *R.* v. *Ryland*, *L. R.* 1 *C. C. R.* 99; 37 *L. J.* (*M. C.*) 10; 10 *Cox*, 882: *R.* v. *Rugg*, 12 *Cox*, 16 (*C. C. R.*): *R.* v. *Jones*, 19 *Cox*, 678), or the defendant's servant (*R.* v. *Ridley*, 2 *Camp.* 650: *R.* v. *Smith*, *L. & C.* 607; 34 *L. J.* (*M. C.*) 153), or apprentice (*R.* v. *Self*, 1 *Leach*, 137; 1 *East*, *P. C.* 226: *R.* v. *Smith*, 8 *C. & P.* 153), or a lunatic (*R.* v. *Pelham*, 8 *Q. B.* 959; 15 *L. J.* (*M. C.*) 105. *Cf.* 24 *& 25 Vict. c.* 100, *s.* 26 (servants and apprentices), 53 *& 54 Vict. c.* 5, *s.* 322 (lunatics); 4 *Edw.* 7, *c.* 15, *s.* 1 (children). It also lies for any act of wilful negligence, whereby human life or health is endangered, such as shipping dangerous combustibles without informing the ship-master: *Williams* v. *H. E. I. Co.*, 3 *East*, 192; 6 *R. R.* 589; or exposing for sale, or possessing, with intent to sell, provisions unfit for human food: *R.* v. *Mackarty*, 6 *East*, 133, 141, *cit.*; 2 *Ld. Raym.* 1179; 3 *Ld. Raym.* 487: *R.* v. *Dixon*, 3 *M. & Sel.* 11; 15 *R. R.* 301: *R.* v. *Haynes*, 4 *M. & Sel.* 214: *R.* v. *Stevenson*, 3 *F. & F.* 106: *Shillito* v. *Thompson*, 1 *Q. B. D.* 12; 45 *L. J.* (*M. C.*) 18. It also lies for acts intended to interfere with or pervert the course of justice, *e.g.*, for disposing of a dead body so as to prevent the coroner from holding an inquest upon it where an inquest ought to be held: *R.* v. *Price*, 12 *Q. B. D.* 247; 53 *L. J.* (*M. C.*) 51: *R.* v. *Stephenson*, 13 *Q. B. D.* 331; 53 *L. J.* (*M. C.*) 176; but not for burning a dead body instead of burying it, unless it be so done as to cause a public nuisance: *R.* v. *Price*, *ubi supra*; for manufacturing false evidence for the purpose of misleading a judicial tribunal, although the evidence is not in fact used: *R.* v. *Vreones* [1891] 1 *Q. B.* 360; 60 *L. J.* (*M. C.*) 62; 17 *Cox*, 267: or for attempting to pervert the course of public justice by publishing articles in a newspaper affecting the conduct or character of persons awaiting trial: *R.* v. *Tibbits and Windust* [1902] 1 *K. B.* 77; 20 *Cox*, 70, (*C. C. R.*), and cases there cited: *R.* v. *Parke* [1903] 2 *K. B.* 432.

It also lies for all nuisances of a public nature, though occasioned by an act in itself innocent, if the nuisance be the probable consequence of the act. *R.* v. *Moore*, 3 *B. & Ad.* 184; 37 *R. R.* 383; *and see* 1 *Hawk. c.* 75, *ss.* 6, 7. Under this head falls the remedy against a common innkeeper who either refuses to receive a traveller as guest in his house or to find him victuals or lodging on being tendered a reasonable price: *see R.* v. *Rymer*, 2 *Q. B. D.* 136; 46 *L. J.* (*M. C.*) 108; 13 *Cox*, 378; 1 *Russ. Cr.* (6th ed.) 740.

Attempts to commit offences.]—Mere intention to commit an offence is not indictable, except in the case of high treason, as to which it is said that under 25 *Edw.* 3, *st.* 5, *c.* 2, *voluntas reputatur pro facto*; but in all cases where the intent to commit a crime is manifested by any overt act, the party may be indicted for an attempt to commit the offence. 1 *Deacon Cr. L.* 643: *R.* v. *Scofield*, *Cald.* 397: *R.* v. *Higgins*, 2 *East*, 5, 21; 6 *R. R.* 615; *R.* v. *Chapman*, 1 *Den.* 432; 18 *L. J.* (*M. C.*) 152: 3 *Cox*,

467: *R.* v. *Taylor*, 1 *F. & F.* 511: *R.* v. *Duckworth* [1892] 2 *Q. B.* 83; 17 *Cox*, 495. And it is perfectly clear that every attempt (not every intention) to commit a felony or misdemeanor is a misdemeanor at common law, whether the crime attempted is one by statute or at common law. *R.* v. *Hensler*, 11 *Cox*, 570 (*C. C. R.*): *R.* v. *Roderick*, 7 *C. & P.* 795, *Parke*, B: *R.* v. *Martin*, 2 *Mood. C. C.* 123; 9 *C. & P.* 213, 215: *R.* v. *Ransford*, 13 *Cox*, 9 (*C. C. R.*): *R.* v. *Cartwright*, *R. & R.* 107, *n.*: *R.* v. *Butler*, 6 *C. & P.* 368. This doctrine has been applied to an attempt to commit suicide. *R.* v. *Doody*, 6 *Cox*, 463: *R.* v. *Burgess*, *L. & C.* 258; 9 *Cox*, 302; 32 *L. J.* (*M. C.*) 185.

To constitute an attempt the act done must be immediately connected with the commission of the offence. *R.* v. *Eagleton*, *Dears.* 515; 24 *L. J.* (*M. C.*) 158: *R.* v. *Cheeseman*, *L. & C.* 140; 31 *L. J.* (*M. C.*) 89; 9 *Cox*, 100: *R.* v. *Roberts*, *Dears.* 539; 25 *L. J.* (*M. C.*) 17. Thus, the *procuring* of indecent prints with intent to sell them is an indictable misdemeanor; but the merely *keeping and preserving* them with that intent is not. *Dugdale* v. *R.*, 1 *E. & B.* 435; *Dears.* 64; 22 *L. J.* (*M. C.*) 50. So the procuring of base coin with intent to utter is indictable at common law (*R.* v. *Fuller*, *R. & R.* 308), but the mere *possession* of base coin with intent to utter it is not indictable at common law. *R.* v. *Stewart*, *R. & R.* 288: *R.* v. *Heath*, *R. & R.* 184. It is so now, in certain circumstances, under 24 & 25 *Vict. c.* 99, *s.* 11, *post*, *tit. Coining*; and possession of coining tools with intent to use them is indictable at common law. *R.* v. *Sutton*, 1 *East*, *P. C.* 172; *Cas. K. B.*, *temp. Hardw.* 379. To render a person criminally liable for an attempt to commit an offence it is not necessary to show that if no interruption had taken place the attempt could have succeeded. *R.* v. *Brown*, 24 *Q. B. D.* 357; 59 *L. J.* (*M. C.*) 47; 16 *Cox*, 715: *R.* v. *Ring*, 61 *L. J.* (*M. C.*) 116; 17 *Cox*, 491 (*C. C. R.*): *R.* v. *Williams* [1893] 1 *Q. B.* 320; 62 *L. J.* (*M. C.*) 29, which overrule *R.* v. *Collins*, *L. & C.* 471; 33 *L. J.* (*M. C.*) 177; 9 *Cox*, 497, in which it had been held that if a person puts his hand into the pocket of another with intent to steal what he can find there, and the pocket is empty, he cannot be convicted of an attempt to steal.

Incitement.]—To solicit or incite another to commit a crime is an indictable misdemeanor at common law, even though the solicitation or incitement has no effect. *R.* v. *Quail*, 4 *F. & F.* 1076: *R.* v. *Gregory*, *L. R.* 1 *C. C. R.* 77; 36 *L. J.* (*M. C.*) 60. This includes an offer of a bribe to a person to commit an offence. *Wade* v. *Broughton*, 3 *V. & B.* 172: and an attempt to incite to the commission of crime is also an indictable misdemeanor at common law. *R.* v. *Ransford*, 13 *Cox*, 9 (*C. C. R.*). It is immaterial whether the principal offence is one existing by the common law or is created by statute. As to incitement to murder, *see post*, *Book II. ch. ii. s.* 1.

Disobedience to statutes.]—Where a statute declares any act or omission to be treason, felony, misprision of treason or misdemeanor, an indictment lies in respect of such act or omission. And even though a statute does not use express terms describing the nature of the offence, if it prohibits a matter of public grievance to the liberties and securities of the subject, or commands a matter of public convenience (such as the repairing of highways or the like), all acts or omissions contrary to the prohibition or command of the statute are misdemeanors at common law, punishable by indictment, unless such method of procedure do manifestly appear to be excluded by it. 2 *Hawk. c.* 25, *s.* 4: *R.* v. *Davis*, *Say.* 163: *R.* v. *Sainsbury*, 4 *T. R.* 451; 2 *R. R.* 433: *R.* v. *Price*, 11 *A. & E.* 727: *R.* v. *Stephenson*,

13 *Q. B. D.* 331; 53 *L. J.* (*M. C.*) 176: *R.* v. *Hall* [1891] 1 *Q. B.* 747; 60 *L. J.* (*M. C.*) 124. In *R.* v. *Kenyon* [1901], 36 *L. J. Newsp.* 371, an indictment was framed for contravening s. 3 of the Disused Burial Grounds Act, 1884 (47 & 48 *Vict. c.* 72) by building on a disused Roman Catholic burial-ground. The remedy usually sought is injunction (*see re Ponsford and Newport District School Board* [1894] 1 Ch. 454; 63 *L. J.*, Ch. 278. But Phillimore, J., seems to have considered the indictment good, and the defendants pleaded guilty, and in two cases were sentenced to imprisonment. If a statute specify a mode of proceeding different from that by indictment, then, if the matter were already an indictable offence at common law, and the statute merely introduces a different mode of prosecution and punishment, the remedy is alternative, and the prosecutor has still the option of proceeding by indictment at common law, or by the mode pointed out by the statute. *Castle's case*, *Cro. Jac.* 644: *R.* v. *Robinson*, 2 *Burr.* 799, 805: *R.* v. *Wigg*, 2 *Ld. Raym.* 1163; 2 *Salk.* 460: *R.* v. *Balme*, 2 *Cowp.* 648: *R.* v. *Richard Carlile*, 3 *B. & Ald.* 161: *and see* 2 *Hale*, 191; 1 *Saund.* 135, and notes; *Hardcastle on Statutes* (3rd ed.), 234; *Maxwell on Statutes* (3rd ed.), 568. And even if a statute prohibit, under a penalty, an act which was before lawful, and a subsequent statute (*R.* v. *Boyall*, 2 *Burr.* 832), or the same statute (in a *subsequent* substantive clause), ordain a mode of proceeding for the penalty different from that by indictment, the prosecutor may, notwithstanding, proceed by indictment upon the prohibitory clause, as for a misdemeanor at common law, or he may at his option proceed in the manner pointed out by the statute. 2 *Hale*, 171: *R.* v. *Wright*, 1 *Burr.* 543; *and see R.* v. *Jones*, 2 *Str.* 1146: *R.* v. *Harris*, 4 *T. R.* 202; 2 *R. R.* 358: *R.* v. *Buchanan*, 8 *Q. B.* 883; 15 *L. J.* (*Q. B.*) 227: *R.* v. *Hall* [1891] 1 *Q. B.* 747, *at* 770; 50 *L. J.* (*M. C.*) 124, *Charles*, J.: *Saunders* v. *Holborn District Board* [1895] 1 *Q. B.* 64, 69; 64 *L. J.* (*Q. B.*) 101. But if the manner of proceeding for the penalty be contained in the *same* clause which prohibits the act, the mode of proceeding given by the statute must be pursued, and no other; for the express mention of any other mode of proceeding impliedly excludes that of indictment. *R.* v. *Robinson*, 2 *Burr.* 799, 805: *R.* v. *Buck*, 2 *Str.* 679: *R.* v. *Hall*, *ubi supra*; *R.* v. *Lovibond*, 19 *W. R.* 753. Where a statute, in one clause, declares an act to be a *public nuisance*, it is indictable, though a subsequent clause subjects it to a pecuniary penalty recoverable by "information, bill, plaint, or action at law," or makes it abateable. *R.* v. *Crawshaw*, *Bell*, 303; 30 *L. J.* (*M. C.*) 58; 8 *Cox*, 375: *R.* v. *Gregory*, 5 *B. & Ad.* 555; 3 *L. J.* (*M. C.*) 25. It is now an established rule of construction that "where an act or omission constitutes an offence under two or more acts, or both under an act and at common law, whether any such act was passed before or after" January 1, 1890, the offender shall, "unless the contrary intention appears, be liable to be punished under either or any of those acts, or at common law, but shall not be liable to be punished twice for the same offence." 52 & 53 *Vict. c.* 63 (*Interpretation Act*, 1889) *ss.* 33, 42. Thus if, in the case of a common-law misdemeanor, a new mode of punishment or new mode of proceeding merely be directed, without altering the class or nature of the offence, the new punishment or new mode of proceeding is alternative, and the offender may be indicted as before for the common-law misdemeanor (*R.* v. *Richard Carlile*, 3 *B. & Ald.* 161); and the mere declaration that an offence shall be felony which was so at common law does not create a new offence. *Williams* v. *R.*, 7 *Q. B.* 250, 253, *Patteson*, J. But if a later statute expressly alters the quality of an offence, *e.g.* by making it a misdemeanor instead of a felony, or a felony instead of a misdemeanor, the offence cannot be proceeded for under the earlier statute. *Michell* v.

Brown, 1 *E. & E.* 257; 28 *L. J.* (*M. C.*) 53; *R.* v. *Cross*, 1 *Ld. Raym.* 711; 3 *Salk.* 193. This result equally follows if the words "feloniously" or "deemed to be a felony" are used in the later act. *R.* v. *Johnson*, 3 *M. & Sel.* 539, 556; 16 *R. R.* 352: *Bayley*, J.: *R.* v. *Solomons*, 1 *Mood. C. C.* 292; overruling *R.* v. *Cale*, 1 *Mood. C. C.* 11. And if a later statute describes an offence created by a former statute, and affixes to it a different punishment, varying the procedure, and giving an appeal where there was no appeal before, the prosecutor must proceed for the offence under the later statute. *Michell* v. *Brown*, *ubi supra*. And where a *statute* make the doing of an act *felonious*, if a subsequent statute make it *penal* only, the latter statute is a virtual repeal of the former, so far as relates to the punishment of the offence. 1 *Hawk. c.* 40, *s.* 5. Where, therefore, a statute (9 *Geo.* 1, *c.* 22) made an offence a capital felony, and a subsequent statute (16 *Geo.* 3, *c.* 30) imposed a forfeiture of twenty pounds for the same offence when first committed, recoverable before justices of the peace, and made the second offence felony, the latter statute was held virtually to repeal so much of the former statute as related to the offence. *R.* v. *Davis*, 1 *Leach*, 271.

Disobedience to rules and orders made under statutory authority.]—Disobedience to an order relating to quarantine, made by the king in council under statutory authority, has been held to be an indictable misdemeanor at common law. *R.* v. *Harris*, 4 *T. R.* 202, explained in *R.* v. *Hall* [1891] 1 *Q. B.* 747, 765; 60 *L. J.* (*M. C.*) 124. And where a statute, the matter of which concerns the public in general, delegates to commissioners the power to make orders under it, disobedience to an order made by them in pursuance of such power is an indictable misdemeanor at common law. *R.* v. *Walker*, *L. R.* 10 *Q. B.* 355; 44 *L. J.* (*M. C.*) 169. As to failure by overseers to account to a poor law auditor, *see R.* v. *Crossley*, 10 *A. & E.* 132; 8 *L. J.* (*M. C.*) 81. Where a corporation were authorized by a public statute to make a towing-path on the side of a river, it was held to be an indictable misdemeanor at common law to obstruct the corporation in the execution of the powers given them by the statute. *R.* v. *Smith*, 2 *Doug.* 441. Disobedience to an order of a court of competent jurisdiction is indictable at common law. *R.* v. *Robinson*, 2 *Burr.* 799, 804; *R.* v. *Mortlock*, 7 *Q. B.* 459: *R.* v. *Brisby*, 1 *Den.* 416; 18 *L. J.* (*M. C.*) 157: *R.* v. *Jeyes*, 3 *A. & E.* 416: *R.* v. *Johnson*, 4 *M. & Sel.* 515; and *see post*, *pt.* ii. *c.* iii. *s.* 13. It was an indictable misdemeanor to obstruct a coroner in the execution of the duties imposed upon him by 4 *Edw.* 1, *st.* 2 (*stat. de officio coronatoris*). *R.* v. *Price*, 12 *Q. B. D.* 247; 53 *L. J.* (*M. C.*) 51: *R.* v. *Stephenson*, 13 *Q. B. D.* 331; 53 *L. J.* (*M. C.*) 176; and the same would probably be held in the case of an obstruction of the coroner in the execution of the duties imposed upon him by *The Coroners Act*, 1887 (50 & 51 *Vict. c.* 71), which repeals and replaces the old statute.

Private injuries.]—An indictment will not lie for a mere private injury against an individual: as for enticing away his apprentice; *R.* v. *Daniel*, 1 *Salk.* 380; entering his close, digging the ground, erecting a shed thereon, expelling him and keeping him out of possession; *R.* v. *Storr*, 3 *Burr.* 1698: *R.* v. *Bake*, *Ib.* 1731; pulling the thatch off a dwelling-house, of which he was in peaceable possession; *R.* v. *Atkins*, *Ib.* 1706; or for a private cheat; *R.* v. *Osborn*, *ib.* 1697; or for excluding commoners by enclosing, *Willoughby's case* [1588], *Cro. Eliz.* 90, or the like. The remedy for injuries of this description is by action only, unless they in some measure concern the King, or are accompanied by circumstances

which amount to a breach of the peace. *Anon.*, 3 *Salk.* 187. Nor will an indictment lie for the infringement of a right common, not to all his majesty's subjects, but only to the inhabitants of a particular district. 1 *Hawk. c.* 76, *s.* 1: *Co. Litt.* 56 *a*: *Westbury* v. *Powel*, cited in *Fineux* v. *Hovenden*, *Cro. Eliz.* 664; *R.* v. *Thrower*, 1 *Vent.* 208; 3 *Keble*, 28: *Austin's case*, 1 *Vent.* 189. So an indictment will not lie for the infringement of rights which are merely private, though regulated by a public statute; *R.* v. *Richards*, 8 *T. R.* 634; 5 *R. R.* 489: *and see Com. Dig. Indictment* (*D.*); nor for an act prohibited by a private statute, which tends merely to the damage of a particular individual; *R.* v. *Pawlyn*, 1 *Sid.* 208; nor will it lie for a mere breach of the bye-laws or customs of a corporation. *R.* v. *Sharples*, 4 *T. R.* 777: *R.* v. *Gorge*, 3 *Salk.* 189. *See Com. Dig. Indictment* (*E.*); 1 *Russ. Cr.* (6th ed.), 195, 201; *and see ante*, p. 3.

Offences indictable at election of accused.]—An offence punishable on summary conviction before justices, *other than an assault*, may, at the option of the accused, under certain circumstances be converted into an indictable offence, under the *Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49, *s.* 17, which enacts as follows: "(1.) A person when charged before a court of summary jurisdiction, with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding *three* months, *and which is not an assault*, may, on appearing before the court, and before the charge is gone into but not afterwards, claim to be tried by a jury; and thereupon the court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence and not with an offence punishable on summary conviction, and the offence shall as respects the person so charged be deemed to be an indictable offence, and if the person so charged is committed for trial, or bailed to appear for trial, shall be prosecuted accordingly, and the expenses of the prosecution shall be payable as in cases of felony. . . . (3.) This section shall not apply to the case of a child, unless the parent or guardian of the child is present;" but if he is, "the claim under this section may be made by such parent or guardian." A list of the enactments to which this provision applies is given in *Douglas, Summary Jurisdiction Procedure* (8th ed.), 149. There are several other statutes, such as 12 & 13 *Vict. c.* 49 (*Prevention of Cruelty to Animals Act*, 1849), *s.* 15; 38 & 39 *Vict. c.* 86 (*Conspiracy and Protection of Property Act*, 1875), *s.* 9, and 50 & 51 *Vict. c.* 28 (*Merchandise Marks Act*, 1887), *s.* 2, *sub-s.* 6, which expressly enable a defendant, when accused of an offence punishable on summary conviction under those statutes, to insist upon a trial by indictment. It is the duty of the Court of Summary Jurisdiction before going into the case to inform the accused of his right to elect: and failure to do so invalidates the subsequent summary proceedings. *R.* v. *Cockshott* [1898] 1 *Q. B.* 582; 67 *L. J. Q. B.* 467. When the defendant elects to be tried on indictment the procedure and powers of the court of trial are the same as in the case of an ordinary misdemeanor, and are not those of the court of summary jurisdiction; *see R.* v. *Clerk of Peace for Manchester* (1889), in *Stone's Justice* (35th ed.), 42.

Effect of repeal on pending proceedings.]—By the unqualified *repeal* of the statute on which an indictment is framed, though it takes place after the finding of the bill, (but before plea pleaded,) the proceedings fall to the ground and no judgment can be pronounced. *R.* v. *Denton*, *Dears.* 3; 18 *Q. B.* 761; 21 *L. J.* (*M. C.*) 207; *see R.* v. *Mawgan in Meneage*, 8 *A. & E.* 496; 7 *L. J.* (*M. C.*) 98. And where a prisoner was indicted for privately stealing from a shop against 10 & 11 *W.* 3, *c.* 16 (*c.* 23, *Ruffhead*),

which was repealed after the offence was committed, but before the prisoner was tried, by 1 *G.* 4, *c.* 117, *s.* 1 *(rep.)*, it was held that the prisoner could not be sentenced under the repealed act. *R.* v. *M'Kenzie*, *R. & R.* 429. But it has been held that an indictment for conspiracy to violate a statute, being a common law offence, will lie after the repeal of the statute, or in respect of an offence committed before the repeal. *R.* v. *Thompson*, 16 *Q. B.* 832: 20 *L. J.* (*M. C.*) 183. As to statutes passed since 1889, *the Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 38, provides that where an Act "repeals any other enactment, then unless the contrary intention appears, the repeal shall not . . . affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed, or affect any investigation, legal proceeding, or remedy in respect of any such . . . penalty, forfeiture or punishment as aforesaid;" and that "any such investigation, legal proceeding, or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing act had not been passed." *See R.* v. *Webb* (1904) 197 *Cent. Cr. Ct. Sess. Pap.* 627, *Walton* J. Particular clauses to the like effect were common in prior statutes: as to their effect, *see R.* v. *Smith*, *L. & C.* 131; 31 *L. J.* (*M. C.*) 105.

Vexatious indictments.]—At common law any person was at liberty to prefer a bill of indictment before a grand jury against another for any indictable offence, without any previous inquiry before a justice into the truth of the accusation. This right was often much abused, because as the grand jury only hear the evidence for the prosecution, and the accused is unrepresented before them, it frequently happened that a person innocent of the charge made against him, and who had no notice that any proceedings were about to be instituted, found that a grand jury had been induced to find a true bill against him, and so to injure his character and put him to great expense and inconvenience in defending himself against a groundless accusation. This common law right has been restricted by legislation in the case of a number of crimes. The *Vexatious Indictments Act*, 1859 (22 & 23 *Vict. c.* 17), provides (*s.* 1) that "no bill of indictment for any of the offences following" (*see list below*) shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law at Westminster (i.e. *now of the High Court of Justice*) or of his majesty's attorney-general or solicitor-general for England, or unless such indictment for such offence, if charged to have been committed in Ireland, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law in Dublin (i.e. *now of the Supreme Court of Ireland*), or of his majesty's attorney-general or solicitor-general for Ireland, or (in the case of an indictment for perjury) by the direction of any court, judge or public functionary, authorized by the *Criminal Procedure Act*, 1851 (14 & 15 *Vict. c.* 100), to direct a prosecution for perjury." The offences specified in the Act of 1859 are:

(*a*) Perjury and subornation of perjury;

(*b*) Conspiracy;

(*c*) Obtaining money or other property by false pretences (but not the mere attempt to obtain: *R.* v. *Burton*, 13 *Cox*, 71, *C. C. R.*);

(*d*) Keeping a gambling house or a disorderly house;
(*e*) And any indecent assault (22 & 23 *Vict. c.* 17, *s.* 1).
To these have been added:
(*f*) All misdemeanors under *Part* 2 of the *Debtors Act*, 1869 (32 & 33 *Vict. c.* 62, *s.* 18), as modified by the *Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), and the *Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71);
(*g*) All libels or alleged libels, apparently including blasphemous, defamatory, seditious and obscene libel (44 & 45 *Vict. c.* 60, *s.* 6);
(*h*) All misdemeanors under the *Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69, *s.* 17);
(*i*) All offences punishable on indictment under the *Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28, *s.* 13); and
(*j*) Misdemeanors under the *Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15, *s.* 25).

A committal for trial by justices sitting in and acting for one petty sessional division of a county on a charge arising in another petty sessional division of the same county is a good committal under 22 & 23 *Vict. c.* 17, *s.* 1. *R.* v. *Beckley*, 20 *Q. B. D.* 187; 57 *L. J.* (*M. C.*) 22. By *s.* 2 of the Act of 1859, "where any charge or complaint shall be made before any one or more of her majesty's justices of the peace that any person has committed any of the offences aforesaid within the jurisdiction of such justice, and such justice shall refuse to commit or to bail the person charged with such offence to be tried for the same, then in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice, and he is hereby required, to take the recognizance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognizance, information and depositions, if any, to the court in which such indictment ought to be preferred, in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence." Where a prosecutor *bonâ fide* prefers before a justice a charge in respect of an offence in the above list, alleged to have been committed within his jurisdiction, and the justice dismisses the charge for want of evidence,—even where there is no evidence in support of the charge,—the dismissal is equivalent to a refusal to commit, and the prosecutor is entitled under *s.* 2 to require the justice to take his recognizance to prosecute the charge. *R.* v. *Lord Mayor of London, ex parte Gostling*, 16 *Cox*, 77; 54 *L. T.* 646; 50 *J. P.* 711. Where a magistrate has refused to grant process he cannot be compelled to do so, nor to take recognizances under the act, unless an indictable offence is disclosed by the information: *Ex parte Wason*, *L. R.* 4 *Q. B.* 573; *and see* *R.* v. *Battier*, 44 *J. P.* 490; *ex parte Reid*, 49 *J. P.* 600; and the only remedy of the would-be prosecutor is to apply *ex parte* to a judge of the K. B. D. for leave to prefer a bill.

In considering the sufficiency of a recognizance to prosecute under *s.* 1 of the *Vexatious Indictments Act*, reference may be made to the accompanying depositions to ascertain the particulars of the offence charged. *R.* v. *Bell*, 12 *Cox*, 37.

If a prosecutor is bound over under *s.* 2 after a refusal to commit for trial, but fails to send up a bill to the grand jury at the sessions for which he is bound before that body is discharged, the court cannot enlarge his recognizances to the next sessions. *R.* v. *Eayres* [1900], 64 *J. P.* 217. The fiat of the attorney-general may be issued even in cases where the magistrates have already refused to commit for trial. *R.* v. *Rogers*, 66 *J. P.* 825, *Fulton*, Recorder. Where the prosecution is instituted on the fiat of the attorney-general, it would seem sufficient to lodge the fiat with the clerk of the court of trial, and unnecessary to produce or prove it at the trial. *R.* v. *Dexter*, 19 *Cox*, 360, *Grantham*, J.

It is not necessary that the performance of any of the conditions mentioned in the *Vexatious Indictments Act*, 1859, should be averred in the indictment or proved before the petty jury. *Knowlden* v. *R.*, 5 *B. & S.* 532; 33 *L. J.* (*M. C.*) 219; 9 *Cox*, 483. If a prisoner committed for obtaining a chattel by false pretences be indicted in one count for that offence, and in another count for obtaining another chattel by false pretences, without any authority having been obtained under the statute to prefer such second charge [*excepting where the second charge is founded upon facts disclosed in the depositions*, 30 & 31 *Vict. c.* 35, *s.* 1, *infra*], the proper course is for the judge at the trial to direct the second count to be quashed, and not to put the prisoner to plead to it. If, however, the two counts are allowed to go to the jury, and evidence is given respecting each charge, and the jury convict on each count, the conviction cannot be supported on either—not on the second, because it ought to have been quashed; nor on the first, because improper evidence has been received. *R.* v. *Fuidge*, *L. & C.* 390; 33 *L. J.* (*M. C.*) 74. When the indictment is preferred by the direction or with the consent in writing of a judge of one of the superior courts, it is for the judge, to whom the application is made for such direction or consent, to decide what materials ought to be before him, and it is not necessary to summon the party accused, or to bring him before the judge. *R.* v. *Bray*, 3 *B. & S.* 255; 32 *L. J.* (*M. C.*) 11. Where three persons were committed for conspiracy, and afterwards the solicitor-general, acting under this statute, directed a bill to be preferred against a fourth person who had not been committed, and all four were indicted together for the same conspiracy, such a course was held to be unobjectionable. *Knowlden* v. *R.*, *ubi supra*. It was doubted whether an indictment under 24 & 25 *Vict. c.* 115, *s.* 57 (*rep.*), for giving false evidence before a naval court-martial, was an indictment for perjury within the *Vexatious Indictments Act*, 1859; *R.* v. *Heane*, 4 *B & S.* 947; 33 *L. J.* (*M. C.*) 115; and whether that statute applied to offences committed out of England and Ireland. *Id.* Under the present *Naval Discipline Act* (29 & 30 *Vict. c.* 109, *s.* 67), it is provided that if perjury before a court-martial out of England is tried in England all statutes and laws applicable to cases of perjury shall apply to the case.

The Act of 1859 was found to be attended by the inconvenience that it was frequently objected on the trial of a prisoner charged with an offence falling under its provisions, that when before the magistrates he had not been charged with, nor committed by them for, the precise offence stated in the indictment, although it was abundantly evident from the depositions that the charge made in the indictment was substantially, although perhaps not in form, gone into before the magistrates. This inconvenience was remedied by the *Criminal Law Amendment Act*, 1867 (30 & 31 *Vict. c.* 35), which, *after reciting that it is found that delay and inconvenience are frequently caused by the provisions contained in s.* 1 *of* 22 & 23 *Vict. c.* 17, *in cases not within the mischief for remedy whereof that act was made and passed, and that it is expedient to restrict the operation thereof, enacts* (*s.* 1) that, "the said provisions of the said first section of the said Act shall not extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the court in or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace, in the presence of the person accused or proposed to be accused by such bill of indictment, and transmitted or

delivered to such court in due course of law; and nothing in the said act shall extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment, if such bill be presented to the grand jury with the consent of the court in or before which the same may be preferred." *See hereon, R.* v. *Brown* [1895] 1 *Q. B.* 119; 64 *L. J.* (*M. C.*) 1; 18 *Cox*, 81. This section is to be read with 22 & 23 *Vict. c.* 17, for the purposes of 32 & 33 *Vict. c.* 62 (*Debtors Act*, 1869), *s.* 18. *R.* v. *Bell*, 12 *Cox*, 37, *Montague Smith*, J. The "consent of the court," mentioned in the last part of *s.* 1, is not a mere formality, and if the court grants such consent without having before it materials on which it may exercise a discretion, the indictment, or any counts contained in it, preferred in pursuance of such consent may be quashed. *R.* v. *Bradlaugh*, 15 *Cox*, 156. But it is not necessary to obtain the consent of the court to the *addition of counts* for offences within the *Vexatious Indictments Act* before the bill is presented to the grand jury, if the facts on which the counts are founded appear upon the depositions. *R.* v. *Clarke*, 59 *J. P.* 248, *Collins*, J. *Semble*, it is necessary so to obtain such consent where it is desired to prefer *a fresh bill of indictment*, whether it charge offences disclosed upon the depositions or not, as is the practice at the Central Criminal Court. Charges preferred before the justices on which they have refused to commit cannot be joined in an indictment with those on which the justices did commit, unless the prosecutor has been bound over as to the dismissed charges. *R.* v. *Crabbe*, 59 *J. P.* 247, *Fulton*, C. S. Where a count charging conspiracy to defraud based on evidence appearing on the depositions was added to counts charging perjury and conspiracy to commit perjury, the Court held the added count to be embarrassing, and refused to allow evidence to be given in support of it. *R.* v. *Harris*, 64 *J. P.* 360, *Grantham*, J.

Costs of vexatious indictments.]—30 & 31 *Vict. c.* 35, *s.* 2, provides that "whenever any bill of indictment shall be preferred to any grand jury, under the provisions of the *Vexatious Indictments Act*, 1859 (*supra*), against any person who has not been committed to or detained in custody or bound by recognizance to answer such an indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the court before which such an indictment shall be tried, in its discretion, to direct and order that the prosecutor or other person by or at whose instance such indictment shall have been preferred shall pay unto the accused person the just and reasonable costs, charges and expenses of such accused person and his witnesses (if any) caused or occasioned by or consequent upon the preferring of such bill of indictment, to be taxed by the proper officer of the court; and upon non-payment of such costs, charges and expenses within one calendar month after the date of such direction and order, it shall be lawful for any of the superior courts of law at Westminster (i.e. *now of the High Court of Justice*), or any judge thereof, or for the justices and judges of the Central Criminal Court (if the bill of indictment has been preferred in that Court), to issue against the person on whom such order is made such and the like writ or writs, process or processes as may now be lawfully issued by any of the said superior courts for enforcing judgment thereof." Where the indictment is preferred to the grand jury by a private prosecutor, and a true bill found, and the director of public prosecutions afterwards undertakes the case, and on the trial the defendant is acquitted, no order can be made on such director for payment of the defendant's costs under this section, notwithstanding 42 & 43 *Vict. c.* 22, *s.* 7. *Stubbs* v. *Director of Public Prosecutions*, 24 *Q. B. D.* 577; 17 *Cox*, 1. It seems doubtful,

indeed, whether in any case an order under 30 & 31 *Vict. c.* 35, *s.* 2, can be made on such director. It is very difficult to conceive what the circumstances could be which would justify such an order upon him. *Id.* Judgment of *Cave*, J., *ad fin.* As to costs see further, *post*, *Book I. ch. vi.*

SECT. 2.

AGAINST WHOM AN INDICTMENT LIES.

AN indictment lies against all persons who actually commit, or who procure, or assist in, the commission of any crime, or who knowingly harbour a traitor or felon; for each, in contemplation of law, is guilty, and liable to punishment according to the part which he takes in the perpetration or concealment of the offence.

Number and gender.]—When a statute (whether passed before or after 1850) creates or defines an offence punishable on indictment or on summary conviction, unless the contrary intention appears in the statute, words importing the masculine gender include females, and words in the singular include the plural, and words in the plural include the singular: *s.* 1 *of* the *Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63, which re-enacts part of 7 & 8 *Geo.* 4, *c.* 28, *s.* 14)).

Corporations.]—By *s.* 2 (1) of the same Act "in the construction of every enactment relating to an offence punishable on indictment or summary conviction, whether contained in an Act passed before or after" January 1, 1890, "the expression 'person' shall, unless a contrary intention appears, include a body corporate." *See R.* v. *Tyler* [1891] 2 *Q. B.* 588, 594, *Bowen*, L.J. A contrary intention would be inferred in the case of treason, felony, or misdemeanors involving personal violence: *Pharmaceutical Society* v. *London & Provincial Supply Association*, 5 *App. Cas.* 857, 869; 49 *L. J.* (*Q. B.*) 736; *R.* v. *Great West Laundry Co.*, 13 *Manitoba*, 66: and in cases where the only penalty for the offence is imprisonment or corporal punishment. *See Pearks Gunston & Tee* v. *Ward* [1902], 2 *K. B.* 1, 11, *Channell*, J.: and a corporation aggregate has been held incapable of perjury. *Wych* v. *Meal*, 3 *P. Wms.* 310; 24 *Eng. Rep.* 1078. But a corporation aggregate may be indicted, by their corporate name, for breaches of public duty, whether in the nature of nonfeasance, such as the non-repair of highways or bridges which it is their duty to repair: *R.* v. *Birmingham & Gloucester Rail. Co.*, 2 *Q. B.* 47; 9 *C. & P.* 469; or of misfeasance, such as the obstruction of a highway by a railway company in a manner not authorized by their act of parliament. *R.* v. *Great North of England Rail. Co.*, 9 *Q. B.* 315; 16 *L. J.* (*M. C.*) 16: *Att.-Gen.* v. *London & North Western Rail. Co.* [1900]; 1 *Q. B.* 78. It would seem, also, that a corporation may be indicted by its corporate name, and fined, for a libel published by its order. *See Pharmaceutical Society* v. *London & Provincial Supply Association*, at p. 870, *per Lord Blackburn*: *Eastern Counties Rail. Co.* v. *Broom*, 6 *Ex.* 314: *Whitfield* v. *South-Eastern Rail. Co.*, *E. B. & E.* 115; 27 *L. J.* (*Q. B.*) 229. Trial of an indictment against a corporation cannot take place before a court of quarter sessions. *See Certiorari*, *post*, *Book I. ch. i. s.* 13.

Capacity.]—The capacity to commit crime presupposes an act of understanding and an exercise of will; and "the full definition of every crime contains expressly or by implication a proposition as to a state of mind. In all cases whatever, competent age, sanity, and some degree of freedom

from coercion are assumed to be essential to criminality." *R.* v. *Tolson*, *Q. B. D.* 168, 187, *Stephen*, J.

Degrees of Complicity.]—We proceed to consider the liability of the respective parties to an offence, and the several grounds of exemption from criminal liability, under the following heads:—

Principals in the first degree.]—The general definition of a principal in the first degree is, one who is the actor or actual perpetrator of the fact. 1 *Hale*, 233, 615. But it is not necessary that he should be actually present when the offence is consummated; for if one lay poison purposely for another who takes it and is killed, he who laid the poison, though absent when it was taken, is a principal in the first degree. *Vaux's case*, 4 *Co. Rep.* 44 *b*; *Fost.* 349: *R.* v. *Harley*, 4 *C. & P.* 369. Nor is it necessary that the act should be perpetrated with his own hands; for if an offence be committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable as a principal in the first degree. *See R.* v. *Giles*, 1 *Mood. C. C.* 166: *R.* v. *Michael*, 2 *Mood. C. C.* 120; 9 *C. & P.* 356: *R.* v. *Mazeau*, 9 *C. & P.* 676: *R.* v. *Bull*, 1 *Cox*, 281: *R.* v. *Manley*, *Id.* 104: *R.* v. *Clifford*, 2 *C. & K.* 202: *R.* v. *Bleasdale*, *Ib.* 765: *R.* v. *Butt*, 15 *Cox*, 564 (*C. C. R.*). Thus, if a child, under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder or any other crime, the inciter, though absent when the fact was committed, is liable for the act of his agent, and a principal in the first degree. *Fost.* 349; 1 *Hawk. c.* 31, *s.* 7: *R.* v. *Palmer*, 1 *B. & P.* (*N. R.*) 96; 2 *Leach*, 978: *R.* v. *Butcher*, *Bell*, 6; 28 *L. J.* (*M. C.*) 14; 8 *Cox*, 77. But if the instrument be aware of the consequences of his act, he is a principal in the first degree, and the employer, if he is absent when the fact is committed, is an accessory before the fact: *R.* v. *Stewart*, *R. & R.* 363: *R.* v. *Williams*, 1 *Den.* 39; 1 *C. & K.* 589; or, if he be present, is a principal in the second degree; *Fost.* 349; unless the instrument concur in the act merely for the purpose of detecting and punishing the employer, in which case he is considered to be an innocent agent. *R.* v. *Bannen*, 2 *Mood. C. C.* 309; 1 *C. & K.* 295: *R.* v. *Johnson*, *C. & Mar.* 218.

Principals in the second degree.]—Principals in the second degree are those who are present at the commission of the offence, and aid and abet its commission.

A person may be a principal in the second degree even if from sex or age incapable of being a principal in the first degree. *R.* v. *Ram*, 17 *Cox*, 609, *Bowen*, L.J.: *Lord Baltimore's case*, 4 Burr. 2179: *R.* v. *Eldershaw*, 3 *C. & P.* 396.

Presence, in this sense, is either *actual* or *constructive*. It is not necessary that the party should be actually present, an ear or eye-witness of the transaction; he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should occasion arise. Thus, if he be outside the house, watching, to prevent surprise, or the like, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make him a principal in the second degree. *Fost.* 347, 350; 2 *Hawk c.* 29, *ss.* 7, 8; 1 *Russ. Cr.* (6th ed.) 162; 1 *Hale*, 555. *See R.* v. *Borthwick*, 1 *Doug.* 207: *Coalheavers' case*, 1 *Leach*, 64; 1 *East P. C.* 343: *R.* v. *Gogerly*, *R. & R.* 343: *R.* v. *Owen*, 1 *Mood. C. C.* 96. But he must be sufficiently near to give assistance; *R.* v. *Stewart*, *R. & R.* 363; and the mere circumstance of a

party going towards a place where a felony is to be committed, in order to assist to carry off the property, and assisting in carrying it off, will not make him a principal in the second degree, unless, at the time of the felonious taking, he was within such a distance as to be *able* to assist in it. R. v. *Kelly*, *R. & R.* 421; 1 *Russ. Cr.* (6th ed.) 164. So, where two persons broke open a warehouse, and stole thereout a quantity of butter, which they carried along the street thirty yards, and then fetched the prisoner, who, being apprised of the robbery, assisted in carrying away the property, it was held that he was not a principal, but only an accessory. *R.* v. *King*, *R. & R.* 332. *See R.* v. *M'Makin*, *R. & R.* 333, *n.*: *R.* v. *Dyer*, 2 *East*, P.C. 767. And although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals, but accessories before the fact. *R.* v. *Soares*, *R. & R.* 25: *R.* v. *Davis*, *Id.* 113: *R.* v. *Else*, *Id.* 142: *R.* v. *Badcock*, *Id.* 249: *R.* v. *Hurse*, 2 *M. & Rob.* 360: *R.* v. *Manners*, 7 *C. & P.* 801: *R.* v. *Howell*, 9 *C. & P.* 437: 3 *St. Tr., N. S.* 1087: *R.* v. *Tuckwell*, *C. & Mar.* 215. So, if one of them have been apprehended before the commission of the offence by the other, he can be considered only as an accessory before the fact. *R.* v. *Johnson*, *C. & Mar.* 218. But presence during the whole of the transaction is not necessary; for instance, if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals. *R.* v. *Bingley*, *R. & R.* 446: *R.* v. *Atwell*, 2 *East*, *P. C.* 768. As, if A. counsel B. to make the paper, C. to engrave the plate, and D. to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that purpose, B., C., and D. may be indicted for the forgery, and A. as an accessory; *R.* v. *Dade*, 1 *Mood*, *C. C.* 307; for, if several make distinct parts of a forged instrument, each is a principal, though he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others. *R.* v. *Kirkwood*, 1 *Mood. C. C.* 304. *See R.* v. *Kelly*, 2 *C. & K.* 379. "Although the prisoner might not be able to write himself, yet if he got any one to write the name, he is as much guilty of forgery as if he wrote it himself." *R.* v. *James*, 4 *Cox*, 90, *Erle*, J.

There must also be a participation in the act; for even if a man is present whilst a felony is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony, or failed to apprehend the felon. 1 *Hale*, 439; *Fost.* 350. *See post*, *Book II., Part IV., Misprision.* It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a convenient distance, in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law, he was present aiding and abetting. So, a participation, the result of a concerted design to commit a specific offence, is sufficient to constitute a principal in the second degree. Thus, if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and then another of the party entices the owner away in order that he who has the goods may carry them off, all are guilty as principals. *R.* v. *Standley*, *R. & R.* 305; 1 *Russ. Cr.* (6th ed.) 167: *R.* v. *Passey*, 7 *C. & P.* 282: *R.* v. *Lockett*, *Id.* 300. So it has been held,

that to aid and assist a person, to the jurors unknown, to obtain money by ring-dropping, is felony, if the jury find that the prisoner was confederate with the person unknown to obtain the money by means of the practice. *R.* v. *Moore*, 1 *Leach*, 314: 2 *East, P. C.* 679. So, if two persons driving carriages incite each other to drive furiously, and one of them run over and kill a man, it is manslaughter in both. *R.* v. *Swindall*, 2 *C. & K.* 230; 2 *Cox* 141. So, also if three persons amuse themselves by shooting with a rifle at a target, without taking proper precautions to prevent injury to others, and one of the shots kills a man, all three are guilty of manslaughter, although there is no proof which of the three fired the fatal shot. *R.* v. *Salmon*, 6 *Q. B. D.* 79; 50 *L. J.* (*M. C.*) 25: 14 *Cox* 494. If one encourages another to commit suicide, and is present abetting him while he does so, such person is guilty of murder as a principal; and if two persons encourage each other to self-murder, and one kills himself, but the other fails in the attempt, the latter is a principal in the murder of the other. *R.* v. *Dyson*, *R. & R.* 523; *R.* v. *Alison*, 8 *C. & P.* 418: *R.* v. *Jessop*, 16 *Cox*, 204, *Field*, J.; *R.* v. *Stormonth*, 61 *J. P.* 729; *Ridley*, J.: *R.* v. *Abbott*, 67 *J. P.* 151, *Kennedy*, J. So, likewise, if several persons combine for an unlawful purpose, or for a purpose to be carried into effect by unlawful means; *see Fost.* 351, 352; particularly, if it is to be carried into effect notwithstanding any opposition that may be offered against it; *Fost.* 353, 354; and one of them, in the prosecution of it, kills a man, it is murder in all who are present, whether they actually aid or abet or not (*Sissinghurst-house case*, 1 *Hale*, 462) provided that the death were caused by the act of some one of the party in the course of his endeavours to effect the common object of the assembly. 1 *Hawk. c.* 31, *s.* 52: *R.* v. *Hodgson*, 1 *Leach*, 6: 1 *East, P. C.* 258: *R.* v. *Plummer*, *Kel.* (J.) 109: *Fost.* 352. But it is not sufficient that the common purpose is merely unlawful: it must either be felonious, or, if it be to commit a misdemeanor, then there must be evidence to show that the parties engaged intended to carry it out at all hazards. *R.* v. *Skeet*, 4 *F. & F.* 931: *see R.* v. *Luck*, 3 *F. & F.* 483: *R.* v. *Doddridge*, 8 *Cox*, 335. And the act must be the result of the confederacy; for, if several are out for the purpose of committing a felony. and, upon alarm and pursuit, run different ways, and one of them kills a pursuer to avoid being taken, the others are not to be considered as principals in that offence. *R.* v. *White*, *R. & R.* 99. Thus, where a gang of poachers, consisting of the prisoners and Williams, attacked a gamekeeper, beat him, and left him senseless upon the ground, but Williams returned, and whilst the gamekeeper was insensible upon the ground, took from him his gun, pocket-book, and money, *Park*, J., held that this was robbery in Williams only. *R.* v. *Hawkins*, 3 *C. & P.* 392. As to the proper directions to the jury in such a case, *see R.* v. *Price*, 8 *Cox*, 96, *Byles*, J. The purpose must also be unlawful; for, if the original object is lawful, and be prosecuted by lawful means, should one of the party in the prosecution of it kill a man, although the party killing, and all those who actually aid and abet him in the act, may, according to circumstances, be guilty of murder or manslaughter, yet, the other persons who are present, and who do not actually aid and abet, are not guilty as principals in the second degree. *Fost.* 354, 355; 2 *Hawk, c.* 29, *s.* 9.

A mere participation in the act, without a felonious participation in the design, will not be sufficient. 1 *East, P. C.* 258: *R.* v. *Plummer*, *Kel.* (J.) 109. Thus, if a master assaults another with malice prepense, and the servant, ignorant of his master's felonious design, takes part with him and kills the other, it is only manslaughter in the servant, though it is murder in the master. 1 *Hale*, 446.

In the case of murder by duelling, both of the seconds are principals in the second degree, as they give aid and assistance by their countenance and encouragement of the principals in the first degree, the actual fighters. *R.* v. *Young*, 8 *C. & P.* 644: *R.* v. *Cuddy*, 1 *C. & K.* 210, although Lord *Hale* considered, that, as far as relates to the second of the party killed, the rule of law in this respect had been too far strained; and he seems to doubt whether a second should be deemed a principal in the second degree. 1 *Hale*, 452, 453. A prize-fight is illegal, and all persons present, aiding and abetting therein, are guilty of assault as principals in the second degree. *R.* v. *Coney*, 8 *Q. B. D.* 534; 51 *L. J.* (*M. C.*) 66. It was once held, that all persons present at a prize-fight, having gone thither with the purpose of seeing the prize-fighters strike each other, were principals in the breach of the peace, and guilty of an assault; *R.* v. *Perkins*, 4 *C. & P.* 537, *Patteson*, J.; *see R.* v. *Murphy*, 6 *C. & P.* 103. But it is now settled that mere voluntary presence as spectators at a prize-fight, does not as a matter of law necessarily render persons so present guilty of an assault as aiders and abettors of the fight: *R.* v. *Coney*, *supra*; although, *semble*, that the mere presence of a person, unexplained, at a prize-fight affords some evidence for the consideration of a jury of aiding and abetting in the fight. *Id.*

If the principal was insane at the commission of the act, no person can be convicted as an aider and abettor of his act. *R.* v. *Tyler*, 8 *C. & P.* 616. In *R.* v. *Coombes* [1895] *Cent. Crim. Ct.*, *Wood-Renton on Lunacy*, 913, *Kennedy*, J., ruled that a man could not be convicted as accessory *after* the fact to a murder committed by an insane boy. It is submitted that in consequence of the alteration of the verdict in cases of insanity by the *Trial of Lunatics Act*, 1883, (*post*, *ch. v. Trial, etc.*), these two rulings are not in accordance with the present law. And in *R.* v. *Tyler*, *ubi supra*, where an insane man collected together a number of persons, who armed themselves with a common purpose of resisting the lawful authorities, and in their presence he shot a peace-officer who came to apprehend him under a warrant, it was held that they were guilty of murder as principals in the first degree; and that no apprehension of personal danger to themselves from him furnished any excuse to them for assisting in his illegal acts. *Cf. McGrowther's case*, *Fost.* 13, 217; 18 *St. Tr.* 391.

Aiders and abettors were formerly defined to be accessories *at the fact*, and could not be tried until the principal had been convicted or outlawed. *Fost*, 347. But it has long since been decided that all those who are present aiding and abetting when a felony is committed, are principals in the second degree, and may be arraigned and tried before the principal in the first degree has been found guilty; 2 *Hale*, 323; and may be convicted, though the party charged as principal in the first degree is acquitted. *R.* v. *Taylor*, 1 *Leach*, 360; 1 *East*, *P. C.* 351: *Banson* v. *Offley*, 2 *Show*, 510; 3 *Mod.* 121: *R.* v. *Wallis*, 1 *Salk.* 334: *R.* v. *Towle*, *R. & R.* 314; 2 *Marsh.* 465; 3 *Price*, 145.

In *Stephen's Digest of the Criminal Law*, p. 36 (5th ed.), it is laid down that principals in the second degree in felony, may *in all cases* be indicted as principals in the first degree. But where by particular statutes the punishment is different (of which it would be difficult now to find an instance), then principals in the second degree must be indicted specially as aiders and abettors. 1 *East*, *P. C.* 348, 350: *R.* v. *Sterne*, 1 *Leach*, 473: 2 *East*, *P. C.* 701. *See*, however, *R.* v. *Manning*, 2 *C. & K.* 903, *n.* If indicted as aiders and abettors, an indictment charging that A. gave the mortal blow, and that B., C. and D. were present aiding and abetting, would be sustained by evidence that B. gave the blow, and that A., C. and D. were present aiding and abetting; and even if it appeared that

the act was committed by a person not named in the indictment, the aiders and abettors might nevertheless be convicted. *R.* v. *Borthwick*, 1 *Doug.* 207; 1 *East, P. C.* 350. *See R.* v. *Swindall*, 2 *C. & K.* 230; 2 *Cox*, 141. And the legal result is the same even where the jury say that they are not satisfied which gave the blow, if they are satisfied that one of them did, and that the others were present aiding and abetting. *R.* v. *Downing*, 1 *Den.* 52; 2 *C. & K.* 382: and *see R.* v. *Salmon* (*ante*, p. 14). Where a prisoner was convicted upon an indictment which charged him with rape as a principal in the first count, and as an aider and abettor in the second, it was held that the conviction upon the first count was good. *R.* v. *Folkes*, 1 *Mood. C. C.* 354: *R.* v. *Gray*, 7 *C. & P.* 164. *See R.* v. *Crisham*, *C. & Mar.* 187: *R.* v. *Downing*, *supra.*

In treason, and in offences below felony, and in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree; 2 *Hawk.* c. 25, *s.* 64: *Mackalley's case*, 9 *Co. Rep.* 67 *b*: *R.* v. *Rogers*, *L. R.* 1 *C. C. R.* 136: 37 *L. J.* (*M. C.*) 83; provided the offence permit of a participation; *Fost.* 345; or specially as aiders and abettors. *R.* v. *Crisham*, *supra.* By the *Accessories, etc. Act*, 1861 (24 & 25 *Vict. c.* 94), *s.* 8, "whoever shall aid, abet, counsel or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law, or by virtue of any act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender." Where, therefore, upon the trial of an indictment charging A. with feloniously wounding, and B. with feloniously aiding and abetting him in the felony, the jury found A. guilty of unlawfully wounding, it was held that B. was properly convicted of aiding and abetting in the misdemeanor. *R.* v. *Waudby* [1895] 2 *Q. B.* 482; 64 *L. J.* (*M. C.*) 251 (*C. C. R.*). If the abettor and principal in a misdemeanor are indicted together as principals, the abettor may be convicted, although the principal is acquitted. *R.* v. *Burton*, 13 *Cox*, 71 (*C. C. R.*).

Accessories before the fact.]—An accessory before the fact is one who, though absent at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony. 1 *Hale*, 615: *R.* v. *Macdaniel*, 19 *St. Tr.* 745; *Fost.* 121.

It is only in felonies that there can be accessories: in high treason, every instance of incitement, etc., which in felony would make a man an accessory before the fact, will make him a principal traitor; *Fost.* 341—346; and he must be indicted as such. 1 *Hale*, 233. And, all those who in felony would be accessories before the fact, in offences under felony are principals and indictable as such. 4 *Bl. Com.* 36: 1 *Russ. Cr.* (6th ed.) 174: *R.* v. *Clayton*, 1 *C. & K.* 128: *R.* v. *Moland*, 2 *Mood. C. C.* 276; *R.* v. *Greenwood*, 2 *Den.* 453; 24 & 25 *Vict. c.* 94, *s.* 8, *supra.*

If the party be actually or constructively present when the felony is committed, he is, as we have seen (*ante*, p. 12), an aider and abettor, and not an accessory before the fact; for it is essential, to constitute the offence of accessory, that the party should be absent at the time the offence is committed. 1 *Hale*, 615: *R.* v. *Gordon*, 1 *Leach*, 515; 1 *East, P. C.* 315, 352. Acting upon this rule, Lord *Coleridge*, C. J., directed the acquittal of a woman indicted as accessory before the fact to a murder, it being proved that she was present at the time when the murder was committed, and was therefore liable, if at all, as a principal. *R.* v. *Brown*, 14 *Cox*, 144.

The procurement may be personal, or through the intervention of a third person; *Fost.* 125: *R.* v. *Earl of Somerset*, 2 *St. Tr.* 965, 19 *St. Tr.* 801, *cit.*: *R.* v. *Cooper*, 5 *C. & P.* 535.

It may also be direct, by hire, counsel, command, or conspiracy: or indirect, by evincing an express liking, approbation, or assent to another's felonious design of committing a felony; 2 *Hawk. c.* 29, *s.* 16; but the bare concealment of a felony to be committed will not make the party concealing it an accessory before the fact; 2 *Hawk. c.* 29, *s.* 23; nor will a tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offence. 1 *Hale*, 616.

The procurement must be continuing: for if the procurer of a felony repents, and before the felony is committed, actually countermands his order, and the principal notwithstanding commits the felony, the original contriver will not be an accessory. 1 *Hale*, 618.

If the accessory orders or advises one crime, and the principal intentionally commits another; as, for instance, if he is ordered or advised to burn a house, and instead thereof commits larceny; or, to commit a crime against A., and instead of so doing commits the same against B.,—the accessory will not be answerable; 1 *Hale*, 617; but if the principal commits the same offence against B. by mistake, instead of A., it seems it would be otherwise. *Fost.* 370 *et seq.*; *but see* 1 *Hale*, 617; 3 *Co. Inst.* 51. But it is clear that the accessory is liable for all that ensues upon the execution of the unlawful act commanded; as, for instance, if A. commands B. to beat C., and he beats him so that he dies, A. is accessory to the murder. 4 *Bl. Com.* 37; 1 *Hale*, 617. Or if A. commands B. to burn the house of C., and in doing so the house of D. is also burnt, A. is accessory to the burning of D.'s house. *R.* v. *Saunders, Plowd.* 473. So, if the offence commanded is in fact committed, although by different means from those commanded: as, for instance, if J. W. hires J. S. to poison A., and instead of poisoning him, he shoots him, J. W. is, nevertheless, liable as accessory. *Fost.* 369, 370. Where the procurement is through an intermediate agent, it is not necessary that the accessory should name the person to be procured to do the act. *R.* v. *Cooper*, 5 *C. & P.* 535. If the agent is innocent the person procuring his act is a principal and not an accessory. *R.* v. *Bull*, 1 *Cox*, 281; *R.* v. *Manley*, 1 *Cox*, 104; 1 *Russ. Cr.* (6th ed.) 165.

To support an indictment for being accessory before the fact, there must be some active proceeding on the part of the defendant; *i.e.* he must procure, incite, or in some other way encourage the act done by the principal. Therefore where T. acted as stakeholder on the occasion of a prize-fight which ended in the death of one of the fighters, but was not present at the fight and took no other part in the circumstances attending it than to hold the stakes and afterwards hand them over to the winner, it was held that he was not liable to be convicted as accessory before the fact to the manslaughter. *R.* v. *Taylor*, *L. R.* 2 *C. C. R.* 147; 44 *L. J* (*M. C.*) 67; 13 *Cox*, 68.

Several persons may be convicted on a joint charge against them as accessories before the fact to a particular felony, though the only evidence against them is of separate acts done by each at separate times and places. *R.* v. *Barber*, 1 *C. & K.* 442.

In manslaughter, it has been said, there can be no accessories before the fact, for the offence is sudden and unpremeditated; and therefore where A. is indicted for murder, and B. as accessory, if the jury find A. guilty of manslaughter, they must acquit B. 1 *Hale*, 437, 466, 615; 1 *Hawk. c.* 30, s. 2. This doctrine rests on *Bibithe's case*, 4 *Co. Rep.* 43 *b.*: *Goose's case, Moore*, 461: *Goff* v. *Byby, Cro. Eliz.* 540; and is controverted by the late *Mr. Greaves, Crim. Cons. Acts* (1st ed.), p. 23. And where a man procured and gave a woman poison in order that she might take it and so procure abortion, and she did take it in his absence, and died of its effects, it was held that he might be convicted as an accessory before the fact to the crime

of manslaughter. *R.* v. *Gaylor, Dears. & B.* 288; 7 *Cox*, 253. In the course of the argument in that case, *Bramwell*, B., said, "Suppose a man for mischief gives another a strong dose of medicine, not intending any further injury than to cause him to be sick and uncomfortable, and death ensues, would not that be manslaughter? Suppose, then, that another had counselled him to do it, would not he who counselled be an accessory before the fact?"

At common law an accessory could not, without his own consent, unless tried with the principal, be brought to trial until the guilt of his principal had been legally ascertained by conviction (1 *Anne, st.* 2, *c.* 9, *s.* 1, *rep.*) or outlawry. *Plowden*, 97: *Fost.* 360: 1 *Hale*, 623. But under the *Accessories, etc., Act*, 1861 (24 *&* 25 *Vict. c.* 94, *s.* 2), "whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law, or by virtue of any Act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony if convicted as an accessory may be punished." An indictment will not lie under this section where no felony is in fact committed. *R.* v. *Gregory, L. R.* 1 *C. C. R.* 77; 36 *L. J.* (*M. C.*) 60. "No person who shall be once duly tried, either as an accessory before or after the fact, or for a substantive felony (under the provisions hereinbefore contained), shall be liable to be afterwards prosecuted for the same offence." *Id. s.* 7. And "if any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be pardoned, or otherwise delivered before attainder; and every such accessory shall upon conviction suffer the same punishment as he would have suffered if the principal had been attainted." *Id. s.* 5. *S.* 2 only applies where the accessory might at common law have been indicted with, or after the conviction of, the principal. And where a defendant was indicted as an accessory before the fact to the murder of S. W., who had by his procurement killed herself, it was held that a like statute did not apply. *R.* v. *Russell*, 1 *Mood. C. C.* 356: *R.* v. *Leddington*, 9 *C. & P.* 79. But by *s.* 1 it is enacted, that "whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished *in all respects* as if he were a principal felon": so that the conviction of the principal is not now in any sense a condition precedent to the conviction of the accessory. *R.* v. *Hughes, Bell*, 242; 29 *L. J.* (*M. C.*) 71. In *R.* v. *Chadwick, Stafford Sum. Ass.* 1850, the prisoner was indicted as a principal for murder by arsenic, and the jury found that he procured the arsenic, and caused it to be administered by another person, but was absent when it was administered; and thereupon it was objected that 11 *&* 12 *Vict. c.* 46, *s.* 1 (*rep.*), which is similar to 24 *&* 25 *Vict. c.* 94, *s.* 1, did not apply to murder, but *Williams*, J., overruled the objection and refused to reserve the point. *Greaves' Criminal Law Acts* (2nd ed.), p. 20. A person who induces a servant of the post-office to intercept and hand over to him a letter, which is in course of transmission by post, is either guilty, together with the post-office servant, of larceny as a principal, or is accessory before the fact to the larceny

committed by the post-office servant, and in either view can be convicted on an indictment charging him with larceny of the letter. *R.* v. *James*, 24 *Q. B. D.* 439; 59 *L. J.* (*M. C.*) 96. He was a joint thief with the postman from whom he obtained the letter, or he was an accessory before the fact, in which case, by 24 & 25 *Vict. c.* 94, *s.* 1, he was liable to be convicted in all respects as if he were a principal felon, *per* Lord *Coleridge*, C.J., *Id.* Where the principal and accessory are tried together, one being charged as principal and the other as accessory before the fact (which will now, probably, never occur), if the principal plead otherwise than the general issue, the accessory shall not be bound to answer until the principal's plea be first determined. 9 *H.* 7, *c.* 19 (*rep.*): 1 *Hale*, 624: 2 *Co. Inst.* 184. Where the principal was indicted for burglary and larceny in a dwelling-house, and the accessory was charged in the same indictment as accessory before the fact to the said "*felony and burglary*," and the jury acquitted the principal of the burglary, but found him guilty of the larceny; it seems the judges were of opinion that the accessory should have been acquitted; for the indictment charged him as accessory to the burglary only, and the principal being acquitted of that, the accessory should have been acquitted also. *R.* v. *Dannelly*, *R. & R.* 310; 2 *Marsh.* 571. And 24 & 25 *Vict. c.* 94, *s.* 6, enacts that "any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice."

If a man be indicted as accessory to several persons in the same felony, and be found accessory to one, it is a good verdict, and judgment may be passed upon him. *R.* v. *Lord Sanchar*, 9 *Co. Rep.* 119; *Fost.* 361; 1 *Hale*, 624.

Incitement.]—The soliciting and inciting a person to commit a felony, where no felony is in fact committed by the person so solicited, still remains a misdemeanor only, notwithstanding 24 & 25 *Vict. c.* 94, *s.* 2 (*ante*, p. 18). *R. Gregory*, *L. R.* 1 *C. C. R.* 77; 36 *L. J.* (*M. C.*) 60.

Accessories after the fact.]—In high treason there are no accessories after the fact, those who in felony would be accessories after the fact being principals in high treason (*ante*, p. 16); yet in their progress to conviction they must be treated as accessories, and indicted specially for the receipt, etc., and not as principal traitors. 1 *Hale*, 238. So, in offences under felony there are no accessories after the fact; 1 *Hale*, 613; although, if the act of the receiver amount to a rescue, or to obstructing an officer of justice in the execution of his duty, or the like, he would undoubtedly be indictable for it as for a misdemeanor. 2 *Hawk. c.* 29, *s.* 4: 1 *Russ. Cr.* (6th ed.) 164. An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. 3 *Co. Inst.* 138: 1 *Hale*, 618: 4 *Bl. Com.* 37: *Fost.* 373: 2 *Hawk. c.* 29, *s.* 1: 1 *Russ. Cr.* (6th ed.) 176: *R.* v. *Burridge*, 3 *P. Wms.* 439, 475; 24 *Eng. Rep.* 1133, 1146. Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to make a man an accessory after the fact; as, for instance, that he concealed him in the house; *Dalt. c.* 161; or shut the door against his pursuers, until he should have an opportunity of escaping; 1 *Hale*, 619; or took money from him to allow him to escape; *Y. B.* 9 *H.* 4, *pl.* 1; or supplied him with money, a horse, or other necessaries, in order to enable him to escape; *Hale's Sum.* 218: 2 *Hawk. c.* 29, *s.* 26; or that the

principal being in prison, J. W. bribed the gaoler to let him escape, or conveyed instruments to him to enable him to break prison and escape. 1 *Hale*, 621.

But merely suffering the principal to escape will not make the party an accessory after the fact; for it amounts at most but to a mere omission. *Y. B.* 9 *H.* 4, *pl.* 1 : 1 *Hale*, 619 : *and see post, Book II., Part IV., Misprision.* So, if a person supply a felon in prison with victuals or other necessaries for his sustenance; 1 *Hale*, 620; or relieve and maintain him if he be bailed out of prison; *Id.*; or if a physician or surgeon professionally attend a felon sick or wounded, although he know him to be a felon; 1 *Hale*, 332; or if a person speak or write in order to obtain a felon's pardon or deliverance; 26 *Ass.* 47; or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly; 3 *Co. Inst.* 139 : 1 *Hale*, 621; or even if he himself agree, for money, not to give evidence against the felon; *Moore* 8; or know of the felony and do not discover it; 1 *Hale*, 371, 618; none of these acts would be sufficient to make the party an accessory after the fact. He must be proved to have done some act to assist the felon personally. *R.* v. *Chapple*, 9 *C. & P.* 355. But if he employ another person to do so, he will be equally guilty as if he harboured or relieved him himself. *R.* v. *Jarvis*, 2 *M. & Rob.* 40.

A wife is not punishable as accessory for receiving, etc., her husband, although she knew him to have committed felony; 1 *Hale*, 48, 621: *R.* v. *Manning*, 2 *C. & K.* 903, *n.*; for she is presumed to act under his coercion. *See post, p.* 30. But no other relation of persons can excuse the wilful receipt or assistance of felons; a father cannot assist his child, a child his parent, a husband his wife, a brother his brother, a master his servant, or a servant his master. *Id.* Even one may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself, by harbouring the thief, or assisting in his escape. *Post.* 123 : *Cromp.* 41 *b*, *pl.* 4 *& 5.* If the wife alone, the husband being ignorant of it, receive any other person being a felon, the wife is accessory, and not the husband. 1 *Hale*, 621. And if the husband and wife both receive a felon knowingly, it shall be adjudged only the act of the husband, and the wife shall be acquitted. *Id.*

To constitute this offence, it is necessary that the accessory at the time when he assists or comforts the felon, should have notice, direct or implied, that he had committed a felony. 2 *Hawk. c.* 29, *s.* 32. It is also necessary that the felony should be complete at the time the assistance is given; for, if one wound another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make him accessory to the homicide; for until death ensues no murder or manslaughter is committed. 2 *Hawk. c.* 29, *s.* 35 : 4 *Bl. Com.* 38.

Accessories after the fact could not until 1848 (11 *& 12 Vict. c.* 46), except with their consent, be tried before the conviction of their principal. 1 *Hale*, 623 : 2 *Hawk. c.* 29, *s.* 45. But they might be tried with their principal; 1 *Hale*, 623; or separately after the principal had been convicted; and having been once duly tried, they could not be again indicted or tried for the same offence. 7 *G.* 4, *c.* 64, *s.* 10 (*rep.*) *The Accessories and Abettors Act*, 1861 (24 *& 25 Vict. c.* 94), *s.* 3, which re-enacts 11 *& 12 Vict. c.* 46, *s.* 2, provides that "whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted or convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall

not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished;" *i.e.* under 24 & 25 *Vict. c.* 94, *s.* 6, or any special statute dealing with the offence) "provided that no person who shall be once duly tried either as an accessory after the fact or for a substantive felony, shall be liable to be afterwards prosecuted for the same offence." *Id. s.* 7. *See also s.* 5, *ante*, p. 18.

On an indictment charging a man as a principal felon only, he cannot be convicted of the offence of being an accessory after the fact. *R.* v. *Fallon*, *L. & C.* 217; 32 *L. J.* (*M. C.*) 66: *Richards* v. *R.*, 66 *L. J. Q. B.* 459; 61 *J. P.* 389. Where several persons are tried upon one indictment, some as principals in murder, others as accessories after the fact to the murder, and the principals are convicted of manslaughter only, the persons charged as accessories may be convicted as accessories to the manslaughter. *R.* v. *Richards*, 2 *Q. B. D.* 311; 46 *L. J.* (*M. C.*) 200; 13 *Cox*, 611 (*C. C. R.*).

As to the joinder of several accessories after the fact in the same indictment, *see* 24 & 25 *Vict. c.* 94, *s.* 6 (*ante*, p. 19).

The receipt of stolen goods did not at common law constitute the receiver an accessory, but was a distinct misdemeanor, punishable by fine and imprisonment; 1 *Hale*, 620; and although by several statutes, receivers were made accessories after the fact, and by 7 & 8 *G.* 4 *c.* 29 (*rep.*), *ss*, 54, 55, 60, might in certain cases be indicted either as accessories after the fact to felony, or for a substantive felony, or might be prosecuted for a misdemeanor, or punished upon summary conviction: (*see now* 24 & 25 *Vict. c.* 96, *ss.* 91, 93, 95, 97:) yet the receipt of stolen goods is still a distinct and separate offence, and as such will be considered hereafter.

Misprision.]—It is a misdemeanor at common law for any person who knows that another has committed a felony to conceal or procure the concealment thereof. *See Steph. Dig. Cr. Law* (5th ed.) 122, 401: 3 *Co. Inst.* 140: 1 *Hale*, 374; *and see post, Book II. Part IV., Accessories.*

Exemptions and Excuses.

Aliens.]—British statutes are not construed to apply to acts of aliens on land outside the King's dominions or at sea except within territorial waters, or on British ships, or in cases of piracy *jure gentium*.

A British subject cannot naturalize himself as a subject of a foreign state at war with this country so as to exempt himself for criminal liability for treason. *R.* v. *Lynch* [1903] 1 *K. B.* 444: 20 *Cox*, 468: 67 *J. P.* 41.

An alien friend is subject to indictment for offences committed in England (*R.* v. *Esop*, 7 *C. & P.* 456: *R.* v. *Barronet*, 1 *E. & B.* 1; 22 *L. J.* (*M. C.*) 25), or upon British ships within the admiralty jurisdiction (*see post*, p. 39), and for piracy *jure gentium*. *Att.-Gen. of Hong Kong* v. *Kwok a Sing*, *L. R.* 5 *P. C.* 179, 199: 1 *Hawk. c.* 17, *s.* 5. This liability appears not to extend to aliens who have diplomatic immunity. *See Diplomatic Privileges Act*, 1708 (7 *Anne*, *c.* 12): *Law Mag. and Review* (*Nov.* 1894), p. 43. *Sed contrà, see* case of *Pantaleon Sa*, 5 *St. Tr.* 461; *and cf.* 2 *St. Tr.* 881, *n.*; *Fost.* 187. The burden of proof that the accused is an alien appears to lie upon him. *See R.* v. *Lindsay*, 14 *St. Tr.* 987, 994: *R.* v. *Macdonald*, 18 *St. Tr.* 857; except perhaps where the offence is committed outside the realm: *but see R.* v. *Jameson* [1894] 2 *Q. B.* 425; 65 *L. J.* (*M. C.*) 218. The liability of an alien enemy is not clearly ascertained. *See R.* v. *Molieres*, *Fost.* 188, *n.*: *R.* v. *Johnson*, 6 *East*, 583, 593; 8 *R. R.* 550, *Ellenborough*, L. C. J.; 1 *Hawk. c.* 17, *s* 6.

Infants.]—It is a general rule, that infants under the age of discretion are not punishable by any criminal prosecution whatever; 1 *Hale*, 27: 1 *Hawk. c.* 1, *s.* 1: *Mirror, c.* 4, *s.* 16 (*Selden Soc. Publ., vol.* 7); but the age of discretion, by the law of England, varies according to the nature of the offence.

Infants under seven.]—An infant under the age of seven years cannot be guilty of felony, or be punished for any capital offence; for, under that age an infant is, by incontrovertible presumption of law, *doli incapax*, and cannot be endowed with any discretion. *Reg.* 309 *b*: 1 *Hale*, 27, 28: 4 *Bl. Com.* 23: *Mirr. c.* 4. *s.* 6: *Fost.* 349: *Reniger* v. *Fogossa*, *Plowd.* 1, 19: *R.* v. *Carter* [1774] 1 *Cowp.* 220, 223: *Marsh* v. *Loader*, 14 *C. B., N. S.* 535. This rule is recognized in *s.* 10 (5) of the *Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49).

Infants under fourteen.]—Between the age of seven and fourteen years an infant is presumed to be *doli incapax*; but this presumption is not incontrovertible and may be rebutted by strong and pregnant evidence of a mischievous discretion, expressed in the maxim *malitia supplet ætatem*; for the capacity to commit crime, do evil and contract guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. 4 *Bl. Com.* 23: 1 *Hale*, 25, 27. Thus, it is said that an infant eight years of age may be indicted for murder, and shall be hanged for it; *Dalt. c.* 147; and an infant between the age of eight and nine years was executed for arson, it appearing that he was actuated by malice and revenge, and had perpetrated the offence with craft and cunning. 1 *Hale*, 25 *n.* So a girl of thirteen was burnt for killing her mistress; 1 *Hale*, 26; and where an infant nine years of age killed an infant of the like age, and confessed the felony, it appearing upon examination that he had hid both the blood and the body, the justices were of opinion that he might lawfully be hanged, but respited the judgment that he might be pardoned. *Fitz. Cor.* 57. *See R.* v. *York*, *Fost.* 70; 4 *Bl. Com.* 24; *R.* v. *Wild*, 1 *Mood. C. C.* 452. But in cases of this nature the evidence of a mischievous discretion, to rebut the *primâ facie* presumption of law arising from nonage, should be clear and strong beyond all doubt and contradiction. 4 *Bl. Com.* 23: 1 *Hale*, 25, 27: *R.* v. *Vamplew*, 3 *F. & F.* 520. Where a child between the age of seven and fourteen years is indicted for felony, two questions are to be left to the jury: first, whether he committed the offence; and secondly, whether at the time he had a guilty knowledge that he was doing wrong. *R.* v. *Owen*, 4 *C. & P.* 236: *R.* v. *Smith*, 1 *Cox*, 260. The fact that the child did the acts constituting the elements of the offence is not in itself any evidence whatever of the guilty state of mind which is essential for conviction. *R.* v. *Kershaw*, 18 *T. L. R.* 357, 37 *L. J. N.* 120; *Bucknill, J.* An infant under fourteen is presumed by law to be unable to commit a rape, and therefore cannot be found guilty of it; for though in other felonies *malitia supplet ætatem*, yet, as to this particular act, the law presumes him impotent, as well as wanting in discretion. This presumption was not affected by 9 *G.* 4, *c.* 31, *ss.* 16, 17 (*rep.*), which first made the offence complete upon proof of penetration, without evidence of emission; *R.* v. *Groombridge*, 7 *C. & P.* 582; nor by the present enactment, 24 & 25 *Vict. c.* 100, *s.* 63, by which 9 *G.* 4, *c.* 31, is superseded: *R.* v. *Waite* [1892] 2 *Q. B.* 600; 61 *L. J.* (*M. C.*) 189; 17 *Cox*, 554. Nor is any evidence admissible to show that the defendant had in fact arrived at the full state of puberty, and could commit the offence. *R.* v. *Philips*, 8 *C. & P.* 736: *R.* v. *Jordan*, 9 *C. & P.* 118: *R.* v. *Brimilow*, *Id.* 366; 2 *Mood. C. C.* 122.

In *R.* v. *Brimilow* it was held that the boy had been properly convicted of an assault under 1 *Vict. c.* 85, *s.* 11 (*rep.*). Nor can a boy under fourteen be convicted of an assault with intent to commit a rape. *R.* v. *Eldershaw*, 3 *C. & P.* 396. This doctrine has been extended to other offences involving carnal knowledge. *R.* v. *Waite, ubi supra.* But a boy under fourteen may be a principal in the second degree in a rape, or like offence, if he aid and assist in the commission of the offence, and it appears that he had a mischievous discretion; for the excuse of impotency will not in such case apply. 1 *Hale*, 630: *R.* v. *Eldershaw*, 3 *C. & P.* 396. *See R.* v. *Allen*, 1 *Den.* 364; 2 *C. & K.* 869; 18 *L. J.* (*M. C.*) 72; 3 *Cox*, 270: *R.* v. *Williams* [1893] 1 *Q. B.* 320; 62 *L. J.* (*M.C.*) 69.

In *R.* v. *Sutton*, 3 *A. & E.* 597, 5 *N. & M.* 353, there are dicta to the effect that under certain circumstances an infant under fourteen might be liable to indictment in respect of public duties arising out of his occupation of property. *See post, tit. Highways.*

Infants over fourteen.]—The incapacity of infants to commit crime ceases upon their attaining the age of fourteen years, at which age they are presumed by the law to be *doli capaces*, and capable of discerning good from evil, and are, with respect to their criminal actions, subject to the same rule of construction as others of more mature age. 1 *Hale*, 25; *Doct. and Stu. c.* 26; *Co. Litt.* 79, 171, 247; *Dalt. c.* 147; 1 *Hawk. c.* 1, *n.* (1).

In some misdemeanors and offences which are not capital an infant is said to be privileged by reason of his nonage, if under twenty-one, because laches is not to be attributed to him. *Co. Litt.* 357; 4 *Bl. Com.* 22. But inasmuch as an infant is liable in tort, it is difficult to understand the grounds of this early distinction, as to misdemeanors, when an infant over seven could be liable for felony. And an infant who is indicted for any notorious breach of the peace, as riot, forcible entry, battery, or for perjury or cheating, or the like, is equally liable as a person of full age; because, upon his trial, the court, *ex officio*, ought to consider whether he was *doli capax*, and had discretion to do the act with which he is charged. 1 *Hale*, 20, 21; 4 *Bl. Com.* 22; 3 *Bac. Abr.*, *Infancy* (*H.*). An infant, though incapable of making a contract of bailment, has been held liable to indictment for larceny as bailee. *R.* v. *M'Donald*, 15 *Q. B. D.* 323. But an infant cannot lawfully be adjudicated bankrupt, and consequently cannot be convicted of an offence under *s.* 12 of the *Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), which depends on the existence of bankruptcy and the existence of valid debts by the infant. *R.* v. *Wilson*, 5 *Q. B. D.* 28; 49 *L. J.* (*M. C.*) 13: *Lovell* v. *Beauchamp* [1894] *App. Cas.* 607.

Summary remedy.]—Under the *Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), power is given to try summarily for any indictable offence committed in England except homicide, a child over seven and under twelve if the child's parent or guardian consent to this course (*s.* 10), and for certain indictable offences a person over twelve but under sixteen, if the youthful offender consents (*s.* 11). Similar provisions are made as to offences in Ireland by 47 & 48 *Vict. c.* 19, *ss.* 4, 6, 7, 9, as amended by 1 *Edw.* 7, *c.* 20, *s.* 14.

Persons of unsound mind.]—Every person at the age of discretion is, unless the contrary be proved, presumed by law to be sane, and to be accountable for his actions. *R.* v. *Oxford*, 4 *St. Tr., N. S.* 497; 9 *C. & P.* 525: *R.* v. *Stokes*, 3 *C. & K.* 185: *R.* v. *Layton*, 4 *Cox*, 149. The presumption in probate cases is the other way, as the person propounding the will must prove the testator competent. *Banks* v. *Goodfellow*, *L. R.*

5 *Q. B.* 549. And a grand jury ought not to ignore a bill of indictment on the ground of the insanity of the accused. *R.* v. *Hodges*, 8 *C. & P.* 195. But if there be an incapacity, or defect of the understanding, as there can be no consent of the will, the act cannot be culpable.

This species of non-volition is classified by *Coke* (*Litt.* 247) and *Hale* (1 *Hist. P. C.* 29) as either natural, accidental, or affected; it is either perpetual or temporary; and is by them reduced to three general heads: 1. *A nativitate, vel dementia naturalis*; 2. *Dementia accidentalis, vel adventitia*; 3. *Dementia affectata.*

1. *Dementia naturalis* is idiocy, or natural fatuity. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals: *Co. Litt.* 247; and those are said to be idiots who cannot number twenty, or tell the days of the week, who do not know their fathers or mothers, or the like; but these instances are mentioned as tests of insanity only, and are not always conclusive; and although idiocy or natural fatuity is in general sufficiently apparent, the question, whether idiot or not, is a question of fact triable by a jury. *Bac. Abr.*, *Idiot* (*A*); *Bro. Abr.*, *Idiot*, 4, and ought to be clearly made out, in order to exempt the accused from punishment. *R.* v. *Arnold*, 16 *St. Tr.* 695, 704; 1 *Russ. Cr.* (6th ed.) 121. A person deaf and dumb from his birth, who has no means of learning to discriminate between right and wrong, or of understanding the penal enactments of the law, as applicable to particular offences, is an idiot; but if it can be shown that he has the use of understanding, which many of that condition discover by signs, then he may be tried, convicted, and presumed to be punished, although great caution should be observed in such proceedings. 1 *Hale*, 34; *Moore*, 4, *pl.* 12; *Fitzh. N. B.* 233. *See R.* v. *Jones*, 1 *Leach*, 102: *R.* v. *Steel*, *Id.* 451: *R.* v. *Dyson* [1831] *Parke*, J., *York Spring Ass.*, 7 *C. & P.* 305 *n.*; *Matthews' Dig.* 410: *R.* v. *Pritchard*, 7 *C. & P.* 303: *R.* v. *Berry*, 1 *Q. B. D.* 447; 45 *L. J.* (*M. C.*) 123; 13 *Cox*, 187.

2. Adventitious insanity, or *dementia accidentalis*, proceeds from various causes, and is of several kinds or degrees; it is either *partial* (an insanity upon some one subject, the party being sane upon all others), or *total*; *permanent* (usually called madness), or *temporary* (the object of it being afflicted with his disorder at certain periods and vicissitudes only, with lucid intervals), which is usually denominated lunacy. 3 *Bac. Abr.* 16.

The distinction between lunacy and madness made by *Hale* and *Coke* is not now observed, and the one word "insanity" covers both classes of mental aberration.

In the *Lunacy Act*, 1890 (53 *Vict. c.* 5) "lunatic" is defined as meaning an idiot or person of unsound mind (*s.* 341).

But the tests applied for the purpose of that act are not the same as the tests of insanity from the point of view of criminal responsibility: *See Wood-Renton on Lunacy*, 5.

3. *Dementia affectata.* *See Drunkenness*, *post*, p. 29.

Where the deprivation of understanding and memory is total, fixed and permanent, it excuses all acts; so likewise a man labouring under adventitious insanity is, during the frenzy, entitled to the same indulgence, in the same degree with one whose disorder is fixed and permanent. *Beverley's case*, 4 *Co. Rep.* 125; *Co. Litt.* 247; 1 *Hale*, 31. But difficulty arises in distinguishing between a total aberration of intellect and a partial or temporary delusion merely, notwithstanding which the patient may be capable of discerning right from wrong; in which case he will be guilty in the eye of the law, and amenable to punishment. Partial insanity, says Lord *Hale*, is the condition of many, especially of

melancholy persons, who generally discover their defects in excessive fear and grief, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the commission of any crime. 1 *Hale*, 30. Doubtless, he adds, most persons that are felons of themselves, and others, are under a degree of partial insanity when they commit these offences; it is very difficult to define the invisible line that divides perfect from partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and the jury, lest, on the one side, there be a kind of inhumanity towards the defects of human nature, or, on the other side, too great an indulgence given to great crimes. He concludes by suggesting, as the best measure, that such a person as, labouring under melancholy distempers, hath yet as great understanding as ordinarily a child of fourteen years hath, is such a person as can be guilty of treason or felony. 1 *Hale*, 30, 412.

Considerable uncertainty has been shown by the judges as to the application or acceptance of Lord *Hale's* rules. In *R.* v. *Arnold*, 16 *St. Tr.* 695, 764, and *R.* v. *Earl Ferrers*, 19 *St. Tr.* 885, it was ruled that a man cannot be acquitted on the ground of insanity unless he is totally deprived of understanding and memory, and does not know what he is doing any more than an infant or a brute or wild beast. In *R.* v. *Hadfield*, 27 *St. Tr.* 1281, the test accepted was, if a man be completely deranged so that he knows not what he does, if he be lost to all sense that he cannot distinguish good from evil, and cannot judge of the consequences of his actions, then he cannot be guilty of crime, because the will, which to a certain extent is the essence of every crime, is wanting. In *R.* v. *Bellingham*, *Coll. Lun.* 636, *add.*, and *R.* v. *Bowler*, *Id.* 673, the test applied was whether, when the act was done, the prisoner was capable of distinguishing right from wrong and was under the influence of any delusion which rendered his mind insensible of the act. *Cf. R.* v. *Parker*, *Id.* 477. And in *R.* v. *Oxford*, 4 *St. Tr., N. S.* 497; 9 *C. & P.* 525, the ruling was in substance the same. In *R.* v. *Offord*, 5 *C. & P.* 168, it was ruled, that, to excuse a man from punishment upon the ground of insanity, it must be proved distinctly that he was not capable of distinguishing right from wrong at the time he did the act, and did not know it to be an offence against the laws of God and nature. The rule now generally adopted is based on the answers of the judges to the *H. L.* given in consequence of *Macnaughton's case*, 4 *St. Tr., N. S.* 847; 10 *Cl. & F.* 200; 8 *Eng. Rep.* 718. *Tindal*, C.J., at the trial directed the jury: "If upon balancing the evidence in your minds you should think the prisoner a person capable of distinguishing right from wrong with respect to the act of which he stands charged, he is then a responsible agent." This involves the proposition that if there be a partial degree of reason, a competent use of it sufficient to have restrained those passions which produce the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil,—then he will be responsible for his actions. *See R.* v. *Higginson*, 1 *C. & K.* 129. On this direction the jury returned a verdict of not guilty. In consequence of the direction and verdict a discussion took place in the *House of Lords*, and a series of questions were propounded to and answered by the judges, in relation to the law respecting alleged crimes committed by persons afflicted with insane delusions. Below are given the questions asked of the judges and the answers of all except *Maule*, J., who gave on his own account a more qualified answer.

Question 1.—"What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular

subjects or persons: as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit?"

Answer.—"Assuming that your lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of *redressing or revenging some supposed grievance or injury, or of producing some public benefit*, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land." (4 *St. Tr., N. S.* 930.) The words italicized appear to have special reference to the cases of *Hadfield*, *Bellingham*, and *Macnaughton*.

Question 2.—"What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime, (murder, for example,) and insanity is set up as a defence?"

Question 3.—"In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?"

Answers.—To the second and third questions:—"That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the *nature and quality* of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time *of doing the act, knew the difference between right and wrong*, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put as to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong: and this course, we think, is correct, accompanied with such observations and explanations as the circumstances of each particular case may require." 4 *St. Tr., N. S.* 931. The words italicised appear to distinguish between the physical character and legal aspect of the act done. *See Mayne, Ind. Cr. Law* [ed. 1896] p. 378.

Question 4.—"If a person, under an insane delusion, as to the existing facts, commits an offence in consequence thereof, is he thereby excused?"

Answer.—"The answer must, of course, depend on the nature of the

delusion; but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment." 4 *St. Tr., N. S.* 932. *See R.* v. *Townley*, 3 *F. & F.* 839.

Question 5.—"Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?"

Answer.—"We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide: and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right." 4 *St. Tr., N. S.* 932.

These answers have in the main been accepted as laying down the law as to the definition of insanity with reference to criminal responsibility. *R.* v. *Townley*, 3 *F. & F.* 839: *R.* v. *Southey*, 4 *F. & F.* 864: *R.* v. *Leigh*, 4 *F. & F.* 915. But they have been the subject of much consideration and criticism by legal and medical writers. (*See* 2 *Stephen, Hist. Cr. Law*, 124–186; *Mayne, Ind. Crim. Law* (ed. 1896), pp. 368, 390; *Wood-Renton on Lunacy*, 885, 914.) *Sir James Stephen* came to the conclusion (2 *Hist. Cr. Law*, 186) that *Macnaughton's case* admitted, as a further exemption, the proposition "that a person should not be punished for any act when he is deprived by disease of the power of controlling his conduct, unless the absence of control has been caused by his own default." So far as this admits the medical theory of uncontrollable impulse, it conflicts with the following cases: *R.* v. *Stokes*, 3 *C. & K.* 185, *Rolfe*, B.: *R.* v. *Barton*, 3 *Cox*, 275, *Parke*, B.: *R.* v. *Burton*, 3 *F. & F.* 772, *Wightman*, J.: *R.* v. *Dove* [1884], *Bramwell*, B.; 3 *Steph. Hist. Cr. Law*, 429: *Wood-Renton, Lunacy*, 900; and with the opinions of the judges appointed to report on the *Draft Code of* 1878; but it is supported as a legal proposition by *dicta* of *Denman*, L.C.J., in *R.* v. *Oxford*, 9 *C. & P.* 525; *Mellor*, J., in *R.* v. *Cockcroft, Taylor, Med. Jurisp.* p. 788; and *Lawrance*, J., in *R.* v. *Duncan, Wood-Renton, Lunacy*, 901, 908; *and see Tuke, Dict. Psych. Med. vol.* 1, p. 314; *Journal of Mental Science, vol.* 43, p. 420 (*a*).

(*a*) *Colonial and American Views.*]—The tendency of judges and legislators in the United States and the British Colonies is not to accept the dicta in *Macnaughton's case* as an adequate definition of insanity with reference to criminal responsibility. In the *Queensland Code of* 1899 (*s.* 27), drafted by the Rt. Hon. Sir Samuel Griffith, C.J., of that Colony, after consideration of the English authorities and Continental and American legislation, the view of Sir J. Stephen is in substance adopted. The

Moral insanity—*i.e.*, disorder of the moral rather than of the mental powers—when a man's intellectual faculties are sound and he knows quite well what he is doing, but his moral sense is affected or diseased, is not yet accepted in England as falling within the rules in *Macnaughton's case*. *R.* v. *Haynes*, 1 *F.* & *F.* 666; *R.* v. *Law*, 2 *F.* & *F.* 836 (*and see Wood-Renton, Lunacy*, 909): *R.* v. *Burton*, 3 *F.* & *F.* 772.

Proof of Insanity.]—Whether the prisoner were sane or insane at the time the act was committed is a question of fact triable by the jury, and dependent upon the previous and contemporaneous acts of the party. Evidence of insanity of ancestors or blood relations is admissible. *R.* v. *Tucket*, 1 *Cox*, 103: *R.* v. *Vyse*, 3 *F.* & *F.* 247. So is evidence of illness exhausting the brain. *R.* v. *Law*, 2 *F.* & *F.* 836. Medical evidence is not essential. *R.* v. *Dart*, 14 *Cox*, 143. Mere absence of any evidence of motive for a crime is not a sufficient ground upon which to infer mania. *R.* v. *Haynes*, 1 *F.* & *F.* 666, *Bramwell*, B.: *R.* v. *Dixon*, 11 *Cox*, 341. Upon a question of insanity, a witness of medical skill may be asked whether, assuming certain facts, proved by other witnesses, to be true, they, in his opinion, indicate insanity, but not whether, having heard the whole evidence, he is of opinion that the prisoner at the time he committed the alleged act was of unsound mind. *Id.* *R.* v. *Frances*, 4 *Cox*, 57, *Alderson* B., and *Cresswell*, J.: *R.* v. *Wright*, *R.* & *R.* 456: *R.* v. *Searle*, 1 *M.* & *Rob.* 75. But a medical witness, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of the witnesses, cannot, in strictness, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time, because each of these questions involves the determination of the truth of the matter deposed to, which it is for the jury to decide. (*See* the answer to the fifth question in *R.* v. *Macnaughton*, *supra*.) Nor can such a witness, although present in court during the whole trial, be asked whether, from the evidence he has heard, he is of opinion that the prisoner at the time he did the act was insane, nor whether the act with which the prisoner is charged was in his opinion an act of insanity, for these are the very

article runs: "A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing or *of capacity to control his actions*, or of capacity to know that he ought not to do the act or make the omission."

And in the case of *R.* v. *Hay* [1899], 16 *Cape of Good Hope, Rep. Sup. Ct.* 290, the Rt. Hon. Sir H. de Villiers, C.J., after hearing a full argument dealing with the law of England and the United States and the Roman-Dutch law, laid down as the law of the Cape, and as the tendency of legal opinion elsewhere, the following rules which also in substance coincide with the opinion of Sir J. Stephen:—

"(1) Where the defence of insanity is interposed in a criminal trial the capacity to distinguish between right and wrong is not the sole test of responsibility in all cases.

"(2) In the absence of legislation to the contrary courts of law are bound to recognize the existence of a form of mental disease which prevents the sufferer from controlling his conduct and choosing between right and wrong, though he may have the mental capacity to distinguish between right and wrong.

"(3) The defence of insanity is established if it be proved that the accused had by reason of such mental disease lost the power of will to control his conduct in reference to the particular act charged as an offence.

"(4) The capacity of the accused to control his own conduct must be presumed till the contrary is proved."

points to be decided by the jury. *R.* v. *Frances, ubi supra: R.* v. *Wright, ubi supra.* Counsel will not be allowed, upon a question of insanity, to quote in his address to the jury the opinions of medical writers as expressed in their books. *R.* v. *Crouch,* 1 *Cox,* 94: *R.* v. *Taylor,* 13 *Cox,* 77, *Brett,* J. As to the mode of ascertaining judicially the facts of insanity, *see post, ch. v., s.* 1, *Arraignment; ch. v. s.* 3, *Trial.*

Drunkenness.]—Drunkenness, which produces a perfect though temporary frenzy or insanity, usually denominated *dementia affectata,* or acquired madness, was formerly held not to excuse the commission of any crime; and an offender under the influence of intoxication could derive no privilege from a madness voluntarily contracted, and was regarded as equally answerable to the law as if he had been in the full possession of his faculties at the time; 1 *Hale,* 32: *Co. Litt.* 247: 1 *Hawk. c.* 1, *s.* 6. But legal opinion has altered on this subject, and it has been ruled that upon an indictment for murder the intoxication of the defendant may be taken into consideration, as a circumstance to show that the act was not premeditated. *R.* v. *Grindley,* 1 *Russ. Cr.* (6th ed.) 144: *R.* v. *Pearson,* 2 *Lewin,* 144: *R.* v. *Thomas,* 7 *C. & P.* 817. The same has been held in cases of attempts to commit suicide. *R.* v. *Moore,* 3 *C. & K.* 319: *R.* v. *Doody,* 6 *Cox,* 463. But there are contrary rulings in *R.* v. *Carroll,* 7 *C. & P.* 145: *R.* v. *Meakin, Id.* 297. When the crime alleged is such that the intention of the accused is one of its constituent elements, the jury may look at the fact that he was in drink in considering whether he formed the intent necessary to constitute the crime; *R.* v. *Doherty,* 16 *Cox,* 306, *Stephen,* J.: *R.* v. *Cruse,* 8 *C. & P.* 541, 546, *Patteson,* J.: *Montgomery Election Petition, Day's Election Cases,* 151, *Wills,* J. *See also R.* v. *Monkhouse,* 4 *Cox,* 55: *R.* v. *Moore,* 3 *C. & K.* 319 (*a*). And drunkenness and consequent delusions may assist to make out a defence of provocation or self-defence. *R.* v. *Thomas, ubi supra: R.* v. *Pearson, ubi supra: R.* v. *Monkhouse, ubi supra: R.* v. *Gamlen,* 1 *F. & F.* 90. The Scotch and Irish rulings on this subject are collected in *Wood-Renton on Lunacy,* 912, 913. If the primary cause of the frenzy be involuntary, or it have become habitual and confirmed, this species of insanity will excuse the offender to the same extent as any other form of insanity. Thus, for instance, if a man through the unskilfulness of his physician, or the contrivance of his enemies, take that which produces a temporary frenzy, he will not, whilst under the influence of the frenzy, be accountable for his actions. So neither will he be liable to be punished for any crime perpetrated under the influence of insanity which is habitual and fixed, though caused by frequent intoxication, and originally contracted by his own act. 1 *Hale,* 32. And *delirium tremens,* caused by drinking, if it produces such a degree of madness, although only temporary, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility for any act committed by him while under its influence. *R.* v. *Davis,* 14 *Cox,* 563, *Stephen,* J. This doctrine has been in one case extended to temporary derangement occasioned by drink: *R.* v. *Baines, Liverpool Assizes* [1886] (noted in *Wood-Renton on Lunacy,* 912), in which case *Day,* J., dissented from the contrary view expressed by *Holroyd,* J., in *R.* v. *Barrow,* 1 *Lewin,* 75, and *R.* v. *Rennie,* 1 *Lewin,* 76.

(*a*) *See R.* v. *Egan* [1897] 23 *Vict. L. R.* 159, as to whether and when a woman can be convicted of murder or manslaughter by overlaying her child when she has taken it to bed with her while she is drunk. In *R.* v. *Glen,* 9 *Queensland L. J.* 140, a verdict of guilty coupled with a rider that the prisoner was in drink and did not know what he was doing was held to be a finding that he had no *animus furandi.* In *R.* v. *Corbett* [1903] *Queensland St. Rep.* 246, *Griffith,* C.J., said, "Drunkeness is never a defence unless it amounts to unsoundness of mind."

By the *Inebriates Act*, 1898 (61 & 62 *Vict. c.* 60), it is enacted (*s.* 1, *sub-s.* 1) that "where a person is convicted on indictment of an offence punishable with imprisonment or penal servitude (*i.e.*, of any non-capital felony and most misdemeanors), if the court is satisfied from the evidence that the offence was committed under the influence of drink, or that drunkenness was a contributing cause of the offence, and the offender admits that he is or is found by the jury to be a habitual drunkard, the court may, *in addition to, or in substitution for* any other sentence, order that he be detained in any State inebriate reformatory, or in any certified inebriate reformatory, the managers of which are willing to receive him." The procedure under the act, and the provisions as to reformatories, are dealt with so far as relevant to the purposes of this work, *post*, under *Punishment*, and *Offences after Previous Convictions*. The act of 1898 is to be read as one with the *Inebriates Acts of* 1879 *and* 1888 (*s.* 29). The term habitual drunkard is defined by *s.* 3 of the *Inebriates Act*, 1879 (42 & 43 *Vict. c.* 19), as meaning "a person who, not being amenable to any jurisdiction in lunacy, is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others, or incapable of managing himself or herself, and his or her affairs." The definition appears to apply only to the habitual use of alcohol, and not to include the use of narcotics. *See Wood Renton, Lunacy*, 954. The act of 1898 does not appear to accept the view that drunkenness falling short of insanity is a defence on a charge of crime, but gives the courts latitude in treatment of crimes directly or indirectly due to drunkenness, by permitting the reformative sentence as an alternative to the ordinary punishment for a crime. The doctrine of criminal responsibility in case of drunkenness due to alcohol is equally applicable to mental or bodily conditions caused by the drinking of narcotics or non-alcoholic stimulants, or exciting drugs, or their hypodermic injection. 1 *Hale*, 32.

Compulsion or coercion.]—The same principle which excuses those who have no mental will in the perpetration of an offence, protects from the punishment of the law those who commit crimes in subjection to the power of others, and not as the result of an uncontrolled free action proceeding from themselves. 4 *Bl. Com.* 27: 1 *Hale*, 44, 51. Thus, if A. by force take the hand of B. in which is a weapon, and therewith kill C., A. is guilty of murder, but B. is excused; but if merely a moral force be used, as threats, duress of imprisonment, or even an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse. 1 *Hale*, 434; 1 *East, P. C.* 225. *M'Growther's case, Fost.* 13: 18 *St. Tr.* 391: *R.* v. *Gordon*, 1 *East, P. C.* 71: *R.* v. *Tyler*, 8 *C. & P.* 616. This protection also exists in the public and private relations of society: public, as between subject and prince, obedience to existing laws being a sufficient extenuation of civil guilt before a municipal tribunal; and private, proceeding from the matrimonial subjection of the wife to the husband, from which the law presumes a coercion, which, in many cases, excuses the wife from the consequence of criminal misconduct. The private relations which exist between parent and child, and master and servant, will not, however, excuse or extenuate the commission of any crime, of whatever denomination; for the command is void in law, and can protect neither the commander nor the instrument. 1 *Hale*, 44, 516. Obedience to usurped power is an excuse only where actual physical compulsion is used or directly available. *See M'Growther's case, ubi supra: Sir H. Vane's case*, 6 *St. Tr.* 119; *Kel.*, (J.), 14: *Axtell's case, Kel.*, (J.), 13.

The mere fact that two persons jointly charged with crime are married does not create any presumption that the wife was coerced by the husband to commit the crime. *Brown v. Att.-Gen. of N. Z.* [1898] *App. Cas.* 234, 237; 67 *L. J.* (*P. C.*) 7: *R.* v. *Mary Baines* [1900] 69 *L. J. Q. B.* 631: 19 *Cox*, 524: 64 *J. P.* 408. But, as a general rule, if a crime be committed by a *feme couverte in the presence of* her husband, the law presumes that she acted under his immediate coercion, and excuses her from punishment; 1 *Hale*, 45, 516; 1 *Hawk. c.* 1, *s.* 9. This protection, however, is not to be allowed in crimes which are *mala in se*, and prohibited by the law of nature, nor in such as are heinous in their character, or dangerous in their consequences; 1 *Hale*, 45, 47, 48; 1 *Hawk. c.* 1, *s.* 11; 4 *Bl. Com.* 29; 1 *Harg. St. Tr.* 28: *R.* v. *Squires*, 1 *Russ. Cr.* (6th ed.) 151. It seems not to apply to murder, *R.* v. *Manning*, 2 *C. & K.* 903, *n.*: *R.* v. *Alison*, 8 *C. & P.* 418; but has been applied to burglary and larceny (*R.* v. *Knight*, 1 *C. & P.* 116); to forgery (*R.* v. *Hughes*, 2 *Lewin*, 229); to felonious assaults (*R.* v. *Smith*, *Dears. & B.* 553); and to robbery (*R.* v. *Torpey*, 12 *Cox*, 45). In some cases the presumption has been extended to misdemeanors: *e.g.* uttering base coin, *R.* v. *Connolly*, 2 *Lewin*, 229; *Matthews' Dig.* 262: *R.* v. *Price*, 8 *C. & P.* 19; *and see R.* v. *Torpey*, *ubi supra*. But the contrary appears to have been held by all the judges in *R.* v. *Cruse*, 8 *C. & P.* 541; 2 *Mood. C. C.* 53; and this is the prevailing opinion. *See R.* v. *Ingram*, 1 *Salk.* 384. So a married woman may be indicted jointly with her husband for keeping a bawdy-house, *R.* v. *Williams*, 10 *Mod.* 63; 1 *Salk.* 384; or a gaming-house, *R.* v. *Dixon*, 10 *Mod.* 335; for these are offences connected with the government of the house, in which the wife has a principal share. 1 *Hawk. c.* 1, *s.* 12. So, they may be jointly convicted of an assault. *R.* v. *Cruse*, *supra*. But if, in the absence of her husband, the wife commit an offence; even by his order or procurement, her coverture will be no excuse; *Anon.*, 2 *East*, *P. C.* 559: *R.* v. *Morris*, *R. & R.* 270; 2 *Leach*, 1096; 1 *Hawk, c.* 1, *s.* 11; even though he appear at the very moment after the commission of the offence; and no subsequent act of his, though it may render him an accessory to the felony of his wife, can be referred to what was done by his wife in his absence. *R.* v. *Hughes*, 1 *Russ. Cr.* (6th ed.) 153; 2 *Lewin*, 229. This presumption of coercion of the wife by the husband, may be rebutted by evidence; though it is doubtful whether a confession by a wife in presence of her husband should be received as such evidence. *R.* v. *Laugher*, 2 *C. & K.* 225. And if it appear that the wife was principally instrumental in the commission of the crime, acting voluntarily, and not by constraint of her husband, although he was present and concurred, she will be guilty and liable to punishment. 1 *Hale*, 516: *R.* v. *Cohen*, 11 *Cox*, 99; 16 *W. R.* 941: *R.* v. *Torpey*, *ubi supra*. Thus, a married woman who swore falsely that she was next of kin to a person dying intestate, and so procured administration to the effects, was held responsible for the offence, though her husband was with her when she took the oath. *R.* v. *Dicks*, 1 *Russ. Cr.* (6th ed.) 147. So where a husband delivered a threatening letter ignorantly, as the agent of the wife, she alone was held to be punishable. *R.* v. *Hammond*, 1 *Leach*, 447. And where the wife in the absence of her husband induced the prosecutor by false representations to meet her at a place, where the husband, the wife being present but taking no active part, by threats of violence induced the prosecutor to execute a valuable security, and the husband and wife were jointly indicted for that offence under 24 & 25 *Vict. c.* 96, *s.* 48, *Brett*, J., directed the jury that if they should be of opinion that the wife in the husband's absence took an independent part in carrying out the crime, the fact of her being the

wife would not absolve her. *R.* v. *John*, 13 *Cox*, 100. Where stolen goods are received by a married woman in the absence of her husband, and are concealed in his house, without his knowledge, she may be indicted and punished for the offence; but if the husband's ignorance of the transaction be not satisfactorily proved, the law will, in most cases, impute the receiving to him. *Dalt. c.* 157. Where husband and wife were convicted jointly of receiving stolen goods, it was held that the conviction of the wife could not be supported, though she had been more active than her husband, because it had not been left to the jury to say whether she received the goods in the absence of her husband. *R.* v. *Archer*, 1 *Mood. C. C.* 143; *R.* v. *Matthews*, 1 *Den.* 596; 4 *Cox*, 214: *R.* v. *McClarens*, 3 *Cox*, 425. *See R.* v. *Wardroper*, *Bell*, 249; 29 *L. J. (M. C.)* 116. But in *R.* v. *Mary Baines* (69 *L. J. Q. B.* 681; 19 *Cox*, 524; 64 *J. P.* 408), where a husband and wife were jointly indicted for receiving stolen goods, and there was evidence of a separate receiving by the wife in the absence of her husband, it was held that she was properly convicted in accordance with the provisions of 24 & 25 *Vict. c.* 96, *s.* 94. And it is submitted that a married woman is indictable for receiving since the Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), if she knowingly deals with goods stolen by her husband in a business carried on by her under her own name. Husband and wife were jointly charged with felonious wounding, with intent to disfigure, and to do grievous bodily harm. The jury found that the wife acted under the coercion of the husband, and that she did not personally inflict any violence on the prosecutor. On this finding the wife was held entitled to an acquittal. *R.* v. *Smith*, *Dears. & B.* 553; 27 *L. J. (M. C.)* 204. And where the prisoner, a married woman, was indicted together with her husband, who was not in custody, for a robbery with violence, in which she had herself taken a very active part, and the jury returned as their verdict that they were of opinion that the whole matter was pre-arranged by the husband, and that the wife acted under his coercion and control at the time, this was held to amount to a verdict of not guilty. *R.* v. *Torpey*, 12 *Cox*, 45. Where upon an indictment for robbery with violence, D. and his wife were found guilty, the jury finding, however, that the wife had acted under her husband's compulsion, this was held to amount to a verdict of not guilty as to the wife. *R.* v. *Dykes*, 15 *Cox*, 771, *Stephen*, J. Husband and wife cannot alone be found guilty of a conspiracy, for they are considered in law as one person, and are presumed to have but one will. 1 *Hawk. c.* 72, *s.* 8.

If a married woman incite her husband to the commission of a felony, she is an accessory before the fact; 1 *Hale*, 516; 2 *Hawk. c.* 29, *s.* 34: *R.* v. *Manning*, 2 *C. & K.* 903, *n.*; but she cannot be treated as an accessory for receiving her husband, knowing that he has committed treason or felony; 1 *Hale*, 47: *R.* v. *Goode*, 1 *C. & K.* 185; nor for concealing a felon jointly with her husband; *Id.*; 1 *Hawk. c.* 1, *s.* 10; nor (before the *Married Woman's Property Act*, 1882, *supra*) for receiving from her husband goods stolen by him. *R.* v. *Brooks*, *Dears.* 184; 22 *L. J.* (*M. C.*) 121. *See R.* v. *Archer*, 1 *Mood. C. C.* 143. And she will not be answerable for her husband's breach of duty, however fatal, though she be privy to his misconduct, if no duty be cast upon her, and she is merely passive. *R.* v. *Squires*, 1 *Russ. Cr.* (6th ed.) 151.

If a married woman, indicted jointly with her husband, be described in the indictment as his wife, she need not prove her marriage, but will be entitled to protection if it appear that she acted under his coercion: *R.* v. *Knight*, 1 *C. & P.* 116; but the mere description will be no ground for dismissing the indictment as to the wife, for the indictment is joint

and several, according to the facts as they may appear. 1 *Hale*, 46. If she be described as a single woman, she must prove her marriage; *R.* v. *Jones*, *Kel.* (J.) 37; and such evidence must be given as will satisfy the jury of her marriage, although it is not absolutely necessary that the actual marriage should be proved. *R.* v. *Atkinson*, 1 *Russ. Cr.* (6th ed.) 159: *R.* v. *Hassall*, 2 *C. & P.* 434: *R.* v. *Woodward*, 8 *C. & P.* 561: *R.* v. *McGinnes*, 11 *Cox*, 391. Evidence of cohabitation and reputation will be sufficient. *Morris* v. *Miller*, 4 *Burr.* 2057, Lord *Mansfield*, C.J.

Ignorance of law.]—Ignorance of the *law* will not excuse from the consequences of guilt any person who has capacity to understand the law. 1 *Hale*, 42: *R.* v. *Crawshaw*, *Bell*, 303; 30 *L. J.* (*M. C.*) 58; 8 *Cox*, 375. If the offence be committed in England, a foreigner cannot be excused because he does not know the law. *R.* v. *Esop*, 7 *C. & P.* 456: *R.* v. *Barronet*, 1 *E. & B.* 1; 22 *L. J.* (*M. C.*) 25. And the same if it be committed in an English ship on the high seas, which is in law part of the territory of England. *R.* v. *Lopez*, *R.* v. *Sattler*, *Dears. & B.* 525; 27 *L. J.* (*M. C.*) 48. Where, however, a defendant was indicted for maliciously shooting at A. B. upon the high seas, and the offence was perpetrated within a few weeks after the passing of 39 *G.* 3, *c.* 37, and before notice of it could have reached the place where the offence was committed, the judges held, that as he could not have been tried before that act passed, and as he could not have heard of it, he ought to be pardoned. *R.* v. *Bailey*, *R. & R.* 1: *and see Burns* v. *Nowell*, 5 *Q. B. D.* 444, 454.

Ignorance or mistake of fact.]—Ignorance or mistake of *fact* may in some cases be allowed as an excuse for the inadvertent commission of a crime, where the accused acted under an honest and reasonable belief in a state of things which if true would have justified the act done. "At common law an honest and reasonable belief in the existence of facts, which if true would make the act for which the prisoner is indicted an innocent act, has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim, *actus non facit reum nisi mens sit rea*. Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty as in infancy, or perversion of that faculty as in lunacy." *R.* v. *Tolson*, 23 *Q. B. D.* 168, 181, *Cave*, J. For instance, if a man, intending to kill a thief in his own house, kill one of his own family, he will be guilty of no offence. 1 *Hale*, 42, 43; 4 *Bl. Com.* 27; *R.* v. *Levett*, *Cro. Car.* 538 *cit.* But this rule proceeds upon a supposition that the original intention was lawful; for if an unforeseen consequence ensue from an act which was in itself unlawful, and its original nature wrong and mischievous, the actor is criminally responsible for whatever consequence may ensue. 4 *Bl. Com.* 27.

"*Mens rea.*"(*a*)]—The general rule of law is that a person cannot be convicted in a proceeding of a criminal nature unless it can be shown that he had a guilty mind; *Chisholm* v. *Doulton*, 22 *Q. B. D.* 736; 58

(*a*) As to statutory offences the true rule of English law seems to be correctly stated in Art. 23 of the Queensland Code of 1899, except as to public nuisances.

"Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or for an event which occurs by accident.

"Unless the intention to cause a particular result is declared to be an element of the offence constituted in whole or in part by an act or omission, the result intended to be caused by an act or omission is immaterial.

"Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act or to form an intention is immaterial so far as regards criminal responsibility."

L. J. (*M. C.*) 183: *R.* v. *Twose*, 14 *Cox*, 327; but it is impossible now to apply the maxim as to "*mens rea*" generally to all statutes, and it is necessary to look at the object and terms of each act to see whether and how far knowledge or a particular intent is of the essence of the offence created; *Cundy* v. *Lecocq*, 13 *Q. B. D.* 207, *Stephen*, J.; 53 *L. J.* (*M. C.*) 125; *Hardcastle on Statutes* (3rd ed.) 459; *Maxwell on Statutes* (3rd ed.) 136. It has been held that it is not necessary to prove that a defendant charged with assaulting a constable in the execution of his duty knew that the constable was so acting; *R.* v. *Forbes*, 10 *Cox*, 362, *Gurney*, Recorder. Where the defendant was indicted under 24 & 25 *Vict. c.* 100, *s.* 55, for unlawfully taking an unmarried girl under the age of sixteen years, out of the possession and against the will of her father, it was held to be no defence that the defendant believed on good grounds that the girl was above sixteen years of age. *R.* v. *Prince*, *L. R.* 2 *C. C. R.* 154; 44 *L. J.* (*M. C.*) 122. All the judges in that case agreed on the general principle that an honest and reasonable mistake of facts furnishes a good defence for an act committed under such mistake, and which would otherwise be criminal, but they all, except Lord *Esher*, considered that the object of the legislature being to prevent a scandalous and wicked invasion of parental rights, it was to be supposed that they intended that the wrongdoer should act at his peril. *R.* v. *Tolson*, 23 *Q. B. D.* 168 at p. 190, *per Stephen, J.* The majority of the judges seem to have held that in order to make the defence of mistake of fact available in that case (*R.* v. *Prince*), the accused must have proved the existence in his mind of an honest and reasonable belief in the existence of circumstances which, if they had really existed, would have made his act not only not criminal but also not immoral. *R.* v. *Tolson*, 23 *Q. B. D.* 168, at p. 181, *per Cave, J.* A defendant was convicted under the repealed statute 8 & 9 *Vict. c.* 100, *s.* 44 (a similar provision to which is contained in 53 & 54 *Vict. c.* 5, *s.* 315), of receiving two or more lunatics into her house, not being a registered asylum or hospital, or a house duly licensed under the above act, or under any previous act, but it was specially found by the jury who convicted, that though the persons so received were lunatics, the defendant honestly, and on reasonable grounds, believed that they were not lunatic. It was held that having regard to the scope of the act, and the object for which it was apparently passed, such mistaken belief was immaterial, and that the conviction was right. *R.* v. *Bishop*, 5 *Q. B. D.* 259; 49 *L. J.* (*M. C.*) 45. But where the prisoner was convicted under 24 & 25 *Vict. c.* 100, *s.* 57, of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband, and the jury found that at the time of the second marriage she, in good faith and on reasonable grounds, believed her husband to be dead, it was held on a case reserved by the court for the consideration of all the judges, that a *bonâ fide* belief by the prisoner on reasonable grounds in the death of the husband at the time of the second marriage, was a good defence, and that the conviction was wrong. *R.* v. *Tolson*, 23 *Q. B. D.* 168; 58 *L. J.* (*M. C.*) 97. The *rationale* of this decision, and the distinction between this case and that of *R.* v. *Prince*, *ubi supra*, seems to be contained in the following words of the judgment of *Stephen*, J., 23 *Q. B. D.* at p. 191—"The conduct of the woman convicted was not in the smallest degree immoral, it was perfectly natural and legitimate. Assuming the facts to be as she supposed, the infliction of more than a nominal punishment on her would have been a scandal. Why, then, should the legislature be held to have wished to subject her to punishment at all?" It is not, perhaps, easy to draw a distinction between *R.* v. *Tolson* and *R.* v. *Bishop*, *ubi supra*, but the same learned judge, at the page last cited, explained the decision in *R.* v. *Bishop*, as

having gone on "the scope of the act constituting the offence, and the object for which it was apparently passed," *cf. Cundy* v. *Lecocq, ubi supra.* This question has been the subject of numerous decisions with regard to offences triable summarily against the statutes relating to licensing, *Bond* v. *Evans*, 21 *Q. B. D.* 249; *Brooks* v. *Mason* [1902] 2 *K. B.* 743; *Sherras* v. *de Rutzen* [1895] 1 *Q. B.* 918; 64 *L. J.* (*M. C.*) 218: and adulteration of food, *Coppen* v. *Moore* (No. 2) [1898] 2 *Q. B.* 306; 67 *L. J.* (*Q. B.*) 689. *Brown* v. *Foot*, 61 *L. J.* (*M. C.*) 110; 17 *Cox*, 509; 56 *J. P.* 581: *Parker* v. *Alder* [1899] 1 *Q. B.* 20; 68 *L. J.* (*Q. B.*) 7; 62 *J. P.* 792. *See also Jones* v. *Davies* [1902] 20 *Cox*, 184: *Greenwood* v. *Backhouse*, 20 *Cox*, 196: *Christie* v. *Cooper* (1900) 2 *Q. B.* 522. Knowledge by the defendant that he is offending against the penal provisions of a statute is sufficient to constitute *mens rea*. *Bank of N.S.W.* v. *Piper* [1897] *A. C.* 383; 66 *L. J.* (*P. C.*) 73.

Sect. 3.

The form of an indictment.

An indictment consists of three parts: the commencement, the statement, and the conclusion. The caption is not part of it. *See post, sect.* 6.

1. *The Commencement.*

(*a*) *Presentment.*

The commencement of every indictment is thus:—"*Suffolk to wit:—The jurors for our lord the King upon their oath, present that,*" &c. [so proceeding to state the offence for which the defendant is to be prosecuted]. If one of the grand jurors be a Quaker, or other person entitled to affirm instead of taking an oath, the indictment ought to commence—"*The jurors for our lord the King upon their oath and affirmation present,*" &c.; 9 *C. & P.* 78; but this is not necessary where, in any legal proceedings, other legal proceedings are set out by way of recital. In such cases it is enough to state that the jurors named acted as jurymen. 6 & 7 *Vict. c.* 85, *s.* 2. An indictment commencing—"*The jurors of our lady the Queen,* &c., was held not to be bad in arrest of judgment, or on writ of error: as the words "of our lady the Queen," might be rejected as surplusage, the jurors intended being those mentioned in caption of the indictment. *R.* v. *Turner*, 2 *M. & Rob.* 214; *Broome* v. *R.*, 12 *Q. B.* 834. And now such defects are merely formal, and since 1851 (14 & 15 *Vict. c.* 100, *s.* 25) objections in respect of them must be taken before the petty jury is sworn; and if they are taken the Court may, if it think necessary, order the indictment to be forthwith amended.

The commencement of a second or subsequent count is in form thus: —"*And the jurors aforesaid, upon their oath aforesaid, do further present that,*" &c. [so proceeding to state the offence]. As to offences which may be joined in one indictment, *see post*, p. 88.

(*b*) *Venue.*

Statutes.

14 & 15 *Vict. c.* 100 (*Criminal Procedure Act*, 1851), *sect.* 23.]—"It shall not be necessary to state the venue in the body of any indictment; but the county, city, or other jurisdiction named in the margin thereof shall

be taken to be the venue for all the facts stated in the body of such indictment:

"Provided that, in cases where local description is, or hereafter shall be, required (*see post*, p. 67) such local description shall be given in the body of the indictment;

"And provided also that where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue."

Sect. 24.]—"No indictment for any offence shall be held insufficient . . . for want of a proper and perfect venue. . . ." [*This re-enacts and extends* 7 *Geo.* 4, *c.* 64, *s.* 20, *which took away the right to object by motion in arrest of judgment, or by writ of error, for the want of a proper or perfect venue. See R.* v. *Albert*, 5 *Q. B.* 37; *Dav. & M.* 89: *R.* v. *Stowell*, 5 *Q. B.* 44; *Dav. & M.* 189: *R.* v. *Gregory*, 7 *Q. B.* 274: *R.* v. *O'Connor*, 4 *St. Tr., N. S.* 935; 5 *Q. B.* 16.]

Venue defined.]—Venue is the common law term for the neighbourhood (*visne*) from which the jurors are to come (*venire*). It is of importance, because at common law only a jury of the district in which the offence was committed can convict of it. "The old jurisdiction of counties was local; they were like different kingdoms. There was no jurisdiction out of the county, no process out of it." *R.* v. *Weston*, 4 *Burr.* 2507, 2511, Lord *Mansfield*. Venue or local jurisdiction is quite distinct from national or territorial jurisdiction. *Companhia de Moçambique* v. *British South Africa Co.* [1893] *App. Cas.* 602: *R.* v. *Ellis* [1899] 1 *Q. B.* 230. *C. C. R.*; *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works* [1898] *App. Cas.* 200, 204.

Venue, how stated.]—The venue is indicated at the commencement of an indictment in the margin, and is the only part of the commencement of an indictment that requires attention. The general common law rule upon the subject is, that the venue in the margin should be the county or other jurisdiction in which the offence was committed; *e.g.*, "Norfolk to wit." 2 *Hale*, 166; *See* 1 *Chitty*, *C. L.* 193; 1 *Stephen*, *Hist. Cr. L.* 281. If the jurisdiction of the court in which the bill of indictment is to be preferred extends only to part of the county, or (as in the case of the Central Criminal Court constituted by 4 & 5 *W.* 4, *c.* 36, or of Winter Assizes held in a Winter Assize County under 39 & 40 *Vict. c.* 57, and 40 & 41 *Vict. c.* 46, or of Spring Assizes held in a Spring Assize County under 42 & 43 *Vict. c.* 1) includes more than one county, or an area specially constituted by Order in Council under 38 & 39 *Vict. c.* 77, *s.* 23. or is confined within the limits of a borough (as to which, *see* 45 & 46 *Vict. c.* 50: *R.* v. *Piller*, 7 *C. & P.* 337, and *R.* v. *Gloucestershire Js.*, 4 *A. & E.* 689), the venue in the margin should be co-extensive with the jurisdiction of the court; *e.g.*, "Central Criminal Court to wit," "Winter Assize County No. 3, Cambridge, to wit." "City of Norwich and County of the same city to wit." That is to say, it should be descriptive of the limit to which the jurisdiction of the court is confined, and the offence must be proved to have been committed within the limit so described. *R.* v. *Stanbury*, *L. & C.* 128; 31 *L. J.* (*M. C.*) 88.

Jurisdiction: General Rule.]—The courts of common law had apart from

statute no power to try any offence not committed within the body of the realm, *i.e.*, their national jurisdiction was territorial and not personal. *Macleod* v. *Att.-Gen. of N. S. W.* [1891] *App. Cas.* 455; *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* [1894] *App. Cas.* 670; and apart from the obsolete jurisdiction of the constable and marshal, no person can be tried under English law for an offence committed on land abroad, except under the authority of a statute. *See R.* v. *Lewis, Dears. & B.* 182; 26 *L. J.* (*M. C.*) 104; 7 *Cox*, 277.

The jurisdiction of the courts of British colonies is limited to offences committed within their territories, unless imperial legislation or the provisions of their Constitution Acts otherwise provide. *Macleod* v. *Att.-Gen. for N. S. W.* [1891] *App. Cas.* 455: *R.* v. *Hilaire* [1903] 3 *N. S. W. State Rep.* 228. *See re Caruchet*, 9 *Queensland L. J.* 122; *Griffith*, C.J.: *re Bigamy Law of Canada*, 27 *Canada*, 461.

The American decisions on this subject are collected in *Dicey, Conflict of Laws*, p. 231; and *see Moore on Extra-territorial Crime*, 23-33.

Statutory exceptions.]—To the general rule there are many statutory exceptions. In some statutes jurisdiction is given over offences not triable at common law. In others, latitude is given as to the place of trial of existing offences.

Treason abroad.]—In indictments for high treason or misprision committed out of the realm, the venue might, before the passing of the *Local Government Act*, 1888, be laid in Middlesex if the trial was to be "where the King's Bench shall sit and be kept;" or by special commission in such shire as the King should appoint. 35 *Hen.* 8, *c.* 2, *s.* 1. But now, by reason of 51 *&* 52 *Vict. c.* 41, *s.* 89, *sub-s.* 3, and *R. S. C.*, Jan., 1903 (*post, ch. v. sect.* 2), the venue in indictments for treason abroad, if the trial is in the King's Bench Division and not before a special commission, is laid in "the county of the county of London and the county of Middlesex." This was the venue laid in *R.* v. *Lynch* [1903] 1 *K. B.* 744. 35 *Hen.* 8, *c.* 2 applies to treasons committed in the Isle of Man, Guernsey, Jersey, Sark, or Alderney, or in foreign possessions which, although parts of the dominions of the British Crown, are not parts of the realm of England. *See* 3 *Co. Inst.* 11, 111; 4 *Co. Inst.* 124; and *post, tit.* "*Treason.*"

Murder, &c.]—"Where any murder or manslaughter shall be committed *on land* out of the United Kingdom, whether within the King's dominions or without, and whether the person killed were a subject of his Majesty or not, every offence committed by any subject of his Majesty, in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place." 24 *&* 25 *Vict. c.* 100, *s.* 9. A British subject, therefore, who, in a foreign country, within the dominion of a foreign power, murders either a British subject or a foreigner is triable in England under the express provisions of this section. *See R.* v. *Azzopardi*, 6 *St. Tr., N. S.* 21; 2 *Mood. C. C.* 288; 1 *C. & K.* 203: *R.* v. *Sawyer, R. & R.* 294. In *R.* v. *Bernard*, 8 *St. Tr., N. S.* 887; 1 *F. & F.* 240, the question was raised whether, under 9 *G.* 4, *c.* 31, *s.* 7 (*rep.*), a foreigner resident in England could be indicted as accessory (by means of acts done by him in England) to a murder committed by a foreigner on foreigners in the kingdom of France;

the prisoner, however, was acquitted. Such a case is now covered by 24 & 25 *Vict. c.* 100, *s.* 4.

Where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die in England or Ireland; or being feloniously stricken, etc., in England or Ireland, shall die of the same at sea, or at any place out of England or Ireland, the offence (whether in the case of principal or accessory) may be dealt with, etc., in the county or place in England or Ireland, in which the death, stroke, poisoning, or hurt happened. 24 & 25 *Vict. c.* 100, *s.* 10. Where a man in a boat at a short distance from the shore was shot by a person on the shore, and died instantly, it was held that the stroke and death were both upon the high seas, and therefore triable under 28 *Hen.* 8, *c.* 15, *infra*, and not under 2 *G.* 2, *c.* 21. *R.* v. *Coombes*, 1 *Leach*, 388; 1 *East, P. C.* 367; 1 *Hawk. c.* 37, *s.* 17.

In indictments for burning or destroying the King's ships, magazines, etc., out of the realm, the venue may be laid in any county within the realm. 12 *G.* 3, *c.* 24, *s.* 2.

For all purposes of and incidental to arrest, trial, and punishment, a crime for which a person is liable to be punished under 46 & 47 *Vict. c.* 3 (*Explosive Substances Act*, 1883), when committed out of the United Kingdom, shall be deemed to have been committed in the place in which such person is apprehended or is in custody. 46 & 47 *Vict. c.* 3, *s.* 7, *sub-s.* 2.

Oppressions, crimes, and offences committed abroad by colonial governors, lieutenant governors, deputy governors, or commanders in chief, shall be inquired of, heard and determined in the King's Bench Division in England, or before such commissioners and in such county of this realm as shall be assigned by his Majesty's commission. 11 *W.* 3, *c.* 12 (11 & 12 *W.* 3, *Ruffhead*). *Picton's case*, 30 *St. Tr.* 225: *R.* v. *Eyre*, *L. R.*, 3 *Q. B.* 487.

Misdemeanors committed in India may be tried in the King's Bench Division in England. 13 *G.* 3, *c.* 63. And in indictments for offences committed by persons employed in any public service "out of Great Britain" the venue may be laid in Middlesex. 42 *G.* 3, *c.* 85, *s.* 1. *See R.* v. *Shawe*, 5 *M. & Sel.* 403. The counties of London and Middlesex are now one for purposes of trial. 51 & 52 *Vict. c.* 41, *s.* 89; *R. S. C.*, Jan. 1903 (*post, ch. v. sect.* 2).

In informations or indictments against the master of a ship for forcing on shore or leaving behind on shore or at sea, in any place in or out of his Majesty's dominions, any person belonging to his crew, the offence may be prosecuted in any court having criminal jurisdiction in his Majesty's dominions, at home or abroad, where such master or other person shall happen to be. 57 & 58 *Vict. c.* 60, *s.* 187.

Offences against the *Foreign Enlistment Act*, 1870, may be tried in any place where the offence was wholly or partly committed, or in any place within the King's dominions where the accused is: and the offence may be averred generally to have been committed in his Majesty's dominions, and the marginal venue may be the county only or place where the trial is held. 33 & 34 *Vict. c.* 90, *ss.* 16, 17; *R.* v. *Jameson* [1896] 2 *Q. B.* 425; 65 *L. J.* (*M. C.*) 218; 18 *Cox*, 392.

Offences against the *Official Secrets Act*, 1889, committed out of the United Kingdom may be tried in the High Court, or the Central Criminal Court. 52 & 53 *Vict. c.* 52, *s.* 6.

Offences against the *Commissioners of Oaths Act*, 1889 (52 & 53 *Vict. c.* 10, *s.* 9), and the *Foreign Marriage Act*, 1892 (55 & 56 *Vict. c.* 23, *s.* 15), committed outside the King's dominions may be tried in any county or place in England.

Offences in the Admiralty jurisdiction.]—Apart from statute offences in the Admiralty jurisdiction were triable by the admiral according to the civil law and not according to the course of the common law, and controversies occasionally arose as to whether the offence was committed within the jurisdiction of the admiral or within the body of the realm. In *R.* v. *Coombes*, 1 *Leach*, 388, it was held that where a shot fired on land killed a man on the sea the offence was triable in the Admiralty jurisdiction. This decision is criticised in *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works* [1898] *App. Cas.* 200, 204, *Halsbury*, L.C. The distinctions and difficulties are now to a great extent removed by legislation. By 28 *H.* 8, *c.* 15, *s.* 1, it was provided that treasons, felonies, robberies, murder, and confederacies thereafter committed in or upon the sea, or in any other haven, river, creek, or place whereon the admiral had or pretended to have jurisdiction should be inquired of, etc., in such shores and places in the realm as should be limited for that purpose by the King's commission. This mode of trial was extended to the following offences if committed on the high seas :—Acts of hostility by a subject of this realm against a subject at sea under colour of a foreign commission; 11 & 12 *W.* 3, *c.* 7, *s.* 8; 18 *G.* 2, *c.* 30, *s.* 1; *see R.* v. *Evans*, 2 *East, P. C.* 798; forcibly boarding a merchant ship, and throwing over or destroying the goods; 8 *G.* 1, *c.* 24, *s.* 1; trading with pirates or fitting out a vessel for that purpose; 8 *G.* 1, *c.* 24, *s.* 1; master or seamen running away with the ship, goods, etc., or laying violent hands on or confining the master, or making a revolt in the ship, etc.; 11 & 12 *W.* 3, *c.* 7, *s.* 9; *see R.* v. *M'Gregor*, 1 *C.* & *K.* 429; dealing in slaves upon the high seas, or in any place where the admiral has jurisdiction, except as therein mentioned; 5 *G.* 4, *c.* 113; *see R.* v. *Zulueta*, 1 *C.* & *K.* 215; and to the offence of being accessory (before or after the fact, on land, or at sea) to piracy. 11 & 12 *W.* 3, *c.* 7, *s.* 10. *See* 8 *G.* 1, *c.* 24, *s.* 3. The offences above mentioned, when a commission was issued for their trial under 28 *H.* 8, *c.* 15, were inquired of, tried, and determined before the judge of the Admiralty Court, and two of the judges of the common-law courts, under a commission of oyer and terminer: and, in the indictment, no county was inserted in the margin as venue, but instead of it merely the words "*Admiralty of England.*" According to *Coke*, rivers in this country to the furthest point of land next the sea, creeks and arms of the sea within the body of a county, and the sea-shore between the high and low watermarks when the tide is out, are not within the jurisdiction of the Admiralty, or within the meaning of the term "high seas." *See Constable's case*, 5 *Co. Rep.* 107; *Hale de Jure Maris*, *c.* 4, p. 10; *Admiralty case*, 12 *Co. Rep.* 79. According to *Hale* the Admiralty Court had concurrent jurisdiction in cases of murder and maiming, and exclusive jurisdiction in cases of piracy *jure gentium*, which is not a common-law offence. 2 *Hale*, 18. *Hale's* view is now accepted. *See R.* v. *Bruce, R.* & *R.* 243; 2 *Leach.* 1093: *R.* v. *Keyn*, 2 *Ex. D.* 76; 46 *L. J.* (*M. C.*) 17; 13 *Cox*, 403; *Mayne, Ind. Cr. L.* [ed. 1896] p. 271. The test whether an arm of the sea is within the body of a county is said to be, whether a man on one shore can see what is being done on the other. 2 *East, P. C.* 804. This has been held to include the Bristol Channel (*R.* v. *Cunningham, Bell*, 72 : 24 *L. J.* (*M. C.*) 66); Milford Haven (*R.* v. *Bruce*, 2 *Leach*, 1093); and Roundstone Bay, Galway (*R.* v. *Mannion*, 2 *Cox*, 158 *C. C. R. Ir.*). As to the offences by foreigners on foreign ships, *see* 41 & 42 *Vict. c.* 73 (*post*, p. 41.)

The jurisdiction of the Admiralty extends over British ships, not only on the high seas, but also in foreign rivers, below the bridges, where the tide ebbs and flows, and where great ships go, although the municipal

authorities of the foreign country may have concurrent jurisdiction. *R.* v. *Anderson*, *L. R.* 1 *C. C. R.* 161; 38 *L. J.* (*M. C.*) 12. As to jurisdiction when a ship is in dock, *see U. S.* v. *Hamilton*, 1 *Mason*, 152, *Story*, J. If great ships go to the place, proof that the tide ebbs and flows is unnecessary. *R.* v. *Allen*, 1 *Mood. C. C.* 494. The jurisdiction extends to all persons on board the ship whether British subjects or foreigners. *R.* v. *Lopez*: *R.* v. *Sattler*, *Dears. & B.* 525; 27 *L. J.* (*M. C.*) 48: *R.* v. *Lesley*, *Bell*, 220; 29 *L. J.* (*M. C.*) 97. And therefore where a foreigner was convicted at the Central Criminal Court of manslaughter, committed on board a British ship in the river Garonne, in France, about 35 miles from the sea, and about 300 yards from the nearest shore, within the flow and ebb of the tide, the conviction was upheld. *R.* v. *Anderson*, *ubi supra*. So also where a larceny is committed by a person unknown on board a British ship lying afloat in the ordinary course of trading, in the open river at Rotterdam, moored to the quay, in a place where large vessels usually lay, and 16 or 18 miles from the sea, between which and the ship there were no bridges, and within the ebb and flow of the tide, it was held that the larceny took place within the jurisdiction of the Admiralty, and therefore that a person who afterwards, in England, received the property so stolen could be tried at the Central Criminal Court, as the thief himself, even if he had been a foreigner, not one of the crew, might have been so tried. *R.* v. *Carr*, 10 *Q. B. D.* 76; 52 *L. J.* (*M. C.*) 12. The liability of a foreigner is not affected by the fact that he was in the first instance brought illegally and by force on board the ship, unless the offence was committed merely for the purpose of freeing himself from such unlawful restraint. Therefore, where the defendant, a foreigner, having committed a crime in England, had fled to Hamburg, and was there arrested and forced on board an English ship, and while he was kept in custody on board such ship on the high seas, killed the officer who had arrested him, not for the purpose of escaping, but a malice prepense, it was held that, even assuming such arrest and detention to be illegal, he was guilty of murder. *R.* v. *Sattler* (*ubi supra*). Where on a trial for maliciously wounding on the high seas, it was stated by three witnesses that the vessel, on board of which the offence was alleged to have been committed, was a British ship of Shields, and that she was sailing under the British flag, but no proof was given of the register of the vessel or of the ownership; it was held that the court had jurisdiction, as the evidence was sufficient to prove that the vessel was British, and that being so, the court would have jurisdiction even if it had appeared that the vessel was not registered. *R.* v. *Seberg*, *L. R.* 1 *C. C. R.* 264; 39 *L. J.* (*M. C.*) 133: *R.* v. *Allen*, 10 *Cox*. 405.

In *R.* v. *Bjornsen*, *L. & C.* 545; 34 *L. J.* (*M. C.*) 180; 10 *Cox*, 74, the prisoner was one of the crew of a ship built in Holstein, whence she sailed to London. All the officers and crew were foreigners, R., the registered sole owner, was an alien born, but described in the register as "of London, merchant." The ship sailed from London under the British flag. While on the voyage the prisoner killed the master on board the vessel when several thousand miles from England, and 200 miles from land. On the trial of the prisoner for murder these facts were proved, and no evidence was given that R. had been naturalized or had obtained letters of denization; under these circumstances it was held that there was no evidence that the ship was British, and that consequently the prisoner could not be convicted in England. Nor can a foreigner be indicted in this country for casting away a foreign ship in foreign waters, if the act do not amount to piracy; but he may be indicted here for a conspiracy in this country

to commit such an offence, provided the conspiracy be not limited to doing the act abroad. *R.* v. *Kohn*, 4 *F. & F.* 68, *Willes*, J.

A foreigner who kills another foreigner or an Englishman on the high seas on board a foreign ship, is in nowise amenable to the law of England, or triable in England except in a case of piracy. *R.* v. *Lewis*, *Dears. & B.* 182; 16 *L. J.* (*M. C.*) 104: *R.* v. *De Mattos*, 7 *C. & P.* 458: *R.* v. *Depardo*, 1 *Taunt.* 26: *R. & R.* 134; 9 *R. R.* 693. This rule applies where the ship has been illegally seized as a slaver by a British vessel. *R.* v. *Serva*, 1 *Den.* 104; 2 *C. & K.* 53; 1 *Cox*, 298. The foreigner is liable to extradition where the ship belongs to a state as to which the Extradition Acts have been applied. 33 & 34 *Vict. c.* 52, *s.* 16. A foreigner was indicted at the Central Criminal Court for manslaughter under the following circumstances. He was in command of a foreign ship, passing within three miles of the shore of England on a voyage to a foreign port; and whilst within that distance his ship ran into a British ship and sank her, whereby a passenger on board the latter ship was drowned. The facts of the case were such as, apart from the question of jurisdiction, to amount to manslaughter by English law. It was held by the majority of a court of 13 judges that the offence was not committed on board the British ship, and that there was no jurisdiction in the courts of this country to try the prisoner, a foreigner passing the English coast on the high seas in a foreign ship, though the occurrence took place within three miles of the English coast. *R.* v. *Keyn*, 2 *Ex. D.* 63; *L. J.* (*M. C.*) 17; 13 *Cox*, 403. Parliament approved the view of the minority, and at once passed the *Territorial Waters Jurisdiction Act*, 1878 (41 & 42 *Vict. c.* 73). Sect. 2 of that Act *declares* (*see R.* v. *Dudley*, 14 *Q. B. D.* 273, 560; 54 *L. J.* (*M. C.*) 32) and enacts that "an offence committed by a person, whether he is or is not a subject of his Majesty, on the open sea, within the territorial waters of his Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly." The phrases and words "the territorial waters of his Majesty's dominions," "the jurisdiction of the Admiral," "offence," "ship," and "foreign ship," are defined by *s.* 7 of the same statute. And *ss.* 3 & 4 place certain restrictions on the prosecution of a person not a subject of his Majesty, and contain provisions as to procedure. The statute does not expressly exclude or include foreign public vessels. As to their position, *see The Parlement Belge*, 5 *P. D.* 197 (*C. A.*) and *Report of Fugitive Slave Commission*, 1876, *Parl. Pap.* 1878, *vol.* 28. The extent to which municipal jurisdiction outside the three miles limit is internationally recognized was fully discussed in the Behring Sea Arbitration.

The Central Criminal Court has jurisdiction to inquire of, hear, and determine any offence committed, or alleged to have been committed, within the jurisdiction of the Admiralty of England, and to deliver the appointed gaols of the Central Criminal Court of prisoners committed to or detained there for such offences; and all indictments found and proceedings had before the Court are valid. 4 & 5 *W.* 4, *c.* 36, *s.* 22; 44 & 45 *Vict. c.* 64, *s.* 2 (2): *R.* v. *Anderson*, *L. R.* 1 *C. C. R.* 161: *R.* v. *Carr*, 10 *Q. B. D.* 76; 52 *L. J.* (*M. C.*) 12.

By the *Admiralty Offences Act*, 1844 (7 & 8 *Vict. c.* 2), all offences alleged to have been committed on the high seas, and other places within the Admiralty of England, may be heard and determined by his Majesty's justices of the assize or others his Majesty's commissioners by whom any court shall be holden under any of his Majesty's commissions of oyer and terminer or general gaol delivery, and they shall have severally and jointly all the powers which by any act are given to the commissioners

named in any commission of oyer and terminer for the trying of offences committed within the Admiralty of England, and may deliver the gaol, in every county and franchise within the limits of their several commissions, of any person committed to or imprisoned therein for any offence alleged to have been committed upon the high seas, etc., and all indictments found, and other proceedings had, by and before the said justices and commissioners shall be valid (*s.* 1). By sect. 2 of the same Act in all indictments preferred before the said justices and commissioners under that Act, the venue laid in the margin shall be the same as if the offence had been committed in the county where the trial is had; and all material facts, which, in other indictments, would be averred to have taken place in the county where the trial is had, shall, in indictments preferred under that Act, be averred to have taken place "on the high seas." The offence need not, therefore, now be averred to have been committed within the jurisdiction of the Admiralty. *R.* v. *Jones*, 1 *Den.* 101; 2 *C. & K.* 165. Sect. 3 provides for the commitment for trial of persons charged with such offences; and sect. 4 saves the jurisdiction of the Central Criminal Court, under 4 *&* 5 *W.* 4, *c.* 36, *s.* 22, *ante*, p. 41. Where any person shall within the jurisdiction of the Admiralty of England or Ireland, become accessory to any felony, whether at common law or by statute, and whether committed within that jurisdiction or elsewhere, or begun within it and completed elsewhere, or begun elsewhere and completed within it, his offence shall be felony, and the venue in the margin of the indictment shall be the same as if the offence had been committed in the county or place in which he is indicted, and his offence shall be averred to have been committed "on the high seas." 24 *&* 25 *Vict. c.* 94, *s.* 9. As to the trial of offenders in the British dominions beyond the seas for crimes committed on the high seas, or in places in which the Crown has power or jurisdiction out of his Majesty's dominions, *see* 12 *&* 13 *Vict. c.* 96; and 53 *&* 54 *Vict. c.* 37. By the *Merchant Shipping Act*, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 687, all offences against property or person committed in or at any place either ashore or afloat out of his Majesty's dominions by any master, seaman, or apprentice, who at the time when the offence is committed is, or *within three months* previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner, and by the same courts, and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution of any such offences may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England. *R.* v. *Dudley*, 14 *Q. B. D.* 273; 54 *L. J.* (*M. C.*) 32, decided on the similar provision in *s.* 267 of 17 *&* 18 *Vict. c.* 104 (*rep.*). *See Ilbert, Government of India*, 410, and as to colonial jurisdiction under the Act, *R.* v. *Hinde* (1902) 22 *N. Z. L. R.* 436. A hulk retaining the general appointments of a ship, registered as a British ship, and hoisting the British ensign, although only used as a floating warehouse, is a British ship within the meaning of the above enactment. *R.* v. *Armstrong*, 13 *Cox*, 184, *Archibald*, J. 57 *&* 58 *Vict. c.* 60, *s.* 686, *sub-s.* 1, also enacts, that where any person, being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbour, or on board any foreign ship to which he does not belong, or not being a British subject is charged with having committed any crime or offence on board any British ship on the high seas, and that person is *found* (that is to say, is found to be at the time of his trial, *R.* v. *Lopez*: *R.* v. *Sattler, Dears.*

& B. 525; 27 *L. J.* (*M. C.*) 48; 7 *Cox*, 431) within the jurisdiction of any court of justice in his Majesty's dominions, which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been so committed; *sub-s.* 2 saves the effect of 12 *&* 13 *Vict. c.* 96. Each of the *Criminal Law Consolidation Acts* of 1861 contains a provision by which all indictable offences in those acts respectively mentioned committed within the jurisdiction of the Admiralty, are to be deemed to be offences of the same nature and subject to the same punishments as if they had been committed on the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if the offence had been committed in that county or place. 24 *&* 25 *Vict. c.* 96 [Larceny, etc.], *s.* 115; *c.* 97 [Malicious Injuries to Property], *s.* 72; *c.* 98 [Forgery], *s.* 50; *c.* 99 [Offences relating to the Coin], *s.* 36; c. 100 [Offences against the Person, *s.* 68]. These enactments give jurisdiction to a borough quarter sessions to try a man arrested in the borough for offences committed at sea. *R.* v. *Peel, L. & C.* 231; *L. J.* (*M. C.*) 69; 9 *Cox*, 220.

Offences during journeys.]—In indictments for felonies or misdemeanors committed upon any person, or on or in respect of any property, in or upon any coach, cart, or other carriage whatsoever employed in any journey, or on board any vessel whatsoever employed in any voyage or journey upon any navigable river, canal, or inland navigation, the venue may be laid in any county through which the coach, etc., or vessel shall have passed in the course of the journey or voyage during which the felony or misdemeanor was committed, in the same manner as if it had been actually committed therein; and where the side, bank, centre or other part of the highway, river, etc., shall constitute the boundary of two counties, the venue may be laid in either of the counties through, or adjoining to, or by, the boundary of any part whereof the coach, etc., or vessel shall have passed in the course of the journey or voyage. 7 *G.* 4, *c.* 64, *s.* 13. This enactment is not confined to the carriages of common carriers, or to public conveyances, but extends to any carriage employed in any journey. *R.* v. *Sharpe, Dears.* 415; 24 *L. J.* (*M. C.*) 40; 6 *Cox*, 418. The fact that a person assaulted in a train changes into another carriage of the same train during the journey, does not take away the jurisdiction. *R.* v. *French*, 8 *Cox*, 252. Similar provisions are contained in *s.* 21 of the *Fugitive Offenders Act*, 1881 (44 *&* 45 *Vict. c.* 69), as to offences on journeys or voyages in which the vehicle or vessel passes through one or more British possessions.

Offences in more than one county or place.]—Where a felony or misdemeanor is committed on the boundary of two or more counties, or within the distance of 500 yards of the boundary, or is begun in one county and completed in another, the venue may be laid in either county, in the same manner as if it had been wholly committed therein. 7 *G.* 4, *c.* 64, *s.* 12 (*cf.* 44 *&* 45 *Vict. c.* 69, *s.* 20). The distance is measured in a direct line as the crow flies. *R.* v. *Wood*, 5 *Jur.* 225; *cf. Lake* v. *Butler*, 5 *E. & B.* 92, and 52 *&* 53 *Vict. c.* 63, *s.* 34, which governs statutes passed since 1889. The first branch of this enactment extends to the boundaries of counties only, and not to prosecutions in limited jurisdictions. *R.* v. *Welsh*, 1 *Mood. C. C.* 175. 7 *G.* 4, *c.* 64, *s.* 12 regulates venue only, and does not enable the prosecutor to *lay* the offence in one county and *try* it

in the other; but only to lay *and* try it in either. *R.* v. *Mitchell*, 2 *Q. B.* 636; 2 *G. & D.* 274. It seems that in cases of murder or manslaughter, where the cause of death arises in one county, and the death takes place in another, the prisoner may, under this statute, be indicted in either county. 3 *Russ. Cr.* (6th ed.), 146.

In the case of misdemeanor persons who anywhere incite, procure, and abet, or assist its commission, can be indicted in the county in which the misdemeanor is committed. *R.* v. *Johnson*, 7 *East*, 65; 29 *St. Tr.* 81; 8 *R. R.* 597. Where an offence is done through an innocent agent (*see ante*, p. 12), the principal may be indicted in the county in which the agent acted, or in that in which the principal procured him to act. *Fost.* 349: *R.* v. *Brisac*, 4 *East*, 164. In indictments for conspiracies or other misdemeanors, the venue may be laid in any county in which it can be proved that an act was done by any one of the offenders in furtherance of their common design. *R.* v. *Burdett*, 4 *B. & Ald.* 95; 1 *St. Tr., N. S.* 1, 116. *See R.* v *Brisac*, 4 *East*, 164. So in indictments for compassing the King's death, or for any of the treasons in 36 *G.* 3, *c.* 7, *s.* 1 (made perpetual by 57 *G.* 3, *c.* 6, *s.* 1), the venue may be laid in any county in which a sufficient overt act can be proved. *R.* v. *Lord Preston*, 12 *St. Tr.* 645: *R.* v. *Vane, Kel.* (J.) 14, 15; 6 *St. Tr.* 119. *See Deacon's case Fost.* 9: 18 *St. Tr.* 365; and *post, tit.* "*Treason.*" In an indictment for sending a threatening letter, the venue may be laid either in the county where the prosecutor received it; *R.* v. *Girdwood*, 2 *East, P. C.* 1120; 1 *Leach*, 142: *R.* v. *Esser*, 2 *East, P. C.* 1125; or in the county from which the offender sent it. So, if a libel, *R.* v. *Burdett*, 1 *St. Tr., N. S.* 1, 124; 4 *B. & Ald.* 95: *R.* v. *Ellis* [1899] 1 *Q. B.* 230: *R.* v. *Watson*, 1 *Camp.* 215: or a letter containing a challenge (*R.* v. *Williams*, 2 *Camp.* 506) be sent from the county of A. to the county of B., the venue may be laid in either county. So, if an act done in one county prove a nuisance to another, in an indictment for it, the venue may be laid in either county, although it has been said to be more correct to lay it in the county in which the act was done. *Staundf. b.* 2, 91. *See post, tit. Larceny.* These rules appear not to apply to offences part of the essential elements of which take place outside England. *R.* v. *Ellis* [1899] 1 *Q. B.* 230, *C. C. R. Cf. Badische Anilin und Soda Fabrik* v. *Basle Chemical Works* [1898] *App. Cas.* 200, 204.

Offences in counties of cities or towns.]—Where an offence is committed within the county of a city or town corporate (except in London, Westminster, or the borough of Southwark, 38 *G.* 3, *c.* 52, *s.* 10), the prosecutor may prefer his indictment to the grand jury of the next adjoining county, at the sessions of oyer and terminer or gaol delivery, and may have the offender tried there. 38 *G.* 3, *c.* 52, *s.* 2. *See R.* v. *Gough*, 2 *Doug.* 791: *R.* v. *Mellor, R. & R.* 144: *R.* v. *Goff, R. & R.* 179: *R.* v. *Pinney*, 3 *St. Tr., N. S.* 11. Or, if the bill have been found by a grand jury of the county of the city, etc., any court of oyer and terminer or gaol delivery, holden for such county of the city, etc., may order it to be tried by a jury of the next adjoining county. 38 *G.* 3, *c.* 52, *s.* 3. In such cases the venue should be stated as prescribed by 14 *& 15 Vict. c.* 100, *s.* 23 (*supra*, p. 35), and the court before which the offender is tried and convicted may order the judgment to be executed either in the county of trial or in the county of the city or town corporate in which the offence was committed. 51 *G.* 3, *c.* 100, *s.* 1. By the *Criminal Justice Administration Act*, 1851 (14 *& 15 Vict. c.* 55, *s.* 19), "whenever any justice or justices of the peace, or coroner, acting for any county of a city or county of a town corporate, within which her Majesty has not been pleased for

five years next before the passing of this act (1 Aug., 1851) to direct a commission of oyer and terminer and gaol delivery to be executed, and until her Majesty shall be pleased to direct a commission of oyer and terminer and gaol delivery to be executed within the same, shall commit for safe custody to the gaol or house of correction of such county of a city or town any person charged with any offence committed within the limits of such county of a city or town not triable at the court of quarter sessions of the said county of a city or county of a town, the commitment shall specify that such person is committed pursuant to this Act; and the recognizances to appear to prosecute and give evidence taken by such justice, justices or coroner, shall in all such cases be conditioned for appearance, prosecution, and giving evidence at the court of oyer and terminer and gaol delivery for the next adjoining county . . . and the justice, justices, or coroner, by whom persons charged as aforesaid may be committed, shall deliver or cause to be delivered to the proper officer of the court the several examinations, informations, evidence, recognizances, and inquisitions relative to such persons at the time and in the manner that would be required in case such persons had been committed to the gaol of such adjoining county by a justice or justices, or coroner, having authority so to commit; and the same proceedings shall and may be had thereupon at the sessions of oyer and terminer or general gaol delivery for such adjoining county, as in the case of persons charged with offences of the like nature committed within such county."

S. 23 of the same Act extends to prisoners bred in or removed for trial to the adjoining county (under *s.* 19) the provisions of 38 *G.* 3, *c.* 52, and 51 *G.* 3, *c.* 100, as to the execution of the sentences to be passed on such persons, and as to the payment of expenses (*see post, Book I. ch. vi., Costs*). By *s.* 188 of the *Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), (1) "Until her Majesty is pleased to direct a commission of oyer and terminer and gaol delivery to be executed within any borough, being a county of a city or county of a town, all bills of indictment for offences committed within that borough shall be preferred, and all proceedings thereon shall be had in the manner authorized by 38 *G.* 3, *c.* 52. (2) For the purposes of that Act, each borough named in the 6th schedule shall be considered as next adjoining the county named in conjunction therewith." 45 & 46 *Vict. c.* 50, *s.* 242, amends 14 & 15 *Vict. c.* 55, *s.* 24, by substituting for the purposes of the Act of 1851 the same 6th schedule. Under it, Northumberland is considered the next adjoining county to Berwick-upon-Tweed and Newcastle-upon-Tyne; Gloucestershire, to Bristol; Cheshire, to Chester; Devonshire, to Exeter; and Yorkshire, to Kingston-upon-Hull. Bristol, Chester, and Exeter were excepted from 38 *G.* 3, *c.* 52 (*see s.* 10), but the exception was repealed by the *Municipal Corporations Act*, 1835 (5 & 6 *W.* 4, *c.* 76, *s.* 109). *See R.* v. *Holden*, 8 *C.* & *P.* 606. As to the mode of stating that the county of trial is next adjoining, *see R.* v. *Goff*, *R.* & *R.* 179.

Separate commissions of assize, etc., are still issued and executed for the counties of the cities or towns of Newcastle-upon-Tyne, Exeter, Bristol, Norwich, Gloucester, Lincoln, Nottingham, Worcester, York, Haverfordwest, and Carmarthen, and for the borough of Leicester.

The counties of cities or towns besides those already named are Canterbury, Southampton, Lichfield, and Poole.

Offences tried in the High Court.]—Where an indictment is tried in the High Court, the venue is the county in which the indictment was found, unless change of venue is ordered (*see post, s.* 13, *Certiorari*), or unless the trial is at bar. *R.* v. *Amery*, 1 *T. R.* 863; 1 *R. R.* 179:

Att.-Gen. v. *Churchill*, 8 *M. & W.* 171, 193: *Dixon* v. *Farrer*, 18 *Q. B. D.* 43 (*C. A.*).

Offences in Central Criminal Court District.]—In indictments preferred at the Central Criminal Court (the jurisdiction of which extends to the city of London and counties of London and of Middlesex, and certain specified portions of the counties of Essex, Kent, and Surrey; 4 & 5 *W.* 4, *c.* 36, *s.* 2; 38 & 39 *Vict. c.* 77. *s.* 23; 51 & 52 *Vict. c.* 41, *s.* 89), the district within the limits of its jurisdiction is to be deemed and taken to be one county for all purposes of venue, local description, trial, judgment, and execution not "thereinbefore" specially provided for; and the venue laid in the margin shall be as follows, "Central Criminal Court, to wit;" and all offences which in other indictments would be laid to have been committed in the county where the trial is had, and all material facts which would be in other indictments averred to have taken place in the county where the trial is had, shall, in indictments preferred and tried in the said court, be laid to have been committed and averred to have taken place "within the jurisdiction of the said court." 4 & 5 *W.* 4, *c.* 36, *s.* 3. As to the trial at this court of offences committed out of its jurisdiction, under 19 & 20 *Vict. c.* 16, *see post*, *s.* 13, *Certiorari*. Persons subject to the military law, who have been committed for the murder or manslaughter of any person subject to that Act, may, under certain circumstances, where the offence has been committed in England or Wales, out of the jurisdiction of the Central Criminal Court, be indicted and tried before that court. 25 & 26 *Vict. c.* 65. The history of the jurisdiction of the court is given in 6 *St. Tr., N. S.* 1135, *Appendix C.*

Accessories.]—Accessories *before* or *after* the fact to any felony wholly committed within England or Ireland may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony, or any felonies, committed in any county or place in which the act by reason whereof such person shall have become such accessory shall have been committed: "and in every other case accessories before the fact may be dealt with, etc., by any court having jurisdiction to try the principal felony or any felonies committed in any county or place in which the accessory shall be apprehended or be in custody, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within his Majesty's dominions or without, or partly within his Majesty's dominions and partly without." 24 & 25 *Vict. c.* 94, *s.* 7. *See R.* v. *Wallace*, 2 *Mood. C. C.* 200; *C. & Mar.* 200. An accessory before the fact may however be indicted, etc., *in all respects* as if he were the principal felon. 24 & 25 *Vict. c.* 94, *s.* 1. As to accessories where the offence is committed in the Admiralty jurisdiction, *see ante*, p. 42.

Bigamy.]—In indictments for bigamy, the venue may be laid either in the county where the offender was apprehended, or is in custody, 24 & 25 *Vict. c.* 100, *s.* 57, or in the county in which the second marriage took place. Where the indictment is not preferred in the county where the second marriage was, but in the county where the prisoner was apprehended or is in custody, it need not state that the prisoner was apprehended or is in custody in the county in which the indictment is preferred. *R.* v. *Whiley*, 1 *C. & K.* 150 (wrongly reported in 2 *Mood. C. C.* 186). If the defendant, being in custody for a felony, be detained for bigamy, he

may be indicted for the bigamy in the county in which he is so detained. *R.* v. *Gordon, R. & R.* 48.

Coinage offences.]—In indictments for offences with reference to false or counterfeit coin, "where any person shall tender, utter, or put off any counterfeit coin in any county or jurisdiction, and shall also tender, utter, or put off any other counterfeit coin in any other county or jurisdiction on the same day or within ten days next ensuing, or where two or more persons have acted in concert in different counties or jurisdictions to commit any offence against the *Coinage Offences Act*, 1861, the offence may be laid and charged to have been committed, and the offender may be dealt with, etc., in any one of those counties or jurisdictions." 24 & 25 *Vict. c.* 99, *s.* 23.

Customs, excise, and stamps.]—In indictments for violently assaulting or resisting officers of the excise (7 & 8 *G.* 4, *c.* 53, *s.* 43), or for offences against the Customs Acts (39 & 40 *Vict. c.* 36, *s.* 258), the venue may be laid in any county. In indictments for offences against the customs committed upon the water which is not or is not certainly known to be within any county, the venue may be laid in any place on land where the offender may be or be brought. 39 & 40 *Vict. c.* 36, *s.* 229.

The provisions of 53 *G.* 3, *c.* 108, *s.* 35, as to venue in offences relating to stamp duties, were repealed, etc., in 1870 (33 & 34 *Vict. c.* 99), and not re-enacted. The *Stamp Duties Management Act*, 1891 (54 & 55 *Vict. c.* 38), contains no venue clause; but 24 & 25 *Vict. c.* 98, *s.* 91, *infra*, is sufficient to cover cases of forgery of stamps.

Escapes and prison breach.]—In indictments for escapes, breaches of prison, and rescues, the venue might formerly be laid either in the jurisdiction where the offence was committed, or in that where the offender should be apprehended and retaken. 4 *G.* 4, *c.* 64, *s.* 44. That statute was wholly repealed by 28 & 29 *Vict. c.* 126, *s.* 73, *sched.* 3. But provisions similar to *s.* 44 are in force as to escapes from Parkhurst Prison (1 & 2 *Vict. c.* 82, *s* 18), and as to escapes from Pentonville (5 & 6 *Vict. c.* 29, *s.* 28).

In indictments for being at large before the expiration of a sentence of penal servitude, the venue may be laid either in the county where the defendant was apprehended or in that from whence he was ordered to be sent to penal servitude. 5 *G.* 4, *c.* 84, *s.* 22; 20 & 21 *Vict. c.* 3, *s.* 3.

Extortion.]—In indictments for extortion, the venue, it is said, may be laid in any county. 31 *Eliz. c.* 5, *s.* 4; 1 *Hawk. c.* 68, *s.* 6 *n.* (3); 2 *Stark. Cr. Pl.* (2nd ed.) 611, *n.* (*k*). *Sed quære*; 2 *Hawk. c.* 26, *s.* 50; 2 *Chitt. C. L.* 234 (*n*). It is, however, doubtful whether 31 *Eliz. c.* 5, *s.* 4, ever applied to criminal proceedings: and this doubt is strengthened by the fact of its total repeal by the *Civil Procedure Acts Repeal Act*, 1879 (42 & 43 *Vict. c.* 59). The only safe course now is to lay the venue for extortion in the jurisdiction where the offence was committed.

Forgery and perjury.]—In indictments for forgery, and uttering forged matter, whether the offence be indictable at common law, or by virtue of any Act passed, or to be passed, the venue may be laid and the offender may be dealt with, etc., in any county or place in which he shall be apprehended or is in custody, in the same manner in all respects as if his offence had been actually committed in that county or place. 24 & 25 *Vict. c.* 93, *s.* 41. *See R.* v. *James*, 7 *C. & P.* 553: *R.* v. *Smythies*, 1 *Den.*

498; 19 *L. J.* (*M. C.*) 31, both decided under a similar Act, 11 *G.* 4 & 1 *W.* 4, c. 66, *s.* 24 (*rep.*). And accessories before and after the fact, if the offence be felony, and aiders and abettors, if the offence be a misdemeanor, may be dealt with, etc., in any county or place in which they shall be apprehended or are in custody, in the same manner in all respects as if their offence, and the offence of their principal, had been actually committed in such county or place. 24 & 25 *Vict.* c. 98, *s.* 41. Forgeries and perjuries punishable under the *Commissioners for Oaths Act*, 1889 "(whether committed within or without his Majesty's dominions), may be inquired of, dealt with, tried and punished in any county or place in the United Kingdom in which the person charged was apprehended or is in custody, and for all purposes incidental to or consequential on the trial or punishment the offence shall be deemed to have been committed in that county or place." 52 & 53 *Vict.* c. 10, *s.* 9.

Offences punishable as perjury under the *Foreign Marriage Act*, 1892, are triable in any county in England, and dealt with in the same manner in all respects as if committed in the county of trial. 55 & 56 *Vict.* c. 23, *s.* 15.

Perjury at a naval court martial wherever committed is triable in England. 29 & 30 *Vict.* c. 109, *s.* 67.

Larceny and receiving.]—If a man commit larceny, simple or compound, in one county, and carry the goods with him into another, he may be indicted for the simple or compound larceny in the county in which he committed it, or he may be indicted for it as for a simple larceny in the county into which, or in any of the counties through which, he carried the goods; for, in contemplation of law, there is such a taking and carrying away as constitute the offence of larceny at common law in every place through which, at any distance of time, the goods were carried by him. *R.* v. *Parkin*, 1 *Mood. C. C.* 45; 1 *Hale*, 507; 2 *Hale*, 163; 3 *Co. Inst.* 113; 1 *Hawk.* c. 33, *s.* 52; 4 *Bl. Com.* 301; 2 *East, P. C.* 771: *Griffith* v. *Taylor*, 2 *C. P. D.* 194, 202, *Cockburn*, L.C.J.: *R.* v. *Fenley*, 20 *Cox*, 252, *Jelf*, J. The larceny itself is ambulatory, but the aggravated circumstances are fixed and stationary. 1 *Hale*, 536: *R.* v. *Thomson*, 2 *Russ. Cr.* (6th ed.) 233: *R.* v. *Millar*, 7 *C. & P.* 665: *R.* v. *Fenley*, *ubi supra*. A country bank note was stolen during its transit through the post office from Swindon, in Wiltshire, to Bristol, and the same note was afterwards inclosed by the defendant in a letter posted by him in Somersetshire, and addressed to the bankers at Swindon, requesting payment of it, which letter with its contents arrived in due course at Swindon; the defendant was held triable in Wiltshire, the possession of the post office servants or of the bankers in Wiltshire being held for this purpose to be his possession. *R.* v. *Cryer, Dears. & B.* 324; 26 *L. J.* (*M. C.*) 192. Where a chattel was stolen in Liverpool, and was sent thence by the thief by rail, and delivered by the railway company to the receiver in the county of M. for the purpose of being disposed of by the receiver, and there was no evidence of any possession by the thief in the county of M., unless either the possession of the railway company or of the receiver could be deemed his possession, it was held that the thief retained control over the chattel in M., was therefore in possession thereof in M., and was liable to be tried in M. under 24 & 25 *Vict.* c. 96, *s.* 114: *R.* v. *Rogers, L. R.* 1 *C. C. R.* 136; 37 *L. J.* (*M. C.*) 83. But if the nature of the property be changed, an indictment for stealing the article in its original state cannot be preferred in the county into which, when so changed, the property is carried. *R.* v. *Edwards, R. & R.* 497: *R.* v. *Halloway*, 1 *C. & P.* 127. Nor, where several commit a joint felony, in the county of A., and there divide the

goods, and afterwards separately carry each his respective share into the county of B., can they be indicted for a joint felony in the latter county. *R.* v. *Barnett*, 2 *Russ. Cr.* (6th ed.) 284. But if two persons steal a thing in one county, though one of them alone carry the property into another county, yet, if both afterwards co-operate to secure the thing in the latter county, both may be indicted in the latter county; for the subsequent concurrence may be connected with the previous taking. *R.* v. *County*, 2 *Russ. Cr.* (6th ed.) 193, 285: *R.* v. *M'Donagh*, *Carr. Supp.* 23. The taking into the second county, however, must be *animo furandi*; the mere possession there is not sufficient. A constable took the defendant with two stolen horses in Surrey, and afterwards, at his request, rode with him on the horses into Kent, where he escaped; the defendant was afterwards indicted in Kent, and the judges were unanimously of opinion that there was no evidence of stealing in Kent. *R.* v. *Simmonds*, 1 *Mood. C. C.* 408. Where an indictment for compound larceny is found in a jurisdiction other than that in which the larceny took place there is no power to try it: and it is doubtful whether the court can acquire jurisdiction by striking out the circumstances of aggravation. *R.* v. *Fenley*, 20 *Cox*, 252, *Jelf*, J. In an indictment for embezzlement where the money is received in one county and the receipt denied in another, it has been held that the venue may be laid in either county. *R.* v. *Taylor*, *R. & R.* 63; 3 *B. & P.* 596: *R.* v. *Hobson*, *R. & R.* 56: *R.* v. *Rogers*, 3 *Q. B. D.* 28; 47 *L. J.* (*M. C.*) 11. A person who steals goods on a British ship within the jurisdiction of the Admiralty of England or Ireland may be indicted in any county or place in England or Ireland in which he is apprehended or in custody: 24 & 25 *Vict. c.* 96, *s.* 115. It was otherwise at common law. 3 *Co. Inst.* 113; 1 *Hawk. c.* 33, *s.* 52.

If a person, having stolen or otherwise feloniously taken any chattel, money, or valuable security, or other property whatsoever, in any one part of the United Kingdom, afterwards have the same in his possession in any other part of the United Kingdom, he may be dealt with, etc., in that part of the United Kingdom in which he so had the property, in the same manner as if he had actually stolen it there. 24 & 25 *Vict. c.* 96, *s.* 114. "And, if any person, in any one part of the United Kingdom, shall receive, or have any chattel, money, valuable security, or other property whatsoever, which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, knowing such property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the United Kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part." 24 & 25 *Vict. c.* 96, *ss.* 114, 122.

"Whosoever shall receive any chattel, money, valuable security, or other property whatsoever knowing the same to have been feloniously or unlawfully stolen, taken, obtained, converted, or disposed of, may, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, may be dealt with, indicted, tried, and punished in the county or place in which he shall have or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, etc., in the county where he actually received such property;" 24 & 25 *Vict. c.* 96, *s.* 96. Therefore, where the stealing is in county A., and the receiving in county B., both are triable in A., and the indictment may allege both the stealing and receiving to have been in A. *R.* v. *Hinley*, 2 *M. & Rob.* 524. But where A., B., and C. were indicted for stealing a

sheep in Dorsetshire, and one count of the indictment also charged C., as for a substantive felony, with receiving the sheep in Somersetshire, not naming any one as the thief, he was held not to be triable for such receiving in Dorsetshire. *R.* v. *Martin*, 1 *Den.* 398; 18 *L. J.* (*M. C.*) 137.

Receiving goods stolen abroad.]—*The Larceny Act*, 1896 (59 & 60 *Vict. c.* 52) *s.* 1, *sub-s.* 1, enacts, "if any person, without lawful excuse, receives, or has in his possession, any property stolen outside the United Kingdom, knowing such property to have been stolen . . . he may be indicted in any county or place in which he has, or has had, the property." By *sub-s.* 2: "For the purposes of this section, property shall be deemed to have been stolen where it has been taken, extorted, obtained, embezzled, converted, or disposed of, under such circumstances that, if the act had been committed in the United Kingdom, the person committing it would have been guilty of an indictable offence, according to the law, for the time being, of the United Kingdom." By *sub-s.* 3: "An offence under this section shall be a felony, or misdemeanor, according as the act committed outside the United Kingdom would have been a felony, or misdemeanor, if committed in England or Ireland." The cases to the contrary cited in *Archbold* (21st ed.) are therefore now no longer law.

Mutiny.]—In indictments for endeavouring to seduce soldiers or sailors from their duty, or for inciting or stirring them up to mutiny, the venue may be laid in any county in England, whether the offence be committed on the high seas or in England. 37 *G.* 3, *c.* 70, *s.* 2.

Post-office offences.]—In indictments for offences against the *Post-office Acts*, the venue may be laid in the county or place in England or Ireland where the offence is committed, or where the offender is apprehended or is in custody; and, if the offence be "committed in or upon or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post letter-bag, or post-letter, or in respect of a post letter-bag, or post-letter, or a chattel, or money, or valuable security sent by the post," the venue may be laid in the county where the offender is apprehended or is in custody, or in any county or place through any part whereof the mail, or the person, or the post letter-bag, or the post-letter, or the chattel, or the money, or the valuable security sent by the post, in respect of which the offence is committed, shall have passed in due course of conveyance or delivery by post: and, if the side, centre, or other part of a highway, or the side, bank, centre, or other part of a river, canal, or navigation, constitute the boundary of two counties, the venue may be laid in either county. 7 *W.* 4, & 1 *Vict. c.* 36, *s.* 37.

Public authorities and officers: offences by.]—In indictments against persons in the public service, or in the police, for larceny or embezzlement or fraudulent application or disposition of property in the possession or power of his Majesty, the venue may be laid in the county or place where the defendant is apprehended or is in custody, or in which the offence is committed. 24 & 25 *Vict. c.* 96, *s.* 70.

Slave trade.]—Offences in connection with the slave trade may be tried either where committed, or in Middlesex, or in any place where the accused for the time being is if it be within the King's dominions, or a place where his Majesty has jurisdiction under the *Foreign Jurisdiction Acts*. 36 & 37 *Vict. c.* 88, *s.* 26.

Unlawful oaths.]—Offences against the *Unlawful Oaths Acts* of 1797 & 1802, if committed on the high seas or outside the realm, or in England, may be tried by a court of oyer and terminer or gaol delivery for any county in England in the same manner as if committed in such county. 37 *G.* 3, *c.* 123, *s.* 6; 52 *G.* 3, *c.* 104, *s.* 7.

Wrecking.]—In indictments for plundering or stealing any part of any ship in distress or wrecked, stranded, or cast ashore, or any goods, merchandize, or articles of any kind belonging to such ship, the venue may be laid either in the county or place in which the offence was committed, or in any county or place next adjoining. 24 & 25 *Vict. c.* 96, *s.* 64.

2. *The Statement.*

Statutes.

7 *Geo.* 4, *c.* 64 (*Criminal Law Act*, 1826.)

Sect. 19. *Misnomer, want of addition.*]—*And for preventing abuses from dilatory pleas, be it enacted that* no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition of the party offering such plea, if the court shall be satisfied by affidavit or otherwise of the truth of such plea; but in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded.

Sect. 21. *Description of offences.*] . . . Where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy, by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute (*see post*, p. 78).

11 & 12 *Vict. c.* 46 (*Criminal Procedure Act*, 1848).

Sect. 4. *Amendment of certain misdescriptions, courts of assize.*]—[*"Whereas a failure of justice frequently takes place in criminal trials by reason of variances between writings produced in evidence and the recital or setting forth thereof in the indictment or information, and the same cannot now be amended at the trial except in cases of misdemeanor;" for remedy thereof* BE IT ENACTED, *that*] it shall and may be lawful for any court of oyer and terminer and general gaol delivery, if such court shall see fit so to do, to cause the indictment or information for any offence whatever, when any variance or variances shall appear between any matter in writing or in print produced in evidence and the recital or setting forth thereof in the indictment or information whereon the trial is pending, to be forthwith amended in such particular or particulars by some officer of the court, and after such amendment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance or variances had appeared.

[*By* 9 *G.* 4, c. 15 (rep. 53 & 54 Vict. c. 33, s. 1), *judges at* Nisi Prius, *and courts of oyer and terminer and general gaol delivery, were empowered to amend the record upon which any trial might be pending, in any indictment or information for any* misdemeanor, *where any variance should*

appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record. By 11 & 12 Vict. c. 46, s. 4, *the same powers were given to the same courts and judges in* all *criminal trials.* 9 G. 4, c. 15, *was held to apply only to cases in which a particular written instrument was professed to be set out recited*; Ryder *v.* Malbon, 3 C. & P. 594; *and only to mere verbal alterations, and not to omissions which altered the effect of the part set out.* See R. *v.* Christian, C. & Mar. 388: R. *v.* Newton, 1 C. & K. 469. *And amendments were made under this statute very sparingly in criminal cases.* R. *v.* Cooke, 7 C. & P. 559: R. *v.* Hewins, 9 C. & P. 786.]

12 & 13 *Vict. c.* 45 (*Quarter Sessions Act*, 1849).

Sect. 10. *Amendments of certain misdescriptions by Courts of Quarter Sessions.*]—Every court of general or quarter sessions of the peace, on the trial of any offence within its jurisdiction, whenever any variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment, shall have the same power in all respects to cause the indictment to be amended which is given to courts of oyer and terminer and general gaol delivery, with regard to offences tried before such last-mentioned courts, by virtue of an act of the twelfth year of her Majesty's reign, intituled "An Act for the Removal of Defects in the Administration of Criminal Justice" (11 & 12 *Vict.* c. 46, *supra*), and after such amendment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no variance or variances had appeared.

14 & 15 *Vict. c.* 100 (*Criminal Procedure Act*, 1851).

["Whereas offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case: and whereas such technical strictness may safely be relaxed in many instances, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence: and whereas a failure of justice often takes place on the trial of persons charged with felony and misdemeanor by reason of variances between the statement in the indictment on which the trial is had and the proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the misstatement whereof the person on trial cannot have been prejudiced in his defence:" BE IT THEREFORE ENACTED . . . as follows:—]

Sect. 1. *Amendment of certain immaterial variances.*]—From and after the coming of this Act into operation (Sept. 1, 1851), whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof,

In the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment;

Or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein;

Or in the name or description of any person or persons, body politic

or corporate, therein stated or alleged to be injured or damaged or intended to be injured or damaged by the commission of such offence;

Or in the christian name or surname, or both christian name and surname, or other description whatsoever, of any person or persons whomsoever therein named or described;

Or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein;

It shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment where such variance occurs and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after any such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred; and in case such trial shall be had at *nisi prius*, the order for the amendment shall be endorsed on the *postea*, and returned together with the record, and thereupon such papers, rolls, or other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer; and in all other cases the order for the amendment shall either be endorsed on the indictment or shall be engrossed on parchment, and filed, together with the indictment, among the records of the court: provided that in all such cases where the trial shall be so postponed as aforesaid, it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses, and of the defendant, and his surety or sureties, if any, accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried, at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as if they were originally bound by their recognizances to appear and prosecute or give evidence at the time and place to which such trial shall have been so postponed: provided also that where any such trial shall lie to be heard before another jury, the Crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn.

Sect. 2. *Verdicts and judgments given after amendment to be valid.*]—Every verdict and judgment, which shall be given after the making of any amendment under the provisions of this Act, shall be of the same force and effect in all respects as if the indictment had originally been in the same form in which it was after such amendment had been made.

Sect. 3. *Records to be drawn up in amended form.*]—If it shall become necessary at any time for any purpose whatsoever to draw up a formal record in any case where any amendment shall have been made under the provisions of this Act, such record shall be drawn up in the form in which the indictment was after such amendment was made, without taking any notice of the fact of such amendment having been made.

Sect. 5. *Description of instruments in indictments for the stealing or destroying, etc., thereof.*]—In any indictment for . . . stealing, embezzling, destroying, or concealing, or for obtaining by false pretences any instrument it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known or by the purport thereof, without setting out any copy or fac-simile thereof or otherwise describing the same or the value thereof. [*The portions of this enactment relating to forgery and uttering were repealed by* 24 *&* 25 *Vict. c.* 95, *s.* 1, *and re-enacted in* 24 *&* 25 *Vict. c.* 98, *s.* 42, *q.v. post, tit.* "*Forgery.*"]

24 *&* 25 *Vict. c.* 98.

Sect. 42. *Description of instruments in indictments for forgery, uttering, etc.*]—*post, tit.* "*Forgery.*"

14 *&* 15 *Vict. c.* 100.

Sect. 7. *Description of instruments.*]—In all other cases wherever it shall be necessary to make any averment in any indictment as to any instrument whether the same consists wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile of the whole or any part thereof.

Sect. 18. *Description of coin and banknotes as money.*]—In every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England or any other bank, it shall be sufficient to describe such money or bank note simply as money, without specifying the particular coin or bank note: and such allegations, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note, shall not be proved, and in cases of embezzlement and obtaining money or bank notes by false pretences by proof that the offender embezzled or obtained any piece of coin or any bank note or any portion of the value thereof, although such piece of coin or bank note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same or to any other person, and such part shall have been returned accordingly.

Sect. 24. *Certain general defects not to vitiate indictments.*]—No indictment for any offence shall be held insufficient

for want of the averment of any matter unnecessary to be proved, nor

for the omission of the words as "appear by the record" or of the words with "force and arms," or of the words "against the peace" (*post*, p. 85), nor

for the insertion of the words "against the form of the statute" instead of the words "against the form of the statutes" or *vice versâ* (*id.*), nor

for that any person mentioned in the indictment is designated by a name of office or other descriptive appellation, instead of by his proper name (*post*, p. 56), nor

for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence (*post*, pp. 67, 94), nor

for stating the time imperfectly, nor

for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor

for want of a proper or perfect venue (*ante*, p. 35), nor

for want of a proper or formal conclusion (*post*, p. 85), nor
for want of or imperfection in the addition of any defendant (*post*, p. 56), nor
for want of the statement of the value or price of any matter or thing or the amount of damage, injury or spoil in any case where the value or price or the amount of damage, injury, or spoil is not of the essence of the offence (*post*, p. 77).

Sect. 25. *Challenging and amending formal defects.*]—Every objection to any indictment for any formal defect apparent on the face thereof shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn and not afterwards: and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person; and thereupon the court shall proceed as if no such defect had appeared.

Sect. 30. *Definitions of Indictment and Property.*]—In the construction of this Act the word "indictment" shall be understood to include "information," "inquisition," and "presentment," as well as indictment, and also any "plea," "replication," or other pleading, and any *nisi prius* record:" . . . and the term "finding of the indictment" shall be understood to include "the taking of an inquisition," "the exhibiting of an information, and the making a presentment" . . . and the word "property" shall be understood to include goods, chattels, money, valuable securities, and every other matter or thing whether real or personal upon or in respect to which any offence may be committed.

Common Law.

In the statement, all the ingredients of the offence with which the defendant is charged, the facts, circumstances and intent constituting it, should be set forth with certainty and precision, without any repugnancy and inconsistency, and the defendant should be charged directly and positively with having committed it.

At common law these rules were strictly enforced *in favorem vitæ* (*see* 2 *Hale*, 193). By reason of the change in the scale of punishments and of the enactments quoted above, they are relaxed to the extent below indicated under the several sub-headings.

Certainty as to the party indicted.]—The defendant should be described in the indictment by his christian name and surname. 2 *Hale*, 175. And when a corporation is indicted it should be described by its proper corporate name or style (*see post*, p. 65). But where the inhabitants of a parish are indicted for not repairing a highway, or the inhabitants of a county for not repairing a bridge, it is enough to describe them as the inhabitants of a parish or county without naming any of them. 2 *Rolle Abr.* 79: 2 *Hawk. c.* 25, *s.* 68.

Formerly it was necessary that the christian name of the defendant stated in the indictment should be such as he obtained at baptism or confirmation; *see* 2 *Rolle Abr.* 145; *Co. Litt.* 3, or both; *Walden* v. *Holmes*, 6 *Mod.* 115; and sundry minute questions were raised as to whether a man could have two christian names. 2 *Hale*, 175, and see *Archbold Cr. Pl.* (22*nd. ed.*) 47, 48. These refinements are rendered obsolete by 14 & 15 *Vict. c.* 100, *ss.* 1, 2, *ante*, *p.* 52. Under *s.* 1 the court may amend any variances between the indictment and the proof with respect to the christian name and (or) surname of the accused, which appears immaterial to the merits of the case if the amendment will not prejudice the defence or the merits.

The surname may be such as the defendant has usually gone by or acknowledged; and if there be a doubt which one of two names is his real surname, the second may be added in the indictment after an *alias dictus*, thus: "*Richard Wilson, otherwise called Richard Layer*" (*Bro. Misnom.* 47).

If the name of the prisoner be unknown, and he refuse to disclose it, he may be described as "*a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of the prison;*" but an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate, would be insufficient. *Anon., R. & R.* 489.

Additions.]—It was formerly necessary, under 1 *Hen.* 5, *c.* 5 (the Statute of Additions) to add to the christian names and surnames of defendants the *additions* of their "estate *or* degree, *or* mystery," and also of the "towns, or hamlets, or places *and* counties of which they were or be, or in which they be or were conversant:" and many authorities are to be found in the books as to the sufficiency of the statement of these matters: *estate* and *degree* meaning the defendant's rank in life, *mystery* meaning his trade, art, or occupation; but 1 *Hen.* 5, *c.* 5, which became practically obsolete by reason of 7 *G.* 4, *c.* 64, *s.* 19, was repealed as to civil proceedings by 42 & 43 *Vict. c.* 59, and was repealed *in toto* by 46 & 47 *Vict. c.* 49, *s.* 4: and before the actual repeal of (*ante*, p. 51) 1 *Hen.* 5, *c.* 5, the provisions of 7 *G.* 4, *c.* 64, *s.* 19 were extended, and the insertion of additions rendered unnecessary, by 14 & 15 *Vict. c.* 100, *s.* 24 (*ante*, p. 54), which enacts that no indictment of any offence shall be held insufficient "for want of or imperfection in the addition of any defendant."

Certainty as to the person against whom the offence was committed.]—*Names:*—In indictments for offences against the persons or property of individuals, the christian name and surname of the party injured should be stated, if the party injured be known; 2 *Hawk. c.* 25, *ss.* 71, 72: *R. v. Earl of Cardigan*, 4 *St. Tr., N. S.* 601; for the murder of "*John Styles*," larceny of the goods of "*John Styles*," burglary in the dwelling-house of "*John Styles*," and therein stealing the goods of "*John Nokes*," and the like. If the name of the party injured be unknown to the prosecutor, as in the case of the murder of a stranger, or larceny from the person of a stranger who does not come forward to prosecute, or the like, he may be described in the indictment as a person unknown; 2 *Hale*, 181; thus, a man may be indicted for the murder of, or for stealing the goods of, "*a certain person to the jurors aforesaid unknown.*" *Partridge v. Strange, Plowd.* 77. The name if stated must be either the real name of the party injured, or that by which he is usually or best known; *R. v. Norton, R. & R.* 510: *R. v. Berriman*, 5 *C. & P.* 601; *Anon.*, 6 *C. & P.* 403; *R. v. J. Williams*, 7 *C. & P.* 298: *R. v. Gregory*, 8 *Q. B.* 508; 15 *L. J.* (*M. C.*) 38; 1 *Cox*, 263: (*see post*, "*Larceny:*") as, for instance, upon an indictment for the murder of a bastard child, it cannot be described by the name of its mother, unless that name has been gained by reputation. *R. v. Clark, R. & R.* 358: *R. v. Waters*, 1 *Mood. C. C.* 457; 7 *C. & P.* 250: *R. v. Evans*, 8 *C. & P.* 765: *R. v. Stroud*, 2 *Mood. C. C.* 270; 1 *C. & K.* 187. A bastard is *quasi nullius filius*, and can have no name or reputation immediately on birth: *Co. Litt.* 36; but may soon acquire a name by reputation. *R. v. Scarborough*, 3 *Cox*, 72. Where, upon an indictment for the murder of a female bastard child, whose name was to the jurors unknown, it appeared that the child had not been baptized, but that the mother, the prisoner,

had said that she should like to have it called *Mary Ann*, and had herself called it *Mary Ann* and *little Mary*, it was held that the child had not acquired a name by reputation. *R.* v. *Smith*, 1 *Mood. C. C.* 402; 6 *C. & P.* 151. A child cannot be described as "a certain male infant of tender age, to wit, of the age of, etc., and not baptized." The indictment should either state its name, or, if it have no name, either by baptism or reputation (*see R.* v. *Stroud*, 2 *Mood. C. C.* 270; 1 *C. & K.* 187), state the name to be to the jurors unknown. *R.* v. *Biss*, 2 *Mood. C. C.* 93; 8 *C. & P.* 773: *R.* v. *Hicks*, 2 *M. & Rob.* 302. But the absence of a name was held to be sufficiently accounted for by the child being described as "then lately before born of the body of A. B.;" *R.* v. *Hogg*, 2 *M. & Rob.* 380; *see R.* v. *Willis*, 1 *Den.* 80; 1 *C. & K.* 722; or "a certain infant female child born of the body of A. B., and of tender age, to wit, of the age of two days, and not named." *R.* v. *Sarah Waters*, 1 *Den.* 356; 18 *L. J.* (*M. C.*) 53; 3 *Cox*, 390. Where the defendant was indicted for killing a woman whose name was to the jurors unknown, and who he sometimes said was his wife, and sometimes not, and there was no evidence of any name by which she was known, it was held, that if she was not his wife, and if her name could not be ascertained by any reasonable diligence, the description was correct. *R.* v. *Campbell*, 1 *C. & K.* 82. No addition is requisite; 2 *Hale*, 182; and if stated it need not be proved; 14 *& 15 Vict. c.* 100, *s.* 1 (*ante*, p. 52). Where it appeared that the party injured had a mother of the same name, the court held that it was not necessary to distinguish her in the indictment by the addition "the younger," although it was objected that in such a case, where such an addition is not given, the presumption is, that it is the parent and not the child that is intended; and some cases were cited to that effect. *R.* v. *Peace*, 3 *B. & Ald.* 579. But where the person injured has a name of dignity, as a peer, baronet, or knight, he should be described by it; and if he were described as a knight, when, in fact, he is a baronet, or the contrary, the variance would (but for the power of amendment given by 14 *& 15 Vict. c.* 100, *s.* 1, *ante p.* 52) be fatal, because a name of dignity (baronet, for instance) is not merely an addition, but is actually a part of the name. 2 *Hawk. c.* 25, *ss.* 71, 72. A *baron* has been held well described as *Lord A. R.* v. *Pitts*, 8 *C. & P.* 771: *R.* v. *Elliott*, *Id.* 722 *n.* As to the proper mode of describing an Irish peer, *see R.* v. *Graham*, 2 *Leach*, 547: *R.* v. *Brinklett*, 3 *C. & P.* 416; and the eldest son of a peer, *Anon.*, 2 *Salk*, 451. An indictment for a libel upon a person who was formerly the reigning Duke of Brunswick and Luneburg, but was then residing as a private person in this country, but commonly called the Duke of Brunswick, was held to describe him sufficiently as "C., Duke of Brunswick and Luneburg." *R.* v. *Gregory*, 8 *Q. B.* 503. So, "His Royal Highness the Duke of Cambridge" has been considered sufficient without setting forth any of his christian names. *R.* v. *Frost*, *Dears.* 474; 24 *L. J.* (*M. C.*) 116. But since 1851 (14 *& 15 Vict. c.* 100, *s.* 24, *ante*, *p.* 54) an indictment is not vitiated by describing a person by his name of office or other descriptive appellation instead of by his proper name.

Property of deceased persons.]—An indictment for stealing the shroud of a dead person must state it to be the goods and chattels of the executor or administrator; 2 *Hale*, 181. If there be no will and no administration, it may be laid to be the goods of the person who defrayed the expenses of the burial (*R.* v. *Haynes*, 12 *Co. Rep.* 113), or formerly of the ordinary, if the shroud were purchased with the money of the deceased; 2 *Hale*, 181. So, if a coffin be stolen, it may be described in the same manner. If, from length of time, it be difficult to ascertain the personal representatives

of the deceased, the property stolen may be laid as the property of a person unknown; but it cannot be described as the property of the churchwardens of the parish from which it was stolen. *Anon.*, 2 *East, P. C.* 652. If goods, the property of a deceased person, be stolen after his death, and before administration granted, the property must formerly have been laid in the ordinary, and not in the administrator; for the rights of the administrator commence only from the date of the letters of administration, and in this respect differ from those of an executor, which take effect from the death of his testator. *R.* v. *Smith*, 7 *C. & P.* 147. "But it is conceived that the law is otherwise settled by *Tharpe* v. *Stallwood*, 5 *M. & G.* 760, and that the property may be laid in the administrator in respect of a thing stolen before the grant, though probably it may also be laid in the ordinary, of whom the administrator seems to be merely the delegate or representative." *Possession in the Common Law*, by *Pollock and Wright*, 128. On an indictment for larceny, it was proved that the larceny took place after the death of the owner of the goods, and there was no proof of any will or letters of administration. The indictment laid the property as that of A. and B., who were not shown to be either executors or administrators of the deceased, but it was proved that on the death of the owner they had taken on themselves the general charge of his property. The indictment was held to be good, and the property to be well laid in A. and B. *R.* v. *King*, 4 *F. & F.* 493. Where the stealing was from the person of a corpse in the highway, in the diocese of W., and it appeared that the last place of abode of the deceased person was in the diocese of G., but that he had left it, and was on his way to come to live with his father in the diocese of W., the property was held to be well laid in the bishop of W. as ordinary. *R.* v. *Tippin, C. & Mar.* 545. Where some of the articles mentioned in an indictment for larceny were shown to have been in the possession of the deceased at the time of her death; as to the others, it was shown that they had belonged to the deceased, and were taken, on the day of her funeral, by the defendant, to the house of A.; and it was proved that search had been unsuccessfully made for a will in the deceased's drawers and boxes; and that no administration had been taken out; it was held, first, that there was sufficient evidence of an intestacy, and that the property was rightly laid in the ordinary; secondly, that a conviction for larceny of *all* the articles mentioned in the indictment was proper. *R.* v. *Johnson, Dears. & B.* 340; 27 *L. J.* (*M. C.*) 52. By the *Court of Probate Act*, 1858 (21 & 22 *Vict. c.* 95), *s.* 19, "from and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the judge of the Court of Probate for the time being, in the same manner and to the same extent as heretofore they vested in the ordinary." And since this Act where the ordinary would have been at common law named as owner, it is usual to lay the property in "Sir A. B., President of the Probate, Divorce, and Admiralty Division of the High Court of Justice." *Quære*, as to the effect of *s.* 1 of the *Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), which creates a real representative, on the description of the land of a deceased person before and after administration is taken out.

Larceny from bailees.]—If property be stolen out of the possession of a bailee, it may be described in the indictment as the property either of the bailor or bailee; 2 *Hale*, 181; although the goods were never actually in the real owner's possession, but in the possession of the bailee only. *R.* v. *Remnant, R. & R.* 136; *R.* v. *Wymer*, 4 *C. & P.* 391. *See Pollock and Wright*

on *Possession in the Common Law.* As, for instance, goods left at an inn, *R.* v. *Todd*, 2 *East, P. C.* 653, or entrusted to a person for safe keeping, *R.* v. *Taylor*, 1 *Leach*, 356: *R.* v. *Statham, Id.* 357 *cit.*; or to a carrier for carriage, *R.* v. *Deakin*, 2 *East, P. C.* 653; 2 *Leach*, 862; *see R.* v. *Spears*, 2 *Leach*, 825; 2 *East, P. C.* 568; cloth to a tailor to make into clothes; linen to a laundress to wash, *R.* v. *Packer*, 2 *East, P. C.* 653; 1 *Leach*, 357 *n.*; goods pawned and the like—may be laid to be the goods and chattels of the person to whom they are so entrusted, etc., or of the owner, at the option of the prosecutor. *See* 2 *Hale*, 181; 1 *Hale*, 513; 2 *East, P. C.* 652; 1 *Hawk. c.* 33, *s.* 47; *R.* v. *Wilkins*, 1 *Leach*, 520; 2 *Ib.*, 875 *cit.*: 2 *East, P. C.* 678. So, where cattle were alleged in the indictment to be the property of a person, who, it appeared in evidence, was merely the agister, and not the actual owner, the judges held it to be sufficient. *R.* v. *Woodward*, 2 *East, P. C.* 653. So, where A. had taken a house in which B., his relation, carried on a trade for the benefit of A. and his family, having himself neither a share in the property nor a salary, but having authority to sell any part of the stock and to buy goods for the shop, accounting to A., it was held that B. was the bailee of the goods in the shop, and that they might be laid as his property. *R.* v. *Bird*, 9 *C. & P.* 44. Iron stolen from the bed of a canal while it was being cleansed, was held to be well laid as the property of the canal company, though they were not themselves carriers of goods. *R.* v. *Rowe, Bell*, 93; 28 *L. J.* (*M. C.*) 128. But where a bailor steals his own goods from his bailee, they must be described in the indictment as the goods of the bailee. *R.* v. *Wilkinson, R. & R.* 470: *R.* v. *Bramley, Id.* 478. Where a bailee by mistake parts with the possession of a chattel to a person not entitled to it, his special property in it is not divested, and it may be described as his in the indictment. *R.* v. *Vincent*, 2 *Den.* 464; 21 *L. J.* (*M. C.*) 109. Goods must not, however, be described as the property of one who has neither the actual nor constructive possession of them. *R.* v. *Adams, R. & R.* 225. Thus, if it appear that the person named as owner is merely servant to the real owner, the defendant (before 14 & 15 *Vict. c.* 100, *s.* 1 (*ante*, p. 52) must have been acquitted; 2 *East, P. C.* 652; for a servant has not a special property in the goods, the possession of the servant being the possession of the master. *R.* v. *Hutchinson, R. & R.* 412; 2 *Russ. Cr.* (6th ed.) 264. A boy of fourteen living and working with his father, whom the father left in charge of a stall of goods, was held not to be a bailee in whom the property of goods stolen from the stall could be laid. *R.* v. *Green, Dears. & B.*, 113; 26 *L. J.* (*M. C.*) 17; 7 *Cox*, 186 (*C. C. R.*). Where, however, the money had never been in the possession of the master, as where it was received by the servant for him, but he is robbed of it before his arrival at home, it was held that it should be laid as the property of the servant, not of the master. *R.* v. *Rudick*, 8 *C. & P.* 237.

Married women.]—Where the person named as owner appears to be a married woman, the defendant must formerly, unless the indictment was amended, have been acquitted, because in law the goods were the property of the husband; 1 *Hale*, 513; and must be described as such except where the woman had married after the larceny and before indictment found. *R.* v. *Turner*, 1 *Leach*, 536. Thus, where a married woman was sent by her husband to sell sheep, and receive the money; she did so, and was robbed of 5*l.*, part of the price of the sheep; it was held that the money was properly described as the property of her husband. *R.* v. *Roberts*, 7 *C. & P.* 485; even though the wife was living apart from her husband upon an income arising from property invested in trustees for her separate

use, because the goods cannot be the property of the trustees; and, in law, a married woman had formerly no property. *R.* v. *French*, *R. & R.* 491; *see R.* v. *Wilford*, *Id.* 517. This rule of the common law that the wife could have no property was made subject to exceptions by statute where the husband and wife had been judicially separated, or where the wife had obtained a protection order; 20 *&* 21 *Vict. c.* 85, *ss.* 21, 25; and is now virtually abolished by 45 *&* 46 *Vict. c.* 75 (*Married Women's Property Act*, 1882), which enacts, *s.* 12, that—"Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceedings under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert his wife:" and (*s.* 16) that "a wife doing any act with respect to any property of her husband which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband." It is not necessary that an indictment against a wife for stealing the goods of her husband should contain averments that the prisoner was the wife of the prosecutor, or that she took the goods in question when leaving or deserting, or about to leave or desert, her husband. *R.* v. *James* (1902), 1 *K. B.* 541; 71 *L. J. Q. B.* 211; 20 *Cox*, 156; 66 *J. P.* 217; and *see post*, *tit.* "*Larceny.*"

Goods let with a ready-furnished lodging must, if a larceny of them be committed by a third person, be described as the goods of the lodger, for the owner neither has nor is entitled to the possession; *R.* v. *Belstead*, *R. & R.* 411; *R.* v. *Brunswick*, 1 *Mood. C. C.* 26; 2 *Russ. Cr.* (6th ed.) 254; but if a larceny be committed by the lodger, then the goods may be described as the property of the owner, or person letting to hire. 24 *&* 25 *Vict. c.* 96, *s.* 74; *see R.* v. *Healey*, 1 *Mood. C. C.* 1; *R.* v. *Hurrell*, *Ry. & M.* 296. Goods seized under a writ of *fieri facias* may be described as the goods of the party against whom the writ issued; for, although they are *in custodiâ legis*, the original owner continues to have a property in them until they are sold. *R.* v. *Eastall*, 2 *Russ. Cr.* (6th ed.) 264, 320. So if A. steals the goods of B., and afterwards C. steals the same goods from A., they may be described as the goods of either B. or A., for the possession of the former is not divested by the tortious taking. *R.* v. *Wilkins*, 1 *Leach*, 52); 2 *East*, *P. C.* 673; *see* 2 *East*, *P. C.* 654. *Sed quære*, whether under such circumstances, the goods can be laid as the property of B. in indictment against C., for B. was out of possession when C. stole them. *Possession in the Common Law*, by *Pollock and Wright*, 152. Clothes or other necessaries furnished by a father to his child may, it seems, be laid as the property either of the father or of the child, particularly if the

child be of tender age. *R.* v. *Haynes*, 12 *Co. Rep.* 113; *Anon.* 2 *East P. C.* 654; but it is safer, perhaps, to allege them to be the property of the child. *See R.* v. *Forsgate*, 1 *Leach*, 463, 464, *n.*: *R.* v. *Hughes*, *C. & Mar.* 593. The prisoner worked in a mill in the same room with three fellow workmen, and was sent by them on paynight for the wages of the four to the cashier of the works. The cashier gave the money for the four to the prisoner, who never gave any of it to his fellow workmen. He was indicted for the larceny, and it was held that the property in the money should be laid in the workmen, and not in the proprietors of the works. *R.* v. *Barnes*, *L. R.* 1 *C. C. R.* 45; 35 *L. J.* (*M. C.*) 204. The prisoners were charged with stealing brass, the property of H. The facts proved as to the ownership were that the brass was the property of a trading company (limited), and that it was seen on the company's premises about twelve days before it was missed; that the company was being wound up; and that H. was the official liquidator, but there was no proof that H. had ever taken possession of the brass or dealt with it as his property. It was held that although this evidence was sufficient to show that H. might have had a title to the brass, it was not sufficient to show that it had ever become his property, so as to warrant the property being laid in him in an indictment for larceny. *R.* v. *Bell*, 13 *Cox*, 623 (*C. C. R.*).

Property of joint owners.]—"In any indictment or information for any felony or misdemeanor whereon it shall be requisite to state the ownership of any property whatsoever, whether real or personal, belonging to or in the possession of more than one person, whether partners in trade, joint tenants, parceners or tenants in common, it shall be sufficient to name one of such persons and to state such property to belong to the person so named, and another or others, as the case may be: and whenever in any indictment for felony or misdemeanor it shall be necessary to mention for any purpose whatsoever any partners, joint tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid: and this provision shall be construed to extend to all joint stock companies and trustees." 7 *G.* 4 *c*, 64, *s.* 14. In an indictment for stealing a bible, a hymn-book, etc., from a methodist chapel, the goods were laid as the property of John Bennett and others, and it appeared that Bennett was one of the society and a trustee of the chapel: *Parke*, J., held that the property was laid correctly. *R.* v. *Boulton*, 5 *C. & P.* 537.

But it is not necessary that a strict legal partnership should exist. Where C. and D. carried on business in partnership, and the widow of C., upon his death, without taking out administration, acted as partner, and the stock was afterwards divided between her and the surviving partner, but, before the division, part of the stock was stolen, it was holden that the goods were properly described as the joint property of the surviving partner and the widow, upon an objection that the children of C. ought to have been joined, or the goods described as the property of the surviving partner and the ordinary, no administration having been taken out. *R.* v. *Gaby*, *R. & R.* 178. And where a father and son took a farm on their joint account, and kept a stock of sheep, their joint property, and, upon the death of the son, the father carried on the business for the joint benefit of himself and his son's children, who were infants, it was holden, upon an indictment for stealing sheep bred from the joint stock, some before and some after the death of the son, that the property was well laid in the father and his son's children. *R.* v. *Scott*, *R. & R.* 13; 2 *East*, *P. C.* 655. The property in money stolen by the prisoner from the shop of an industrial society in which he is a partner, is well laid in the sole manager of the business, who is also a partner in

the society and in possession of the shop, and responsible to the society for all moneys coming into his possession. *R.* v. *Webster*, *L. & C.* 77: 31 *L. J.* (*M. C.*) 17. So, where the prisoner stole money from the shop of an industrial society of which he was a member, and one of the committee of management, and the shop was under the management of a boy of thirteen, who accounted daily to the treasurer of the society for the moneys received by him, it was held that the property in the money was well laid in the boy. *R.* v. *Burgess*, *L. & C.* 299: 32 *L. J.* (*M. C.*) 185. A box belonging to a benefit society was stolen from a room in a public-house; two of the stewards had keys of this box, and by the rules of the society the landlord ought to have had a key, but, in fact, had not; it was held that the prisoner might be convicted on a count laying the property in the landlord alone. *R.* v. *Wymer*, 4 *C. & P.* 391. *See R.* v. *Cain*, *C. & Mar.* 309: 2 *Mood. C. C.* 204. As to larceny or fraudulent conversion by trustees (24 & 25 *Vict. c.* 96, *s.* 80), by directors of companies (*Id. s.* 81), by members of co-partnership and beneficial owners (31 & 32 *Vict. c.* 116, *s.* 1), by persons entrusted with property for a special purpose (1 *Edw.* 7, *c.* 10), *see post, tit.* "*Fraudulent Conversion.*"

Property of Joint Stock Banks.]—By the *Country Bankers Act*, 1826 (7 *G.* 4 *c.* 46), *s.* 9, in indictments or informations by or on behalf of joint-stock banking co-partnerships, for stealing or embezzling money, goods, effects, bills, notes, securities or other property belonging to them, or for any fraud, forgery, crime or offence committed against or with intent to injure or defraud such co-partnerships, the money, etc., may be stated to be the property of, and the intent may be laid to defraud, any one of the public officers of such co-partnerships; and the name of any one of their public officers may be used in all indictments or informations where it otherwise would be necessary to name the persons forming the company. It was at one time considered that, in an indictment against a person not a member of the company, under 7 *G.* 4, *c.* 46, *s.* 9, or in an indictment under 1 & 2 *Vict. c.* 96 (continued and extended by 3 & 4 *Vict. c.* 111, and made perpetual as so extended by 5 & 6 *Vict. c.* 85, *s.* 1), against a share-holder in a joint-stock banking company, for stealing or embezzling the goods or money of the company, the intent *must* be alleged to be to defraud, or the property *must* be laid in, a public officer of the company, duly appointed and registered under the Acts. *Chapman* v. *Milvain*, 5 *Ex.* 61; *see R.* v. *Atkinson*, 2 *Mood. C. C.* 278: *C. & Mar.* 525. These acts apply only to certain unincorporated partnerships, and it has been held that 7 *G.* 4, *c.* 64, *s.* 14, applies to such partnerships, and that, under it, an indictment laying the property in one of the members of the company, and others is proper. *R.* v. *Pritchard*, *L. & C.* 34; 30 *L. J.* (*M. C.*) 169. 1 *Russ. Cr.* (6th ed.) 30, note by *Mr. Greaves*. Where a banking company is registered under the *Companies Act*, 1862, 25 & 26 *Vict. c.* 89, the property may be laid in the company by its corporate name. *See sect.* 18.

County Property.]—"In any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any bridge, court, gaol, house of correction, infirmary, asylum, or other public building, erected or maintained in whole or in part at the expense of any county, riding or division, or on or with respect to any goods, or chattels whatsoever, provided for or at the expense of any county, etc., to be used for making, altering, or repairing any bridge or any highway at the ends thereof, or any court or other such building as aforesaid, etc., or to be used in or with any such court or other building, the property, whether real or personal, may be described as belonging to the inhabitants of such county,

etc., without specifying their names." 7 *G.* 4, *c.* 64, *s.* 15. *See* 1 *Russ. Cr.* (6th ed.) 27 *n.* County gaols and houses of correction are now vested in the prison commissioners (40 & 41 *Vict. c.* 21, *s.* 48). The other property referred to in this enactment is now for the most part, if not wholly, vested in the county council of the administrative county by 51 & 52 *Vict.* 41, *s.* 3 (iv.) and may be laid in such council by its corporate name; and property of a county not specified in the enactment may be described as *the property* of the County Council.

Parish Property.]—In indictments for stealing, taking or carrying away, or buying or receiving goods, chattels, furniture, provisions, clothes, linen and wearing apparel, boot materials, utensils, materials or things had, bought, procured or provided for the use of the poor of any parish, township or hamlet, the property may be laid in "*the overseers for the time being,*" of the parish, township or hamlet, without stating or specifying the names of any of them. 55 *G.* 3, *c.* 137, *s.* 1. *See R.* v. *Went, R. & R.* 359.

"In any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any workhouse or poor-house, or on or with respect to any goods or chattels whatsoever, provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, or to be used in any workhouse or poor-house in or belonging to the same, or by the master or mistress of such workhouse or poor-house, or by any workmen or servants employed therein, the property may be described as belonging to the overseers of the poor for the time being of such parish, etc., without specifying their names." 7 *G.* 4, *c.* 64, *s.* 16. By the *Poor Law Act,* 1835 (5 & 6 *W.* 4 *c.* 69), *s.* 7, the guardians of the poor of every union formed under the *Poor Law Amendment Act,* 1834 (4 & 5 *W.* 4, *c.* 76), and of every parish placed under the control of a board of guardians by virtue of that Act, are made a corporation by the name of the "Guardians of the poor of the —— union, (*or* of the parish of ——,) in the county of ——;" and as such corporation are empowered to accept, take, and hold for the benefit of the union or parish any buildings, lands or hereditaments, goods, effects, or other property; and by that name to bring actions, to prefer indictments, etc.; and in every such action or indictment relating to any such property, it shall be sufficient to lay or state the property to be that of the guardians of the —— union, or of the parish of ——.

The Poor Law Amendment Act, 1842 (5 & 6 *Vict. c.* 57), *s.* 16, empowers boards of guardians to accept and hold on behalf of their union or parish any lands, buildings, goods, effects, or other property as a corporation and in all cases to sue and be sued in their corporate name. Except in cases within that section the legal estate in such property vested in overseers by 55 *G.* 3, *c.* 137, is not divested by the subsequent Poor Law Acts. *Doe d. Norton* v. *Webster,* 12 *A. & E.* 442. In rural parishes the legal estate of the overseers in certain of the property held for parish purposes is now vested in the parish council, or if there is none, in the chairman of the parish meeting and the overseers. (56 & 57 *Vict. c.* 73, *ss.* 5, 19, 52 (5)). But notwithstanding the last-mentioned statute, an assistant overseer, indicted for embezzling money collected by him from the ratepayers, is still properly described in the indictment as the servant of the inhabitants of the parish, and the money so embezzled is rightly laid as the property of such inhabitants. *R.* v. *Smallman* [1897] 1 *Q. B.* 4: 66 *L. J. Q. B.* 82 (*C. C. R.*): 18 *Cox,* 451.

In respect of any indictment or any criminal proceeding every collector or assistant overseer appointed under the authority of any order of the *Local Government Board* shall be deemed and taken to be the servant of

the inhabitants of the parish whose money or other property he shall be charged to have embezzled or stolen, and *shall* be so described; and it shall be sufficient to state any such property to belong to the inhabitants of such parish without the names of any such inhabitants being specified. 12 & 13 *Vict. c.* 105, *s.* 15. The orders governing the appointment of assistant overseers and collectors are tabulated in the *Index to the Statutory Rules and Orders Revised* (ed. 1904), *tit.* "*Poor, England.*"

Highway authorities.]—"In any indictment or information for any felony or misdemeanor, committed on or with respect to any materials, tools, or implements provided for making, altering, or repairing any highway, within any parish, etc., otherwise than by the trustees or commissioners of any turnpike road, it shall be sufficient to aver that any such things are the property of the surveyor or surveyors of the highways for the time being of such parish, township, hamlet or place, and it shall not be necessary to specify the name or names of any such surveyor or surveyors." 7 *G.* 4, *c.* 64, *s.* 16.

Under the present law local authorities have in all cases been made surveyors of the highways within their districts, *i.e.* in a borough or urban district, the town council or urban district council. (38 & 39 *Vict. c.* 55, *s.* 144.) And the materials, implements, etc., are vested in borough and urban councils by 38 & 39 *Vict. c.* 55, *s.* 149, and the materials, etc., vest, in rural districts, in the rural district councils, as successors to Highway Boards. (25 & 26 *Vict. c.* 61, *s.* 11; 56 & 57 *Vict, c,* 73, *s.* 25.)

In London the Metropolitan Borough Councils are surveyors of highways as to all roads within their districts except certain bridge approaches and embankments vested in the L.C.C. (18 & 19 *Vict. c.* 20, *s.* 96: 62 & 63 *Vict. c.* 14, *s.* 6.)

Main roads and their materials in every county but London vest in the county council. 51 & 52 *Vict. c.* 41, *s.* 11 (6).

Commissions of sewers.]—"In any indictment or information for any felony or misdemeanor committed on or with respect to any sewer, or other matter within or under the view, cognizance, or management of any commissioners of sewers, it shall be sufficient to state any such property to belong to the commissioners of sewers, within or under whose view, cognizance, or management any such things shall be; and it shall not be necessary to specify the names of any of such commissioners." 7 *G.* 4, *c.* 64, *s.* 18.

Crown property.]—Moneys, chattels, or valuable securities stolen or embezzled by persons in the public service, or by constables or other persons employed in the police of any county, city borough, district, or place whatsoever, may be described as the property of the King. 24 & 25 *Vict. c.* 96, *ss.* 69, 70.

Property of societies.]—The moneys, goods, chattels, securities for money, and all other effects whatever, belonging to any friendly society, or any branch of a friendly society, must be stated to be the property of the trustees for the time being, in their proper names as trustees for the society or branch (as the case may be) without further description. *R.* v. *Marks*, 10 *Cox*, 367; 59 & 60 *Vict. c.* 25, *s.* 51; from which it follows that the trustees cannot be guilty of larceny in stealing the property of the society. *R.* v. *Loose, Bell*, 259; 29 *L. J.* (*M. C.*) 132; 8 *Cox*, 302; unless, besides being trustees, they are also part beneficial owners thereof. 31 & 32 *Vict. c.* 116, *s.* 1: *post, tit.* "*Larceny.*" The property in money, etc.,

belonging to registered industrial and provident societies, should be laid in the society by its corporate name. *See* 56 & 57 *Vict. c.* 39, *ss.* 3, 21. The same is true of societies within the *Building Societies Acts.* 37 & 38 *Vict. c.* 42, *s.* 9. The property in money, etc., belonging to a registered trade union should be laid in the person or persons for the time being holding the office of trustee, in his or their proper name or names, as trustees of such trade union, without any further description. 34 & 35 *Vict. c.* 31, *s.* 8: 39 & 40 *Vict. c.* 22, *s.* 3. The same rule applies as to the property of trustee savings banks, 26 & 27 *Vict. c.* 87, *s.* 10; *R.* v. *Bull*, 1 *Cox*, 137; and of loan societies, 3 & 4 *Vict. c.* 110, *s.* 8. In the case both of friendly societies and industrial and provident societies and trade unions, the property may also be laid in the person in whose possession the money, etc., was at the time it was stolen, and who was accountable to the society or union for it. *See ante*, p. 61.

Chelsea Hospital property.]—In indictments for stealing, pawning, selling, buying, exchanging, receiving, embezzling, secreting, or disposing of, or not accounting for clothes, linen or other goods, belonging to the hospital at Chelsea, or the commissioners thereof, the property may be laid to be in "The Lords and others, Commissioners of the royal hospital for soldiers at Chelsea, in the county of Middlesex:" and in all prosecutions under the *Chelsea Hospital Act*, 1826 (7 *G.* 4, *c.* 16), it is sufficient to charge the act as done with intent to defraud "the Lords and others, Commissioners of the royal hospital for soldiers at Chelsea in the county of Middlesex," in any case in which it is necessary to state a particular intent to defraud. 7 *G.* 4, *c.* 16, *s.* 35.

Post Office property.]—In indictments for stealing post letters, etc., etc., the property may be laid in the Postmaster-General; 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 40; and in indictments for offences committed in respect of telegraphic messages sent by or entrusted to the Postmaster-General, the property of such telegraphic messages may be laid in him. 31 & 32 *Vict. c.* 110, *s.* 21; 32 & 33 *Vict. c.* 73, *s.* 23.

Customs property.]—Any moneys, chattels, or other valuable securities, which shall or may be received by any officer, clerk, or other person in the service of the customs, either as duties of customs, or under or by virtue of any statute, or by the order or direction of the commissioners of customs, or in virtue of his office or employment, or otherwise, for the use and service of his Majesty or of any public department, shall be deemed to be moneys, chattels or valuable securities for the public service, and shall be considered as such within the meaning of the *Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), and in any information, indictment or other instrument in relation thereto, the same may be laid as the property of his Majesty. 39 & 40 *Vict. c.* 36, *s.* 29.

Bankrupt's estate.]—In indictments for stealing or embezzling property vested in the trustee of a bankrupt, by virtue of his appointment, such trustee may be designated as "the trustee of the property of A. B., a bankrupt," without inserting the proper name of the trustee. 46 & 47 *Vict. c.* 52, *s.* 83.

Corporation property.]—Property vested in a body of persons should not be laid as the property of that body, unless it be incorporated, but should be described as the property of the individuals who constitute that body, or of some of them, as in the case of partners, trustees, or

unincorporated joint-stock companies. *R.* v. *Sherrington*, 1 *Leach*, 513: *R.* v. *Beacall*, 1 *Mood. C. C.* 15. But when goods of a corporation are stolen, they should be laid to be the property of the corporation, in their corporate name, and not in the names of the individuals who compose it; *R.* v. *Patrick*, 2 *East, P. C.* 1059; 1 *Leach*, 253; and there is a difference in this respect between an ancient corporation and a corporation newly created. An ancient corporation may by use have a special name, differing in substance from that by which they were originally incorporated, and they may plead and be impleaded by that name; but a corporation created within memory must plead and be impleaded by the name by which they were incorporated. 10 *Co. Rep.* 29 *b.*; *Hob.* 211; *Noy.* 54; 2 *Brownl.* 292; *Latch.* 229; 3 *Mod.* 6; *Cro. Eliz.* 351; *Bac. Abr. Corp.* (C. 3). This in case of a municipal corporation is the name specified in their charter of incorporation.

In the case of metropolitan borough councils it is the name given by the order creating the council or by letters patent subsequently issued.

In the case of urban, rural, or parish councils, the corporate name is that stated in the order constituting them. At boards of guardians, see *ante*, p. 63.

Most of the trading companies, familiarly known as joint-stock companies, are now incorporated under the *Companies Acts*, 1862 to 1900 (25 & 26 *Vict. c.* 89, *etc.*; *see s.* 18). Where on an indictment against the prisoner as servant to A. and others, for embezzlement, proof was given that the prisoner was servant to a trading company, calling itself "The R. Coal Company, Limited;" that this name was over the office door of the company; that there were eighty shareholders, of whom A. was one; that its affairs were managed by directors; that its shares were transferable by certificate without the consent of the other shareholders; and that a minute book of resolutions was kept, but no certificate of incorporation was put in evidence,—it was held that there was no evidence that the company was incorporated, and that on the evidence the prisoner was properly alleged in the indictment to be the servant of A. and others. *R.* v. *Frankland, L. & C.* 276; 32 *L. J.* (*M. C.*) 69. The existence of a company under its corporate name is sufficiently proved by parol evidence that it has carried on business under that name. *R.* v. *Langton*, 2 *Q. B. D.* 296; 46 *L. J.* (*M. C.*) 136; 13 *Cox*, 345. But it is preferable to prove the existence and name of the company by the certificate of incorporation: *R.* v. *May*, 64 *J. P.* 570. (*a*)

Amendment of misdescriptions.]—Prior to 14 & 15 *Vict. c.* 100, *ss.* 1, 24 (*ante*, pp. 52, 54), variances, if material, were fatal, and could not be amended. 2 *East, P. C.*, 651, 781.

For the old law as to immateriality of variances where the words were *idem sonantia* (*see* 1 *Chit. Cr. L.*, 216: *Archbold, Cr. Pl.* (22nd ed.) 58, 59.

Certainty as to age of person injured.]—Where it is essential to constitute the offence that the party injured should have been of a certain age, the party must be stated in *every* count of the indictment to be of

(*a*) As to judicial notice of the incorporation of a company referred to in a statute, *see R.* v. *Connell*, 6 *Queensland, L. J.*, 209.

It is not clear that *R.* v. *Langton* could be applied to a foreign corporation, *R.* v. *Whitehouse*, 6 *Queensland L. J.*, 313, *Griffith*, C. J., but it would seem to apply to companies proved to carry on business under a name containing the word "limited." *R.* v. *Cawley*, 7 *Queensland L. J.* 45.

that age; and it will not be sufficient to state the age in the first count only, and in a subsequent count merely to describe the party as "the said A. B." *R.* v. *Martin*, 9 *C. & P.* 213. *See R.* v. *Sarah Waters*, 1 *Den.* 356; 18 *L. J.* (*M. C.*) 53; 3 *Cox*, 303.

Certainty as to time and place.]—Under 14 & 15 *Vict. c.* 100, *s.* 24 (*ante*, p. 54) immaterial defects as to statement of time or place are not fatal to an indictment. *See R.* v. *Nicholls*, 68 *J. P.* 452 (*C. C. R.*). Formerly time and place must have been laid with certainty. The date, and in certain cases (*see post, local description*) the place of the offence, should be stated in the indictment. *Staundf.*, 95 *a*: *R.* v. *Hollond*, 5 *T. R.* 607: *R.* v. *Aylett*, 1 *T. R.* 63, 69: *R.* v. *Haynes*, 4 *M. & Sel.* 214. But it never was necessary that they should be laid according to the truth, *unless time was of the essence of the offence, or unless local description was required*, for in other cases if the time stated were previous to the finding of the indictment, and the place were within the county or other extent of the court's jurisdiction, a variance between the indictment and evidence in the time when the offence was committed, 2 *Co. Inst.* 318; 3 *Co. Inst.* 230: *Sir H. Vane's case*, *Kel.* (J.), 16: *R.* v. *Aylett*, *ubi supra*, or in the place where committed, *provided the place proved were within the jurisdiction of the court*, 2 *Hawk. c.* 25, *s.* 84, was not material. And for this reason, in practice all the facts in an indictment usually were stated to have occurred at the same time and place, time and special venue being laid as to the first fact, and afterwards referred to by the words "*then and there*," as to the others. Where larceny of a number of articles is charged without specification of time the prosecution may be put to elect as to the three cases on which they will proceed if the evidence proves that the articles were taken on different occasions: *R.* v. *Nicholls*, *ubi supra*.

The time, if laid, should be the day of the month and year upon which the act is supposed to have been committed. In no case is it necessary to state the *hour* at which the act was done, unless rendered essential by the statute upon which the indictment is framed. 2 *Hawk. c.* 25, *s.* 76. *See Combe* v. *Pitt*, 3 *Burr*, 1423, 1434: *R.* v. *Clarke*, 1 *Bulst.* 203; *March, pl.* 127; 2 *Co. Inst.* 318. In burglary, indeed, it is usual to state it; but alleging the offence to have been committed "*in the night*," without mentioning the hour, seems to be sufficient; but *see* 1 *Hale*, 549; 2 *Hawk. c.* 25, *ss.* 76, 77: *R.* v. *Waddington*, 2 *East, P. C.* 513. And an indictment for burglary, alleging that the offence was committed "burglariously," but without any statement of time or "*in the night*," has been held good. *R.* v. *Thompson*, 2 *Cox*, 377. In an indictment under the *Night Poaching Act*, 1828 (9 *G.* 4, *c.* 69), for unlawfully entering or being in a close by night for the purpose of taking game, armed, it is not necessary to state the hour of the night. *Davies* v. *R.*, 10 *B. & C.* 89. Where a time is limited for preferring an indictment, the time laid should appear to be within the time so limited. *See R.* v. *Brown*, *M. & M.* 163; *and post*, p. 94.

Local description or special venue.]—Formerly, the place (or *special venue*, as it is technically termed) must have been such as in strictness the jury who are to try the cause should come from. But since 1851 the common law has been to a great extent abrogated (*see Stephen*, 1 *Hist. Cr. L.* 281; as 14 & 15 *Vict. c.* 100, *s.* 23 (*ante*, p. 35)), makes it unnecessary to state any venue in the body of an indictment; but requires a local description to be inserted when necessary.

The cases in which local description seems to be required are, keeping disorderly houses; burglary (*Russ. Cr.* (6th ed.) 44; *R.* v. *St. John*, 9 *C.*

& P. 40); housebreaking (*R.* v. *Bullock*, 1 *Mood. C. C.* 324 *n.*); stealing in a dwelling-house (*R.* v. *Napper*, 1 *Mood. C. C.* 44); poaching or being armed at night on land for the purpose of killing game (*R.* v. *Ridley*, *R. & R.*, 515); being found by night armed with intent to break into a dwelling-house, etc., and to commit a felony therein (*R.* v. *Jarrald*, *L. & C.* 301; 32 *L. J.* (*M. C.*) 258); sacrilege (*post*, *tit.* "*Burglary*," *etc.*); riotously demolishing churches, houses, machinery, etc. (*R.* v. *Richards*, 1 *M. & Rob.* 177); maliciously firing a dwelling-house, perhaps an out-house, but not a stack (*R.* v. *Woodward*, 1 *Mood. C. C.* 323); forcible entry (2 *Leon.* 186); nuisances to highways (*R.* v. *Steventon*, 1 *C. & K.* 55; 4 *Chit. Cr. L.* 423); malicious injuries to sea banks, mill dams, or other local property, 1 *Taylor, Ev.* (9th ed.), p. 209.

At the Central Criminal Court, the present practice is to insert the parish in all indictments, in order that the taxing officers of the court may see at a glance to which part of the Central Criminal Court district the case belongs, and upon what county treasurer the order for costs should be made.

It also enables the High Court, if the indictment is removed by *certiorari*, to determine in what county it should be tried. *R.* v. *Connop*, 4 *A. & E.* 942; and *see Cr. Off. Rules*, 1883, *r.* 41.

Before 1851 it was necessary to state accurately the dates of written instruments; but the mode of describing such instruments is now regulated by 14 *&* 15 *Vict. c.* 100, *ss.* 5, 7 (*ante*, p. 54), and under *s.* 1 of the same statute (*ante*, p. 52), the court may amend variances which it considers immaterial between the statement in the indictment and the evidence as to "the name or description of any matter or thing therein named or described."

Certainty as to the facts, circumstances and intent constituting the offence.] —Every offence consists of certain acts done or omitted under certain circumstances (*ante*, p. 11, 33); and as a general rule in an indictment for the offence, it is not sufficient to charge the defendant generally with having committed it, as, that he stole the goods of J., or committed burglary in the house of J. S., or the like; but every fact or circumstance which constitutes or is a necessary ingredient in the offence must be specifically and categorically stated in the indictment.

The offence must appear upon the face of the indictment to be a distinct substantive offence; you cannot charge a man with being a common thief, a common champertor or conspirator, common malefactor, or common robber; but if he have committed a larceny, robbery, etc., the indictment must set forth every fact and circumstance which is a necessary ingredient in the offence. Thus, an indictment for extortion, charging that the defendant took extorsively for every horse so much, and for every twenty sheep so much, was held bad: because it charged the defendant with extortion generally, and not upon any particular occasion. *R.* v. *Roberts*, 4 *Mod.* 101; 11 *Show.* 389. So, that the defendant was a calumniator, and a common and turbulent breaker of the peace, etc., was held bad for the same reason. *R.* v. *Taylor*, 2 *Str.* 849; *R.* v. *Cooper*, *Id.* 1246; 2 *Hale*, 182. And the same where a constable was indicted for behaving badly and negligently in the execution of his office, without specifying any particular instance of negligence, etc. *R.* v. *Winteringham*, 1 *Str.* 2. *See also R.* v. *O'Callaghan*, 14 *Cox*, 499. The exceptions to this rule are:—

1. In indictments and inquisitions for murder or manslaughter it is now unnecessary to set forth the manner in which or the means by which the death was caused. 24 *&* 25 *Vict. c.* 100, *s.* 6.

2. A person may be indicted for being "a common barrator," without

detailing the particulars of the barratry; *l'Anson* v. *Stuart*, 1 *T. R.* 748, 752, 754; 1 *R. R.* 392; but according to *Hawkins, bk.* 1, *c.* 81, *s.* 13, it is settled practice not to let the prosecutor try an indictment of this kind until he has given to the defendant particulars of the matters which he proposes to prove. *See R.* v. *Curwood*, 3 *A. & E.* 815.

3. A woman may be indicted for being "a common scold," without detailing the particulars of her conduct. *l'Anson* v. *Stuart, ubi supra.*

4. A person may be indicted for keeping a common gambling-house or bawdy-house, without stating those circumstances which it may be necessary to give in evidence to show that it is a house of that description: *Id.*, and *see* 2 *Hawk. c.* 25, *ss.* 57, 59.

5. In an indictment for soliciting or inciting to the commission of a crime, *R.* v. *Higgins*, 2 *East*, 5; 6 *R. R.* 615, or for aiding and assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance, nor to state the offence contemplated with the precision which would be required as an indictment for the full offence: and this, it would seem, even where the full was actually committed. Thus in an indictment framed upon 37 *G.* 3, *c.* 70, which enacts that any person who shall maliciously and advisedly *endeavour* to seduce any person serving in his Majesty's forces from his duty and allegiance shall be guilty of felony, it is unnecessary to state the means by which the prisoner had endeavoured to seduce the soldier from his duty and allegiance. *R.* v. *Fuller*, 2 *Leach*, 790; 1 *B. & P.* 180. With respect to the description of the *solicitation or endeavour* it seems that general words are sufficient, because the *endeavour, attempt, or solicitation* is in general made up of a number of petty circumstances, which cannot be set out on the record. 1 *Stark. Cr. Pl.* 146 (2nd ed.).

6. In an indictment or information for bribery or undue influence at a parliamentary election, it is sufficient to allege that the defendant was, at the election at or in connexion with which the offence is intended to be alleged to have been committed, guilty of bribery or undue influence (as the case may require). 26 *&* 27 *Vict. c.* 29, *s.* 6. By *s.* 53 of the *Corrupt and Illegal Practices Prevention Act*, 1883 (46 *&* 47 *Vict. c.* 51), this enactment is extended to any prosecution or indictment for the offence of any corrupt practice within the meaning of the following statutes, viz., at parliamentary elections, 46 *&* 47 *Vict. c.* 51 (*Corrupt and Illegal Practices Prevention Act*, 1883), *s.* 53: at municipal elections (*a*) generally, 47 *&* 48 *Vict. c.* 70 (*Municipal Elections and Corrupt and Illegal Practices Act*, 1884), *s.* 30: (*b*) in the City of London, *Id. s.* 35; *at elections of guardians of the poor* (*Id. s.* 36); of county councils, 51 *&* 52 *Vict. c.* 41 *s.* 75; of district and parish councils, 56 *&* 57 *Vict. c.* 73, *s.* 48, *sub-s.* 3; and of metropolitan borough councils, 62 *&* 63 *Vict. c.* 14. An indictment under 46 *&* 47 *Vict. c.* 51, which merely charged the defendant with "corrupt practices" at a parliamentary election, without setting out the nature of such corrupt practices as "bribery" or "undue influence," was quashed on motion for want of certainty. *R.* v. *Norton*, 16 *Cox*, 59, *Pollock*, B. But after verdict no objection for want of certainty can be taken to an indictment so framed, although the majority of the judges were of opinion that if the objection had been taken by way of motion to quash the indictment it must have prevailed. *R.* v. *Stroulger*, 17 *Q. B. D.* 327; 55 *L. J.* (*M. C.*) 137.

7. In an indictment for an offence under the *Debtors Act*, 1869 (32 *&* 33 *Vict. c.* 62), as amended and extended by the *Bankruptcy Acts* of 1883 *&* 1890, it is sufficient to set forth the substance of the offence charged in the words of the Act, specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy,

trading, adjudication, or any proceedings in, or order, warrant, or document of any court acting under the *Bankruptcy Acts*, 1883 & 1890. *See* 32 & 33 *Vict. c.* 62, *s.* 19, and 46 & 47 *Vict. c.* 52, *s.* 149, *sub-s.* 2; 53 & 54 *Vict. c.* 71, *s.* 26. Where an indictment under *s.* 13, *sub-s.* 1 of 32 & 33 *Vict. c.* 62 (*Debtors Act*, 1869), alleged in the words of that sub-s. that the defendant "unlawfully in incurring a certain debt and liability to A. B., did obtain credit from the said A. B. under false pretences," without stating the false pretences with which the defendant was charged, it was held that such indictment was good by virtue of *s.* 19 of that statute, and that no objection to it could be taken by motion to quash or otherwise. *R.* v. *Watkinson*, 12 *Cox*, 271 (*C. C. R.*): *R.* v. *Pierce*, 16 *Cox*, 213 (*C. C. R.*); 56 *L. J.* (*M. C.*) 85, overruling *R.* v. *Bell*, 12 *Cox*, 37.

Where the offence cannot be stated with complete certainty it is sufficient to state it with such certainty as it is capable of. Thus in the case of a conspiracy to defraud a person of goods, it is not necessary to describe the goods as in an indictment for stealing them; and it has been held sufficient to describe them as "divers goods." *Anon.*, 1 *Chit. Rep.* (*K. B.*) 698. *See also R.* v. *Gill*, 2 *B. & Ald.* 204; 20 *R. R.* 407: *R.* v. *Kenrick*, 5 *Q. B.* 49: *Taylor* v. *R.* [1895] 1 *Q. B.* 25; 64 *L. J.* (*M. C.*) 11. In indictments for perjury and offences of the same nature, also, the certainty formerly required according to the rules above mentioned is now no longer necessary; for under 14 & 15 *Vict. c.* 100, *s.* 20 (which re-enacts and extends similar provisions contained in 23 *G.* 2, *c.* 11), it is necessary only to state the substance of the offence, and by what court, or before whom the oath, etc., was taken, etc., without setting out the bill, answer, etc., or any part of any proceeding in law or equity, and without setting out the commission or authority of the court or person before whom the offence was committed. *See post, tit.* "*Perjury.*"

If any fact or circumstance which is a necessary ingredient of the offence be omitted in the indictment, such omission vitiates the indictment, and the defendant may avail himself of the defect in statement by demurrer, motion in arrest of judgment, or writ of error. Thus, in an indictment for assaulting an officer in the execution of process, without showing that he was an officer of the court out of which the process issued; *R.* v. *Osmer*, 5 *East*, 304; *see R.* v. *Everett*, 8 *B. & C.* 114; for contemptuous or disrespectful words to a magistrate, without showing that the magistrate was in the execution of his duty at the time; *R.* v. *Leafe*, *Andr.* 226 (Ir.); against a public officer for non-performance of a duty, without showing that he was such an officer as was bound by law to perform that particular duty; *R.* v. *Hollond*, 5 *T. R.* 607, 623; for obtaining money under false pretences (before the passing of 24 & 25 *Vict. c.* 96, *s.* 88) without showing whose money it was; *R.* v. *Norton*, 8 *C. & P.* 196: *R.* v. *Martin*, 8 *A. & E.* 481; 7 *L. J.* (*M. C.*) 89; that he feloniously did lead away a horse, etc., without saying "take;" 2 *Hale*, 184: in all these and the like cases the indictment is bad, and the defect may be taken advantage of in the manner above mentioned. *See R.* v. *Cheere*, 7 *D. & R.* 461; 4 *B. & C.* 902; and *cf. R.* v. *Wade*, 1 *B. & Ad.* 861. In an indictment for neglecting to provide sufficient sustenance for a child of tender years, the omission to state expressly that the prisoner had the ability to provide does not hurt if the indictment avers that it was the duty of the prisoner to provide, and that he unlawfully *neglected* to provide, the ability to provide being implied, and therefore sufficiently averred, by the word *neglect*. *R.* v. *Ryland*, *L. R.*, 1 *C. C. R.* 99; 37 *L. J.* (*M. C.*) 10; 11 *Cox*, 101.

Particulars.]—There are certain decisions which indicate that where

an indictment is in general terms the court, instead of exercising its discretionary power to quash the indictment, "may direct particulars to be delivered to the accused of any matter alleged in the indictment, and may adjourn the trial for the purpose of such delivery." Under these decisions orders have been made on the prosecution to furnish particulars in cases of barratry, nuisance, embezzlement, and conspiracy. It is sufficient to make a general charge of the offence in indictments for barratry and keeping a disorderly house; *l'Anson* v. *Stuart*, 1 *T. R.* 748, 752; and perhaps for other nuisances; *see R.* v. *Curwood*, 3 *A. & E.* 815 (gas works); *R.* v. *Downshire*, 3 *A. & E.* 816, *cit.* (obstructing highway). According to *Hawkins* (*bk.* 1, *c.* 81, *s.* 13), it was settled practice not to allow the prosecutor to try an indictment for barratry until he had given particulars. In an anonymous case, 1 *Chit.* (*K. B.*) 698, on a charge of conspiracy, the court seems to have considered barratry the only case in which particulars could be ordered.

But in *R.* v. *Hodgson* [1828] 3 *C. & P.* 422, *Vaughan*, B., on an indictment for embezzlement under 7 & 8 *G.* 4, *c.* 29 (*rep.*), expressed an opinion that particulars ought to be given of the names of the persons from whom the embezzled sums were alleged to have been received (and *see Carr. Suppl.* (3rd ed.) 322). And in *R.* v. *Bootyman* [1832] 5 *C. & P.* 300, *Littledale*, J., made an order for particulars on a similar indictment. In *R.* v. *Marquis of Downshire* [1834] 4 *A. & E.* 698, *Parke*, J., on an indictment for obstruction on highway, ordered particulars of the situation of the ways alleged to have been obstructed; and in *R.* v. *Curwood* [1835] 3 *A. & E.* 816; 5 *N. & M.* 369, the Court of King's Bench without affidavit ordered particulars of the several acts of nuisance to be proved under an indictment for causing a public nuisance by the produce of gas works.

And since the decision in *R.* v. *Gill*, 2 *B. & Ald.* 204; 20 *R. R.* 407, that an indictment for conspiracy may be framed in a general form, there have been numerous instances of orders for particulars. In *R.* v. *Hamilton* [1836] 7 *C. & P.* 448, *Littledale*, J., made an order for particulars on a general indictment for conspiracy, and adjourned the trial. He stated that the particulars should contain the same information as a special count, so as to give the accused the same information as if the count had been framed specially.

In *R.* v. *Rycroft* [1852] 6 *Cox*, 77, *Williams*, J., made a similar order on a similar indictment, and said that it was a matter of right, although there had been a preliminary inquiry and committal for trial. In *R.* v. *Roberts* [1852] *Dears.* 30, 32, *n.*, *Crompton*, J., granted a rule *nisi* for an order for particulars under general counts for conspiracy without an affidavit, and the general counts were in the end abandoned. And in *R.* v. *Stapylton* [1857] 8 *Cox*, 69; 6 *W. R.* 60, the Court of Queen's Bench on an indictment for conspiracy held that the defendant was entitled as of right to particulars of the acts relied upon in support of a general count for conspiracy. In this case application for particulars under special counts was refused, there being no affidavit by the defendant; but the court did not definitely decide whether, even on an affidavit, such particulars would be added as a special count. Under the present practice, whereby the evidence for the prosecution in almost every indictable case appears either in the depositions or in the notice of further evidence given before the trial (*see post, tit.* "*Evidence*," *s.* 8), occasion seldom arises for making an order for particulars.

Immaterial averments—surplusage.]—By 14 & 15 *Vict. c.* 100, *s.* 1 (*ante*, p. 52) no indictment is to be deemed insufficient for the want of any

averment unnecessary to be proved. In other words, every fact and circumstance laid in an indictment, which is not a necessary ingredient in the offence, may be rejected as surplusage, and need not be proved at the trial; *R.* v. *Jones*, 2 *B. & Ad.* 611; and defects in the manner of stating such matter, will not vitiate the indictment. *R.* v. *Walker*, 4 *Co. Rep.* 41; *R.* v. *Long*, 5 *Co. Rep.* 121 *b.*: *R.* v. *Holt*, 2 *Leach*, 593: *Att.-Gen. of New South Wales* v. *Macpherson*, *L. R.* 3 *P. C.* 268. *And see R.* v. *Howarth*, 3 *Stark.* (*N.P.*) 29. When the indictment contains surplusage, but facts constituting a complete offence are sufficiently stated without such superfluous words, the indictment is not bad because such surplusage is erroneously stated. *R.* v. *Parker*, *L. R.*, 1 *C. C. R.* 225; 39 *L. J.* (*M. C.*) 60, *Cockburn*, C.J.; *cf. R.* v. *Radley*, 1 *Den.* 450, 18 *L. J.* (*M. C.*) 154: *R.* v. *Godfrey*, *Dears. & B.* 426; 27 *L. J.* (*M. C.*) 151: *R.* v. *Huntley Bell*, 238; *and see post*, p. 78. The allegation usually inserted in an indictment for perjury, "that so the defendant did commit wilful and corrupt perjury," may be rejected as surplusage. *Ryalls* v. *R.*, 11 *Q. B.* 781. Upon an indictment containing these words, charging the defendant with perjury in making a false affidavit under the *Bills of Sale Act* it was held that the offence was not perjury (but *see now* 41 *&* 42 *Vict. c.* 31, *s.* 17), but that these words might be rejected as surplusage, and that the indictment, even after disregarding them, sufficiently stated the common law misdemeanor of taking a false oath, and that the defendant was rightly convicted thereon. *R.* v. *Hodgkiss*, *L. R.* 1 *C. C. R.* 212; 39 *L. J.* (*M. C.*) 14. In an indictment against a defendant who has claimed to be tried by a jury under *s.* 17 of the *Summary Jurisdiction Act* (42 *&* 43 *Vict. c.* 49) 1879, it is not necessary to aver that such claim has been made. *R.* v. *Chambers*, 65 *L. J.* (*M. C.*) 214; 18 *Cox*, 401 (*C. C. R.*).

Amount of certainty necessary.]—Not only must all the facts and circumstances which constitute the offence be stated, but they must be stated with such certainty and precision (*a*) that the defendant may be enabled to judge whether they constitute an indictable offence or not, in order that he may demur or plead to the indictment accordingly—that he may be enabled to determine the species of offence which they constitute, in order that he may prepare his defence accordingly—that he may be enabled to plead a conviction or acquittal upon this indictment, in bar of another prosecution for the same offence—and that there may be no doubt as to the judgment which should be given, if the defendant be convicted. *See R.* v. *Horne*, 2 *Cowp.* 672: 20 *St. Tr.* 651: *R.* v. *Rowed*, 3 *Q. B.* 180; 11 *L. J.* (*M. C.*) 74; *White* v. *R.*, 13 *Cox*, 318; *Ir. Rep.* 10 *C. L.* 508 (*C. C. R. Ir.*): *Taylor* v. *R.* [1895] 1 *Q. B.* 25; 64 *L. J.* (*M. C.*) 11.

(*a*) Certainty to a certain intent in general, however, is all that is required. *Co. Litt.* 303 *a.*; *R.* v. *Long*, 5 *Co. Rep.* 121 *a.* Certainty is of three kinds: certainty to a certain intent in every particular, which is required only in pleas, etc., of estoppel and pleas in abatement; certainty to a common intent, which is required in ordinary pleas; and certainty to a certain intent in general, which is required in declarations and indictments. The latter is a medium between the other two; not so great a degree of certainty as the first, and a greater degree of certainty than the second. I shall endeavour further to define them. Where certainty to a certain intent in every particular is required, the court will presume the negative of everything the pleader has not expressly affirmed, and the affirmative of everything the pleader has not expressly negatived; or, in the words of Lord Coke, the pleader must exclude every conclusion against him. Where certainty to a common intent only is required, the court will presume in favour of the pleader every proposition which by reasonable intendment is impliedly included in the pleading, though not expressed; and where words are made use of, which admit of a natural sense, and also of an artificial one, or one to be made out by argument or inference, the natural sense shall prevail. Thus,

Therefore in indictments for offences of a local nature, such as burglary, arson, and stealing in the dwelling-house, etc., a local description of the house, etc., must be given, namely, the parish or place, and county in which it is situate (*see ante*, p. 67). In indictments for obtaining money by false pretences, the false pretences must be specified. *R.* v. *Mason*, 2 *T. R.* 581; 1 *R. R.* 545: *R.* v. *Munoz*, 2 *Str.* 1127. In an indictment against a person for not serving the office of constable, the mode of election must be set out, to show that he was legally elected; for if he were not legally elected, he cannot be guilty of a crime in not serving. *R.* v. *Harpur*, 5 *Mod.* 96. An indictment for extortion must show what fee was due, or that nothing was payable, *R.* v. *Lake*, 3 *Leon.* 268, as well as the fee exacted; and an indictment for stopping up the King's highway must specify what part is alleged to have been obstructed. *R.* v. *Wright* [1834] 1 *A. & E.* 434: *R.* v. *Roberts*, 4 *Mod.* 101; 1 *Show.* 389. Also, for the same reasons, an indictment is bad for uncertainty if it charges the defendant with one or other of two offences, *in the disjunctive*, as that he murdered, *or* caused to be murdered, forged *or* caused to be forged, 2 *Hawk.* c. 25, *s.* 58; *R.* v. *Stocker*, 1 *Salk.* 342, 371; *R.* v. *Stoughton*, 2 *Str.* 900; *R.* v. *Flint, Cas.* (*K. B.*) *temp. Hardw.* 370; *R.* v. *Morley*, 1 *Y. & J.* 221; 1 *Chit. Cr. L.*, 230: or if it charges him in two different characters, in the disjunctive, as *quod* A., *existens servus* sive *deputatus*, took, etc. *Smith* v. *Mall*, 2 *Rolle Rep.* 263: or if it may apply to either of two different definite offences, and does not specify which. *R.* v. *Marshall*, 1 *Mood. C. C.* 158. But uncertainty or ambiguity in stating matter which may be rejected as surplusage does not vitiate the indictment. *R.* v. *Parker*, *L. R.* 1 *C. C. R.* 225; 39 *L. J.* (*M. C.*) 60. The uncertainty of one count of an indictment cannot be aided by reference to the description of the offence in another count. *R.* v. *Sarah Waters*, 1 *Den.* 356; 18 *L. J.* (*M. C.*) 53, 11 *Cox*, 101. But after verdict, defective averments in a second count may be aided by reference to sufficient averments in the first count. *R.* v. *Waverton*, 2 *Den.* 340; 17 *Q. B.* 562; 21 *L. J.* (*M. C.*) 7.

The Court will construe the words of the pleading according to their ordinary and usual acceptation, and technical terms according to their technical meaning. And if the sense of a word is ambiguous in the ordinary acceptation of it, it should be construed according as the context and subject-matter require it to be, in order to render the whole consistent and sensible: thus the word "*until*" may be construed inclusive or exclusive of the day to which it is applied according to the context and subject-matter. *R.* v. *Stevens*, 5 *East*, 244. In *R.* v. *Bigg*, 1 *Str.* 18; 3 *P. Wms.* 419; 24 *Eng. Rep.* 1127, the defendant was indicted for erasing the indorsement of a bank-note, and it appeared that the words erased were on the face of the note, but the jury found that such was commonly

if a plea state that the master and fellows of a college were seised in fee, it shall be intended in right of the college; *Fulmerston* v. *Steward*, *Plowd.*, 102; if a man plead a feoffment, livery shall be intended, because it would not otherwise be a feoffment; *Co. Litt.* 303 *b.*; or, if he plead an assignment of dower, it shall be intended by metes and bounds, for otherwise it would not be a legal assignment. *Bro. Pleader*, 145; *Kadwalader* v. *Bryan*, *Cro. Car.* 162. Common intent, however, is a rule of construction only, and not of addition; it cannot add to a sentence words which are not impliedly included in it; and therefore, in trespass, if the defendant plead a release, without showing at what time it was made, the court cannot presume that it was made after the trespass, *Plowd.* 46 *a.*, unless the particular trespass be specially mentioned in it. Certainty to a certain intent in general, being a medium between the two degrees of certainty above mentioned, may be inferred from what has just now been said respecting them; and it should seem, therefore, that in cases where it is required, everything which the pleader should have stated, and which is not either expressly alleged or by necessary implication included in what is alleged, must be presumed against him.

called an indorsement; and a majority of the judges held that the description was correct. An indictment will not be vitiated by ungrammatical language, if the real meaning be sufficiently expressed. *R.* v. *Stokes*, 1 *Den.* 307; 2 *C. & K.* 536; 17 *L. J.* (*M. C.*) 116. In indictments against officers for neglect of duty or malversation in their offices, it is sufficient to allege that they were such officers at the time of the offence committed, without showing their appointment; *see R.* v. *Hollond*, 5 *T. R.* 607, 623: 2 *R. R.* 678; for their regular appointment is presumed from their exercising the duties of their offices. Where it was stated that the justices of our lord the King were assigned by letters patent under "his seal of Great Britain," it was presumed to be the great seal, *R.* v. *Yandell*, 4 *T. R.* 521, for it could not be by any other.

Matter of inducement.]—Mere matter of inducement does not require so much certainty as the statement of the gist of the offence. *R.* v. *Wright*, 1 *Vent.* 169; *Com. Dig. Indictment* (*G.* 5). Thus, in an indictment for disobedience to an order of justices for payment of a church rate, made under 53 *G.* 3, *c.* 127, an averment, by way of inducement, that a rate was *duly made* as by law required, and afterwards duly allowed, and that the defendant was by it duly rated, was held sufficient, without setting out the facts which constituted the alleged due rating, etc., although in the statement of the offence itself it would not have been sufficient. *R.* v. *Bidwell*, 1 *Den.* 222; 17 *L. J.* (*M. C.*) 99: *R.* v. *Wade*, 1 *B. & Ad.* 861: *R.* v. *Soper*, 3 *B. & C.* 857: *R.* v. *Sainsbury*, 4 *T. R.* 451; 2 *R. R.* 433: *R.* v. *Westley*, *Bell*, 193; 29 *L. J.* (*M. C.*) 35. So, an averment in an indictment under 33 & 34 *Vict. c.* 90, *s.* 11, that "within the limits of her Majesty's dominions and after the coming into operation therein of the Act called the *Foreign Enlistment Act*, 1870," certain offences against that Act were committed is a sufficient allegation that the Act was in operation in that part of his Majesty's dominions in which the alleged offences were committed. *R.* v. *Jameson* [1896] 2 *Q. B.* 425; 65 *L. J.* (*M. C.*) 218.

Description of writings.]—At Common Law, written instruments, wherever they formed a part of the gist of the offence charged (*see R.* v. *Coulson*, 1 *Den.* 592; 19 *L. J.* (*M. C.*) 182), must be set out *verbatim*. Thus, in the case of forgery, the instrument forged must, before 2 & 3 *W.* 4, *c.* 123, *s.* 3 (*rep.*), have been set out in the indictment in words or figures; *R.* v. *Mason*, 1 *East*, 180, *n.*; 2 *East*, *P. C.* 975; *R.* v. *Powell*, 1 *Leach*, 77: *R.* v. *Hart*, *Id.* 145: *R.* v. *Lyon*, 2 *Leach*, 597, 608; and on an indictment for not executing a warrant, the nature and tenor of the warrant must have been shown. *R.* v. *Burrough*, 1 *Vent.* 305; *Com. Dig. Indictment* (*G.* 3). The rule above stated never applied to written instruments made the subject of larceny by statute. *R.* v. *Johnson*, 3 *M. & Sel.* 539: 16 *R. R.* 352. But the indictment must follow some of the descriptions given in the statute. Thus, where an indictment upon 2 *G.* 2, *c.* 25, *s.* 3 (*rep.*), which applied to bank notes, bills of exchange and promissory notes, etc., described the instrument stolen as "a certain note, commonly called a bank note," it was held insufficient. *R.* v. *Craven*, *R. & R.* 14: 2 *East*, *P. C.* 601. And where the indictment described the instrument stolen as "a bank post bill," but did not set out the bill, the indictment was held bad, because it did not fall within any of the descriptions in that statute. *R.* v. *Chard*, *R. & R.* 488. The strictness of the common law rule has been relaxed by 14 & 15 *Vict. c.* 100, *ss.* 5, 7 (*ante*, p. 52), and *ss.* 42, 43 of the *Forgery Act*, 1861 (24 & 25 *Vict. c.* 98). Under these enactments it is sufficient to describe an instrument referred to in an indictment

by any name or designation by which it is usually known without setting out a copy or facsimile. But it is still necessary that the description should be such as to bring the instrument within the words of the enactment on which the indictment is framed.

It was formerly essential where the written instrument or parts of it were set out *verbatim* to set them out correctly, but the Court can now under 14 & 15 *Vict.* c. 100, s. 1 (*ante*, p. 52), amend any variance between indictment and evidence in this respect if it considers the variance not material to the merits of the case, and that the amendment will not prejudice the defendant in his defence of the merits.

If an indictment describes a written instrument as *purporting* to be so and so, the instrument when produced in evidence must appear upon the face of it to be what it is described as purporting to be, otherwise the defendant may be acquitted for the variance, if not amended. As, for instance, if the instrument be described as a "certain paper writing purporting to be a bank-note," and the note produced, though made to resemble, vary materially in its form from a real bank-note. *R.* v. *Jones*, 1 *Doug.* 300; *R.* v. *Reading*, 1 *East*, 180, *n.*; 2 *Leach*, 590: *R.* v. *Edsall*, *Id.* 662, *n.* (*a*). As to the meaning of the word "purporting," see *R.* v. *Keith*, *Dears.* 486; 24 *L. J.* (*M. C.*) 110: *R.* v. *Goldstein*, *R. & R.* 473.

Words spoken or written.]—Where words, written or spoken, are the gist of the offence, they must be set forth *verbatim* or with particularity in the indictment; as, for instance, in an indictment for scandalous or contemptuous words spoken to a magistrate in the execution of his office; *R.* v. *Bagg*, 1 *Rolle Rep.* 79: *R.* v. *How*, 2 *Str.* 693; or, for defamatory libel, *Zenobio* v. *Axtell*, 6 *T. R.* 162: *R.* v. *Callanan*, 6 *B. & C.* 102; *Abbott*, C. J.; or for blasphemous or seditious words; *R.* v. *Popplewell*, 2 *Str.* 686: *R.* v. *Sparling*, 1 *Str.* 497; or sending a threatening letter. *R.* v. *Lloyd*, 2 *East*, *P. C.* 1122: *R.* v. *Hunter*, 2 *Leach*, 624, 631. And if there be any material variance between the words proved and those laid, even if laid as spoken in the third person, and proved to have been spoken in the second, *R.* v. *Berry*, 4 *T. R.* 217, the defendant will be acquitted, unless the judge think fit to amend the variance. But if some of the words be proved as laid, and the words so proved amount to an indictable offence, it will be sufficient. *And see post, tit.* "*Treason.*"

An indictment charging the publication of an obscene libel must formerly have set out the words complained of. *Bradlaugh* v. *R.*, 3 *Q. B. D.* 607 (*C. A.*): *R.* v. *Bradlaugh*, 48 *L. J.* (*M. C.*) 5. The rule laid down in this case has, however, now been set aside by 51 & 52 *Vict.* c. 64, s. 7. *See post, tit.* "*Libel*," where the section is fully set out.

In indictments for perjury and like offences it is not necessary to set out in full the affidavit, answer, etc., on which perjury is assigned, and is sufficient to set out the substance of the offence charged. 14 & 15 *Vict.* c. 100, s. 20. In indictments for obtaining, etc., money by false pretences the words constituting the alleged false pretence should be set out in full; *see ante*, p. 73; *post, tit.* "*False Pretences.*" As to indictments for treason, *see that title, post.*

Description of records.]—Where any matter laid in an indictment is to be proved by a record, care must be taken that the statement corresponds exactly with the record. On this subject, and that of variances between written and printed instruments, and the statement or setting forth thereof upon the trial, *see post, Part II.* "*Evidence.*" As to stating names of jurors in proceedings set out by way of recital, *see* 6 & 7 *Vict.* c. 85, s. 2 (*ante*, p. 35).

Description of personal chattels.]—Where personal chattels are the subject of an offence, as in larceny, they should be described specifically by their appropriate names, and the number of each species or particular kind of goods should be stated: *see* 2 *Hale*, 182, 183: and formerly the value also, thus, for instance, "*one coat* [*of the value of twenty shillings*], *two pairs of boots* [*of the value of thirty shillings*], *two sheets* [*of the value of thirteen shillings*], *of the goods and chattels of one J. S.*," or, "*one sheep of the price of twenty shillings*," etc., and the like. If, for instance, it were "*twenty wethers and ewes*," the indictment would be bad for uncertainty; it should state how many of each. 2 *Hale*, 183. The statement of value can now in most cases be safely omitted; *see post*, p. 77. Goods may be described by the name by which they are known in trade; as, for instance, a set of new handkerchiefs in the piece may be described as so many handkerchiefs, though they are not separated from each other, if the pattern designate each, and they are considered in trade as so many handkerchiefs. *R.* v. *Nibbs*, 1 *Mood. C. C.* 25. Ingots of tin, or a bar of iron may be described as so many pounds weight of tin or iron; but where an article has obtained, in common parlance, a particular name of its own, it would be wrong to describe it by the name of the material of which it is composed. *R.* v. *Mansfield, C. & Mar.* 140. Under the present practice the main reason for enumerating all the goods, in cases where their value is not material, is to found an application for restitution on conviction of the thief.

The prosecutor is bound (subject to the power of amendment given by 14 & 15 *Vict. c.* 100, *s.* 1, *ante*, p. 52) by the description of the species of goods stated. Thus, an indictment for stealing a pair of shoes could not, before that statute, be supported by evidence of a larceny of a pair of boots. But a variance in the number of the articles is immaterial, provided that the value of the goods proved to have been stolen be sufficient to constitute the offence at law, that is to say, since the abolition of the distinction between grand and petty larceny in 1827, provided that such goods are of *some* value, though not necessarily of the value of the smallest coin known to the law. *R.* v. *Morris*, 9 *C. & P.* 349. So, if there be ten different species of goods enumerated, and the prosecutor prove a larceny of any one or more of a sufficient value, it will be sufficient, although he fail in his proof of the rest.

Description of animals.]—An indictment for a larceny of live animals need not state them to be alive, because the law will presume them to be so, unless the contrary be stated; but if, when stolen, the animals were dead, that fact should be stated; for, as the law would otherwise presume them to be alive, the variance would be fatal (unless amended). *R.* v. *Edwards, R. & R.* 497: *R.* v. *Halloway*, 1 *C. & P.* 128. *See R.* v. *Williams*, 1 *Mood. C. C.* 107. But if an animal have the same appellation whether it be alive or dead, and it makes no difference as to the charge whether it were alive or dead, it may be called, when dead, by the appellation applicable to it when alive. *R.* v. *Puckering*, 1 *Mood. C. C.* 242. An indictment for stealing chattels which are the subject of larceny only in particular cases or under certain circumstances, must show that they fall within the requisite description. Thus an indictment for stealing "three eggs" was ruled to be bad, because only the eggs of animals *domitæ naturæ* are the subject of larceny. *R.* v. *Cox.* 1 *C. & K.* 494; but *see R.* v. *Gallears*, 1 *Den.* 501; 19 *L. J.* (*M. C.*) 13. An indictment for stealing "fowls" ought to describe them as "tame" or "domestic;" and it was formerly doubted, whether the omission of such a description is the subject of amendment. *R.* v. *Lonsdale*, 4 *F. & F.* 56. But an indictment for bestiality, which described the animal as a "certain bitch," was

held sufficiently certain, although the females of foxes and some other animals, as well as of dogs, are so called. *R.* v. *Allen*, 1 *C. & K.* 495. As to what animals are the subject of larceny, *see post, tit.* "*Larceny.*"

Value.]—It is unnecessary to state value, *except where it is of the essence of the offence* (14 *&* 15 *Vict. c.* 100, *s.* 24, *ante*, p. 54), such as an offence against the *Larceny Act*, 1861, *s.* 60, or the *Debtors Act*, 1869, *s.* 11, *sub-s.* 4. Where value is essential to constitute the offence, and the value is ascribed in the indictment to many articles collectively, the offence must be made out as to all or a sufficient number of the articles, for the grand jury have ascribed the value to all the articles collectively. *R.* v. *Forsyth*, *R. & R.* 274.

Money.]—Until 1851, *money* was described in an indictment as so many "pieces of the current gold," or "silver," or "copper coin of the realm, called ——," and the particular species of coin must have been specified. *See R.* v. *Fry*, *R. & R.* 482: *R.* v. *Warshaner*, 1 *Mood. C. C.* 466: *R.* v. *Radley*, 1 *Den.* 450; 18 *L. J.* (*M. C.*) 154. And if a larceny of particular pieces of coin, as sovereigns, half-sovereigns, crowns, etc., was charged, the indictment was not supported by proof of the stealing of a sum of money, which must have consisted of *some or other* of the coins mentioned in the indictment, without proof of the stealing of some one or more of the specific coins named. *R.* v. *Bond*, 1 *Den.* 517; *L. J.* (*M. C.*) 138. Since 1851 (14 *&* 15 *Vict. c.* 100, *s.* 18, *ante*, p. 54), it has been sufficient to describe coin or bank-notes as "money" without specifying any particular coin or bank-note.

Notes of a provincial bank, which were not at the time of the commission of the offence in circulation for value, but which were paid in at one branch of the bank, and were in course of transmission to another branch, at which they had originally been issued, in order that they might there be re-issued or otherwise disposed of—it not being the practice of the bank to re-issue at one branch notes originally issued at another—were held to be bank-notes within 14 *&* 15 *Vict. c.* 100, *s.* 18. *R.* v. *West*, *Dears. & B.* 109; 26 *L. J.* (*M. C.*) 6. Where an indictment charged a prisoner with stealing "nineteen shillings in money of the moneys of A. B.," and the evidence is that the prisoner stole a sovereign in gold, it was held that he cannot be convicted of stealing nineteen shillings: *R.* v. *Bird*, 42 *L. J.* (*M. C.*) 44; but in such a case the court before which the indictment is being tried may order the indictment to be amended under 14 *&* 15 *Vict. c.* 100, *s.* 1 (*ante*, p. 52) by striking out "nineteen shillings," and inserting "money," which by *s.* 18 of the same statute is a sufficient description of the thing stolen, and the prisoner may be convicted upon the indictment as so amended. *R.* v. *Gumble*, *L. R.*, 2, *C. C. R.* 1. In the report of *R.* v. *Gumble*, 42 *L. J.* (*M. C.*) 7, the amendment made, or rather suggested, for it appears from both reports that it was taken as made and not actually made, was the substitution of "one sovereign" for "nineteen shillings and sixpence." Either amendment would, however, have been within the power of the court, and either would have have been effectual; the one mentioned in the *Law Reports*, as furnishing a sufficient description of the things stolen, within *s.* 18 *of* 14 *&* 15 *Vict. c.* 100, and that mentioned in the *Law Journal*, as accurately describing the actual coin stolen.

Words of art.]—In an indictment for murder, the words "did murder" (*murdravit*), *Dy.* 261 *a*; in an indictment for rape the words "did ravish" (*rapuit*), *Staundf.* 26 *a*; and in an indictment for larceny the words "feloniously did take and carry away" (*felonicè cepit et asportavit*), 4 *Bl. Com.* 305, are absolutely necessary; they are technical words, essential to

the definition of the offence, without which these offences respectively cannot be described upon the record: and if omitted, the defendant may demur, move in arrest of judgment, or bring a writ of error. An indictment for any offence is not now held insufficient for the omission of the words "as appears upon the record," or of the words "with force and arms" (formerly inserted in many indictments). 14 & 15 *Vict.* c. 100, *s.* 24 (*ante*, p. 54). *See* 1 *Chit. Cr. L.* 240; 1 *Step., Hist. C. L.* 286.

Statement of intent.]—The intention of the party at the time he committed the offence is often a necessary ingredient in it; and in such cases it is necessary to state the intention in the indictment (*ante*, pp. 11, 33) as one of the facts and circumstances which constitute the offence. *See R.* v. *Philipps*, 6 *East*, 464. (*See post, Part II. ch. i.*) In some cases the law has adopted certain technical expressions to indicate the intention with which an offence is committed; and in such cases the intention must be expressed by the technical word prescribed, and no other. Thus, treason must be laid to have been done "*traitorously*;" all felonies, whether at common law or created by statute (*R.* v. *Gray, L. & C.* 365; 33 *L. J.* (*M. C.*) 78; *R.* v. *Martin*, 6 *St. Tr., N. S.* 925, 1093), to have been done "*feloniously*;" burglary is laid to have been done "*feloniously and burglariously*" and with intent to commit a felony; murder, "*feloniously* and *of his malice aforethought*;" 2 *Hale*, 184, 187; forgery, "*feloniously*," if made felony by statute, and "*with intent to defraud*," etc. All misdemeanors should be laid to have been done unlawfully even where that word does not occur in the definition of the offence.

Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to subject the defendant to that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. 2 *Hale*, 170. But *see* 7 *G.* 4, *c.* 64, *s.* 21 (*ante*, p. 51).

Statutory offences.]—Lastly, as to indictments for offences created by statute. The statute contains a definition of the offence; and the offence consists of the commission or omission of certain acts by certain persons under certain circumstances, and in some cases with a particular intent. As to the construction of expressions relating to number, gender, or person in statutes, *see ante*, p. 11. An indictment for an offence against a statute, must with certainty and precision charge the defendant to have committed or omitted the acts, under the circumstances and with the intent mentioned in the statute; and if any one of these ingredients in the offence be omitted, the defendant may move to quash the indictment, demur, move in arrest of judgment, or bring a writ of error. The defect will not be aided by verdict: *see Lee* v. *Clarke*, 2 *East*, 333, nor will the conclusion *contra formam statuti* cure it. 2 *Hale*, 170: *R.* v. *Jukes*, 8 *T. R.* 542; 5 *R. R.* 455: *Com. Dig. Information* (*D.* 3).

Aider by verdict.]—But "where the offence charged has been created by any statute or subjected to a greater degree of punishment or excluded from the benefit of clergy by any statute the indictment or information shall *after verdict* be held sufficient to warrant the punishment prescribed by the statute if it describe the offence in the words of the statute." 7 *G.* 4, *c.* 64, *s.* 21 (*ante*, p. 51), as to the effect of the *sub-s.* *R.* v. *Martin*, 8 *A. & E.* 481.

It is, however, necessary to aver such facts and circumstances as are necessary to bring the case within the operation of the statute upon which

the indictment is founded. *See R.* v. *Warshaner*, 1 *Mood. C. C.* 466; *Hamilton* v. *Reg.*, 9 *Q. B.* 271; *Douglas* v. *R.*, 13 *Q. B.* 74: *R.* v. *Bowen*, 13 *Q. B.* 790: *R.* v. *Rowlands*, 2 *Den.* 364; 17 *Q. B.* 671; 21 *L. J.* (*M. C.*) 81; *Nash* v. *R.*, 4 *B. & S.* 935; 33 *L. J.* (*M. C.*) 94; *R.* v. *Goldsmith*, *L. R.* 2 *C. C. R.* 74; 42 *L. J.* (*M. C.*) 94: *Heymann* v. *R.*, *L. R.* 8 *Q. B.* 102: *Taylor* v. *R.* [1895] 2 *Q. B.* 25. In an indictment upon 5 *Eliz. c.* 11, *s.* 2 (*rep.*) (which made it high treason to clip, round or file any of the coin of the realm, "for wicked lucre or gain's sake,") it was necessary to charge the offence to have been committed for the sake of wicked lucre or gain, otherwise it would be bad. 1 *Hale*, 220. So an indictment on that part of the Black Act (*rep.*) which made it felony "*wilfully and maliciously*" to shoot at any person in a dwelling-house or other place, was held bad, because it charged the offence to have been done "*unlawfully and maliciously*," omitting the word "wilfully;" *R.* v. *Davis*, 1 *Leach*, 493; some of the judges, indeed, thought that "maliciously" included "wilfully;" but the majority held, that as "wilfully" *and* "maliciously" were both mentioned in the statute as descriptive of the offence, both must be stated in the indictment. *See also R.* v. *Bent*, 1 *Den.* 157; 2 *C. & K.* 179; *but see R.* v. *Harvey*, *L. R.* 1 *C. C. R.* 284; 40 *L. J.* (*M. C.*) 63. So an indictment upon 7 *& 8 G.* 4 *c.* 30, *s.* 2 (*rep.*), for feloniously, voluntarily, and maliciously setting fire to a barn, was held bad, because the words of the statute are "*unlawfully* and maliciously." *R.* v. *Turner*, 1 *Mood. C. C.* 239. So an indictment upon 9 *G.* 4, *c.* 31, *s.* 12 (*rep.*), charging the prisoner with "feloniously, wilfully, and maliciously cutting," etc., was not sufficient, the words of the statute being "*unlawfully* and maliciously." *R.* v. *Ryan*, 2 *Mood. C. C.* 15; *R.* v. *Cook*, 2 *East, P. C.* 616; 1 *Leach*, 105. *See also R.* v. *Douglass*, 1 *Camp.* 212. Where a word not in the statute is substituted in the indictment for one that is, and the word thus substituted is equivalent to the word used in the statute, or is of more extensive signification than it, and includes it, the indictment will be sufficient. As, for instance, if the word "*knowingly*" be in the statute, and the word "*advisedly*" be substituted for it in the indictment. *R.* v. *Fuller*, 1 *B. & P.* 180; 2 *Leach*, 790, or the word "*wilfully*" in the statute, and "*maliciously*" in the indictment (the words "*advisedly*" and "*maliciously*" not being in the statutes respectively), the indictment would be sufficient. An indictment framed upon 24 *& 25 Vict. c.* 100, *s.* 18, which enacts that whosoever shall unlawfully and maliciously by any means "cause" any grievous bodily harm to any person, shall be guilty of felony, was held sufficient though the word "cause" was used instead of "inflict." *R.* v. *Bray*, 15 *Cox*, 197 (*C. C. R.*). It is much better, however, to follow strictly the words of the statute, as it precludes all question about the meaning of the expressions used. And it is sufficient to follow the words of the statute or describe the offence unless indeed they are generic terms, in which case it is necessary to state the species, according to the truth of the case. Thus, in an indictment on the *Incitement to Mutiny Act*, 1797 (37 *G.* 3, *c.* 70), which makes it felony to endeavour to seduce a soldier or sailor from his duty, it is sufficient to charge an *endeavour*, *etc.*, without specifying the means employed. *R.* v. *Fuller*, *ubi sup.* But where a statute (for instance) makes the maliciously killing of cattle a felony, it is not sufficient in an indictment on the statute to charge the defendant with killing "cattle" generally, but the species of cattle, as horse, mare, gelding, cow, ox, heifer, etc., must be stated. *R.* v. *Chalkley*, *R. & R.* 258. And where the subject of the indictment cannot be brought within the meaning of the statute without the aid of extrinsic evidence, it is necessary, besides charging the offence in the words of the

statute, to aver such facts and circumstances as may be necessary to bring the matter within the meaning of it; as, for instance, where by the usage of a public office, the bare signature of a party upon a navy bill operates as a receipt, an indictment for forging such a receipt, setting forth the navy bill and indorsement, and charging the defendant with having forged "a certain receipt for money; to wit, the sum of 25*l.* mentioned and contained in the said paper upon a navy bill, which forged receipt was as follows; that is to say,—*William Thornton, William Hunter,*" was held bad, because it did not show, by proper averments that these signatures imported a receipt. *R.* v. *Hunter*, 2 *Leach*, 624; 2 *East, P. C.* 928. *See R.* v. *Barton*, 1 *Mood. C. C.* 141: *R.* v. *Thompson*, 2 *Leach*, 910: *R.* v. *Boardman*, 2 *M. & Rob.* 147.

Exceptions and provisoes.]—*Hale* (1 *Hist. P. C.* 170, 171) says that in certain cases the indictment need not mention nor qualify a statutory offence so as to exempt it out of provisoes; and the defence may take the benefit of the provisoes under "not guilty." The general rule is stated in *Thibault* v. *Gibson*, 12 *M. & W.* 88, 94, by Lord *Abinger*, C.B., in the following terms:—

"In all cases where proceedings are taken against a party for the recovery of a penalty under a statute, if there be any exception in the clause which gives the penalty exempting certain cases from its operation, the declaration or information must show that the particular case is not within the exception. But where it comes by way of proviso in a subsequent part of the Act, it is not necessary to notice it in the declaration or information, but it is matter which the defendant must allege as ground for defence."

For other authorities to the like effect, *see Spieres* v. *Parker*, 1 *T. R.* 141; 1 *R. R.* 165: *R.* v. *Earnshaw*, 15 *East*, 456: *R.* v. *Jarvis*, 1 *East*, 643, *n.*, 646, *n.*: *R.* v. *Pratten*, 6 *T. R.* 559: *R.* v. *Baxter*, 5 *T. R.* 83; 2 *Leach*, 578; 2 *East, P. C.* 781: *R.* v. *Matters*, 1 *B. & Ald.* 362: *R.* v. *Pearce*, *R. & R.* 174: *R.* v. *Robinson*, *Id.* 321: *R.* v. *Palmer*, 1 *Leach*, 102: *Simpson* v. *Ready*, 12 *M. & W.* 736, 740. In *R.* v. *James* [1902] 1 *K. B.* 540 (*C. C. R.*) the effect of the authorities on this subject was held to be that it is not necessary for the prosecution to negative a proviso, even though the proviso be continued in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause. *See R.* v. *Hall*, 1 *T. R.* 320: *Steel* v. *Smith*, 1 *B. & Ald.* 94. Where a statute makes the doing of an act "without lawful authority or excuse" criminal, it is sufficient if the indictment negatives "lawful excuse" without also negativing "lawful authority," as there can be no "lawful authority" which would not also be a "lawful excuse," and therefore to negative "lawful excuse" is also to negative "lawful authority." *R.* v. *Harvey*, *L. R.* 1 *C. C. R.* 284; 40 *L. J.* (*M. C.*) 63.

Citing statutes.]—It is not necessary in an indictment to cite or recite any statute. As to the mode proper at common law of stating the title, etc., of a statute in pleading, *see R.* v. *Biers*, 1 *A. & E.* 327: *Gibbs* v. *Pike*, 8 *M. & W.* 223: *Beck* v. *Beverley*, 11 *M. & W.* 845: *R.* v. *Westley*, *Bell*, 193; 29 *L. J.* (*M. C.*) 35.

It was to avoid risk of errors of statement that the conclusion "against the form of the statute" or "statutes," etc., was introduced. *Palgrave* v. *Windham* [1718] 1 *Str.* 214. But that conclusion is now unnecessary. *See* 14 *& 15 Vict. c.* 100, *s.* 24, *ante*, pp. 54, 55.

By the *Interpretation Act*, 1889 (52 *& 53 Vict. c.* 63), *s.* 35 (1) in any

Act, *instrument or document*, an Act may be cited (*a*) by reference to the short title, if any, of the Act, either with or without a reference to the chapter, or (*b*) by reference to the regnal year in which the Act was passed, and where there are more statutes or sessions than one in the same regnal year, by reference to the statute or the session as the case may require, and where there are more chapters than one by reference to the chapter, and any enactment may be cited by reference to the section or sub-section of the Act in which the enactment was contained." Most of the Acts still in force referred to in this work have been given short titles either by the *Short Titles Act*, 1896 (59 & 60 *Vict. c.* 14), or by other enactments.

Figures in indictment.]—No part of the indictment should be in *figures*; and therefore numbers, dates, etc., should be stated in words at length. 2 *Hale*, 170. In the old books on Crown practice it is generally stated that numbers in an indictment must be expressed in words. *Burn's Justice* (17th ed.), published in 1793, states the rule thus (*vol. ii.* p. 693): "Figures to express numbers are not allowable in an indictment, but numbers must be expressed in words (2 *Hale*, 170; *Cr. Circ. Comp.* 109; *R.* v. *Haddock*, *Andr.* 137), or at least in Roman numerals (*R.* v. *Philips*, 1 *Str.* 261)." 4 *G.* 2, *c.* 26 (*rep.*), which abolished Latin indictments, directed that indictments, etc., should be written in such legible hand and character as the Acts of Parliament are usually engrossed in, and the lines and words of the same to be written at least as close as the said Acts usually are, and not in any hand commonly called court hand, and *in words at length and not abbreviated.* 6 *G.* 2, *c.* 14, *s.* 5 (*rep.*), permitted indictments, etc., to be "written or printed in a common legible hand or character, and with the like way of writing or printing, and *with the like manner of expressing numbers by figures* as have heretofore or are now commonly used in the said courts respectively, and with such abbreviations as are now commonly used in the English language." In *Rex* v. *Haddock*, *ubi sup.*, the objection was taken that in an indictment the year of our Lord and certain quantities of bricks were expressed in common figures. Counsel for the objection cited 2 *Hale*, 170; 1 *Sid.* 40; 1 *Keb.* 19; and *Style*, 88. Chief Justice *Lee*, at p. 146, held as to this objection: "There is great weight in it from the authority of the cases which have been cited in support thereof. There is no distinction as to this point between indictments capital or criminal, but the only difference between them is the consideration of the punishment; and therefore the passage cited out of Lord *Hale's* history is very material, and he is therein very express that figures ought not to be used in indictments. The cases in *Style*, 88; 1 *Sid.* 40; 1 *Keb.* 19, have been also cited. The case cited *contra*, 1 *Vent.* 256, doth not clash with the opinion *contra* of Lord *Hale*, because that is the case of a venue in a civil action. Nor is the other of *Rex* v. *Yeomans* strong enough to encounter his opinion, wherein he is so very express, and treats professedly of the subject, for there the figures were not Roman, so that the matter did not come in question." In *R.* v. *Yeomans* (*Pasch.*, 11 *Will.* 3), referred to in *Andrews*, p. 141, a caption had been held bad for having the date in common English figures—1697—but it was held that if Roman had been used it would have been well. This accords with *R.* v. *Philips*, 1 *Str.* 261. The only exception to this is, where a *fac-simile* of a written instrument is set out, as was formerly necessary, and as is still done in certain cases in an indictment for forgery at common law (*see post, tit.* "*Forgery*"), in which case it must be set out in the indictment in words and figures, as in the original itself. *R.* v. *Mason*, 1 *East*, 180, *n.* Both the statutes discussed in *Haddock's case* were

repealed in 1879 by 42 & 43 *Vict. c.* 59. The preamble of the Act describes the Acts to be repealed as relating to civil procedure or matters connected therewith, and describes them as spent or ceasing to be in force otherwise than by specific and express repeal by Parliament, or as by lapse of time and change of circumstances become unnecessary. But the form of the saving clause is calculated to create doubts as to the exact effect of the repeal.

But the use of figures for words is now not unusual, and seems at most to be merely a formal defect, amendable under 14 & 15 *Vict. c.* 100, *s.* 25 (*ante*, p. 55). *Lawrance*, J., so held in *R.* v. *Price*, 17 *T. L. R.* 80; 35 *L. J. Newsp.* 647; 41 *Sol. J.* 71. In *R.* v. *Edwards*, Cumberland Summer Assizes, July, 1901, *Ridley*, J., ruled to the same effect. He consented to state a case on the point, but it seems never to have been stated.

Duplicity.]—The indictment must not be double; that is to say, *no one count* of the indictment should charge the defendant with having committed two or more offences: for instance, with having committed a murder *and* a robbery, or the like. So, two defendants cannot be jointly charged with murder or manslaughter by means of an injury done by one of them to the deceased on one day and another injury done by the other of them on a different day. *R.* v. *Devett*, 8 *C. & P.* 639. But where the offence charged, whether felony or misdemeanor, is one single act it may be made the subject of a single count. For instance, where the prisoner was charged in one count with uttering a number of forged receipts, and it was proved that all the forged receipts were uttered at one and the same time, in one bundle, the count was held good. *R.* v. *Thomas*, 2 *East, P. C.* 934. So, the indictment may charge the prisoner, in the same count, with felonious acts with respect to several persons—as in robbery, with having assaulted A. and B., and stolen from A. one shilling, and from B. two shillings—if it was all one transaction. *R.* v. *Giddins, C. & Mar.* 634. A man may be indicted for the battery of two or more persons in the same count where the battery is one transaction, or for a libel upon two or more persons when the publication is one single act, without rendering the count bad for duplicity. *R.* v. *Benfield*, 2 *Burr.* 980, 983, 984: where *R.* v. *Clendon*, 2 *Str.* 870; 2 *Ld. Raym.* 1572, was held not law: and *see R.* v. *Jenour*, 7 *Mod.* 400. A count charging a man with one endeavour to procure the commission of two offences, is not bad for duplicity, because the endeavour is the offence charged. *R.* v. *Fuller*, 1 *B. & P.* 180; 2 *Leach*, 790.

An exception to the rule as to duplicity is to be found in indictments for burglary, in which it is usual and proper to charge the defendant with having broken and entered the house with intent to commit a felony, and also with having committed the felony intended. Laying several overt acts in a count for high treason is not duplicity, *Kelyng*, (J)., 8, because the charge consists of the compassing, etc., and the overt acts are merely evidence of it; and the same as to conspiracy. That the defendant published *and* caused to be published a libel is not double, for they are the same offence. *R.* v. *Bradlaugh*, 15 *Cox*, 217.

An indictment under 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 20 (*rep.*), which charged "destroying, defacing, *and* injuring" a register, is not bad for duplicity, the destruction, etc., being all one act. *R.* v. *Bowen*, 1 *Den.* 22; 1 *C. & K.* 501. And it is the practice to charge in indictments for libel that the defendant "did publish and cause to be published;" and in indictments under 38 & 39 *Vict. c.* 24, "did make and concur in making a false entry." An indictment under *s.* 7 of 38 & 39 *Vict. c.* 86, charging that the defendant "used violence to *or* intimidated" has been held bad for

duplicity. *R.* v. *Edmondes*, 59 *J. P.* 776, *Lawrance*, J.: and *semble* it was also bad for uncertainty, *ante*, p. 72.

In criminal cases, the mode of objecting to duplicity is the same as in civil proceedings prior to the *Common Law Procedure Act*, 15 & 16 *Vict.* c. 76; *i.e.*, by special demurrer, perhaps also by general demurrer: or the court on motion may quash the indictment, which is now the usual procedure; but it seems that duplicity cannot be made the subject of a motion in arrest of judgment or of a writ of error; *Nash* v. *R.*, 4 *B. & S.* 935; 33 *L. J.* (*M. C.*) 94; and it is cured by a verdict of guilty as to one of the offences, and not guilty as to the other. Duplicity is distinct from the joinder in one indictment of counts for different offences, as to which *see post*, p. 88.

Statements must be positive.]—Every fact and circumstance stated in an indictment must be laid positively: that is, the indictment must directly affirm that the defendant did so and so, or that such a fact happened under such and such circumstances: it cannot be stated by way of recital, "*that whereas*," etc., or the like. 2 *Hawk. c.* 25, *s.* 60: *R.* v. *Whitehead*, 1 *Salk.* 371: *R.* v. *Crowhurst*, 2 *Ld. Raym.* 1363: *R.* v. *Askman*, 1 *Sess. Cas.* 159. Where an indictment for not obeying a justice's order set forth the order by way of recital, "*that whereas a certain order*," etc., although it charged the not obeying of the order positively, it was held bad. *R.* v. *Crowhurst*, 2 *Ld. Raym.* 1363. So, stating a matter by way of argument or inference would render the indictment bad; as, for instance, that by a certain indenture *testatum existit* that J. S. demised, etc.; and this, perhaps, even in mere matter of inducement, although in one case the contrary certainly has been decided. *R.* v. *Goddard*, 3 *Salk.* 171: 2 *Ld. Raym.* 920.

The reason for this rule is that the indictment is in form a finding of facts by the grand jury. *See R.* v. *Pewtress*, 2 *Str.* 1026.

A defect in these respects is not cured by verdict; and consequently the defendant may take advantage of it by demurrer, motion in arrest of judgment, or writ of error.

Statements must not be repugnant.]—Where one material part of an indictment is repugnant to another, the whole is void: as, for instance, an indictment charging the defendant with forging a bond by which J. S. was *bound*, etc. (which is impossible if the writing be forged); or with *disseising* A., and it appears upon the face of the indictment that A. had but an estate for years; 2 *Hawk. c.* 25, *s.* 62; with stealing the goods of the *said* J. S. where the name of J. S. was not previously mentioned; *Id. s.* 72; or in the parish *aforesaid*, where no parish was before mentioned; for forging a bill of exchange, stating it to be *signed* by the party whose signature was alleged to be forged; *R.* v. *Carter*, 2 *East, P. C.* 985; or the like. If the repugnancy be in an immaterial part, it may in general be rejected as surplusage, especially after verdict. *Bac. Abr., Pleas* (14): and *see ante*, p. 71, *immaterial averments*. Thus, upon an indictment, *tempore* 1 *G.* 4, for stealing a mare in the fourth year of the reign of *G.* 4, against the peace of our lord the now King, the words "fourth year of the" were rejected as surplusage. *R.* v. *Gill*, *R. & R.* 431. But still it is a general rule, that an allegation in pleading, which is sensible and consistent in the place where it occurred, and not repugnant to *antecedent* matter, cannot be rejected as surplusage, though laid under a *videlicet*, however inconsistent it may be with an allegation subsequent. *R.* v. *Stevens*, 5 *East*, 244. One count of an indictment charged A. with stealing a promissory note from B.; a second with stealing a bank-note from B.;

and a third, with receiving goods "so as aforesaid feloniously stolen." It was held, after verdict, that the indictment was not objectionable on the ground of repugnancy; for, first, the words of reference in the third count did not necessarily import a stealing of the goods *by A.*; and, secondly, if they did the count was conceivably capable of proof. *R.* v. *Craddock*, 2 *Den.* 31; 20 *L. J.* (*M. C.*) 31.

Averments, how made.]—The usual way of making an averment in an indictment is thus: "*And the jurors aforesaid, upon their oath aforesaid, do further present that,*" etc.; or if it is connected with what has immediately preceded it, it may be introduced simply thus: "*And* that," etc., then proceeding to state the matter of the averment. But when the matter of the averment is but a mere adjunct of some person or thing preceding, it does not require even this technical mode of introducing it; thus, "that A. *being* an officer," etc., is a sufficient averment that A. was an officer; *see* 2 *Hawk. c.* 25, *s.* 112: *R.* v. *Johnson*, 2 *Rolle Rep.* 225: *R.* v. *Boyall*, 2 *Burr.* 832: *R.* v. *Bootie*, *Id.* 864: *R.* v. *Higginson*, *Id.* 1232: *R.* v. *Somerton*, 7 *B. & C.* 463; "that A., *knowing* that B. was indicted for forgery, concealed a witness against him," is a sufficient averment that B. was indicted. *Fitzg.* 122, 263. "So is "*dans* plagam mortalem," *R.* v. *Long*, 5 *Co. Rep.* 121 *b*; *March*, *pl.* 137, or "*sciens* that," etc., *R.* v. *Lawley*, 2 *Str.* 904, is a good averment. And, where an indictment for perjury stated that "at and upon the hearing of the said complaint," the defendant deposed, etc., this was held a sufficient averment that the complaint was heard. *R.* v. *Aylett*, 1 *T. R.* 63, 70: 1 *R. R.* 152. The ability of a person to perform an act is sufficiently implied in and averred by an averment that he unlawfully *neglected* to do that act. *R.* v. *Ryland*, *L. R.* 1 *C. C. R.* 99; 37 *L. J.* (*M. C.*) 10.

Consequences of defective statement.]—Defective statements in an indictment fall into three classes: 1. Defects which are incurable and fatal to the indictment. 2. Defects which are aided or cured by verdict. 3. Defects which may be cured by amendment before verdict.

1. *Incurable defects.*—If all the ingredients of the offence (whether it be an offence at common law or one created by statute) are not set forth in the indictment, or if any of them are not stated with sufficient certainty, the defendant may move to quash the indictment, or may demur, or may move in arrest of judgment, or bring a writ of error. *Heymann* v. *R.*, *L. R.*, 8 *Q. B.* 102: *R.* v. *Goldsmith*, *L. R.*, 2 *C. C. R.* 74; 42 *L. J.* (*M. C.*) 94.

2. *Defects aided by verdict.*—In offences created by statute, or subjected to a greater degree of punishment by any statute (although the defendant may demur, if the indictment does not describe the offence with sufficient certainty), he cannot, if it describe the offence in the words of the statute, move in arrest of judgment, or bring a writ of error; for, after verdict, the indictment will, in that case, be sufficient to warrant the punishment. 7 *G.* 4, *c.* 64, *s.* 21 (*ante*, p. 51). A count of an indictment, under sect. 221 of the *Bankruptcy Act*, 1861 (*rep.*), charged that the defendant was adjudged bankrupt in the London District Court of Bankruptcy, and that, upon his examination in the said court, with intent to defraud and defeat the rights of his creditors, he did not fully and truly discover to the best of his knowledge and belief all his property, to wit, all his personal property in money and goods. The defendant having been found guilty, upon error brought, it was contended that the count was bad for uncertainty in not setting out the number and value, or even the kind of goods referred to in it; but it was held that any want of certainty which

existed was cured after verdict by 7 *G.* 4, *c.* 64, *s.* 61. *Nash* v. *R.*, 4 *B & S.* 935; 33 *L. J.* (*M. C.*) 94.

There was no distinction at common law between the rules of pleading in civil and criminal cases. *Heymann* v. *R.*, *L. R.*, 8 *Q. B.* 102; 12 *Cox*, 383: *Castro* v. *R.*, 6 *App. Cas.* 229, 243: *R.* v. *Munslow* [1895] 1 *Q. B.* 758; 64 *L. J.* (*M. C.*) 138 (*C. C. R.*). And, independently of 7 *G.* 4, *c.* 64, *s.* 21 (*ante*, p. 51), it is a general rule of pleading at common law, that where an averment which is necessary for the support of the pleading is *imperfectly stated*, and the verdict on an issue involving that averment is found, if it appears to the court after verdict, that the verdict could not have been found on this issue without proof of *this* averment then, after verdict, the *defective averment*, though it might have been bad on demurrer, is cured by verdict. *Heymann* v. *R.*, *ubi supra*: *R.* v. *Goldsmith*, *L. R.*, 2 *C. C. R.* 74; 42 *L. J.* (*M. C.*) 94. In pursuance of this rule, and independently of 7 *G.* 4, *c.* 64, *s.* 21, it was held that, assuming that an indictment for receiving goods obtained by false pretences, might have been quashed or held bad on demurrer for not setting out the false pretences, the defect, if any, was cured by verdict. *R.* v. *Goldsmith*, *ubi supra*: *Taylor* v. *R.* [1895] 1 *Q. B.* 25; 64 *L. J.* (*M. C.*) 11. So also where defendant was indicted under 46 & 47 *Vict. c.* 51 for "corrupt practices" at a parliamentary election, without setting out the nature of such corrupt practices, as "bribery," "undue influence," etc., it was held that *after verdict* no objection could be taken to the indictment for want of certainty. *R.* v. *Stroulger*, 17 *Q. B. D.* 327; 55 *L. J.* (*M. C.*) 137. The above rule is applicable only to an averment *imperfectly stated*, *i.e.*, an averment which is stated but which is imperfectly stated. It is not applicable to the case of the total omission of an essential averment. For such a total omission the verdict is no cure. And when it is said in the rule that the verdict could not have been found without proof of the averment, the meaning is, the verdict could not have been found without finding this imperfect averment to have been proved in a sense adverse to the accused. See the judgment of *Brett*, J. A., in *R.* v. *Aspinall*, 2 *Q. B. D.* 48, 58; 46 *L. J.* (*M. C.*) at pp. 149, 150: *Heymann* v. *R.*, *L. R.* 8 *Q. B.* 102; 12 *Cox*, 383: *R.* v. *Silverlock* [1894] 2 *Q. B.* 766, 772; 63 *L. J.* (*M. C.*) 233 (*C. C. R.*).

3. *Defects cured by amendment.*—These defects have been treated *seriatim* under the preceding paragraphs of this chapter, and the power of amendment depends on the statutes set out, *ante*, pp. 51-55.

3. *Conclusion of the Indictment.*

For an offence at common law.]—An indictment for an offence at common law concludes thus: "*Against the peace of our lord the King, his crown and dignity.*" Indictments for nuisance usually conclude: "to the great damage and common nuisance of all the liege subjects of our said lord the King," etc., as well as "against the peace," etc.: but this conclusion, *ad commune nocumentum*, never seems to have been essential.

Where the offence was committed in one reign and the indictment is preferred in another reign, the proper form of conclusion is "against the peace of our late lord the King," etc. *See* 1 *Chit. Cr. L.* 247; *Lookup* v. *R.*, 4 *Bro. Parl. Cas.* 332; 2 *Eng. Rep.* 225; 2 *Hawk. c.* 25, *s.* 92; and for the conclusion of the indictment against the regicides, *Kel.* (J.) 11.

For an offence by statute.]—An indictment for an offence created by statute concludes thus; "*Against the form of the statute* [or *statutes*] *in*

such case made and provided, and against the peace of our lord the King, his crown and dignity."

Formerly great care was necessary in ascertaining whether the indictment should conclude as for an offence at common law, or as for an offence by statute, and in the latter case whether the expression "against the form of the statute" or "against the form of the statutes" should be used, and in all cases a proper and formal conclusion was necessary. *See R.* v. *Radcliffe* [1838] 2 *Mood. C. C.* 68.

But by the *Criminal Procedure Act*, 1851 (14 & 15 *Vict. c.* 100), *s.* 24 (*ante*, p. 54), no indictment for any offence shall be held insufficient for the omission of the words "against the peace," nor for the insertion of the words "against the form of the statute," instead of "against the form of the statutes," or *vice versâ*, nor for want of a proper or formal conclusion. *See* 1 *Russ. Cr.* (6th ed.) 37 *n.*: *R.* v. *Holmes, Dears.* 207; 22 *L. J.* (*M. C.*) 122: *Castro* v. *R.*, 6 *App. Cas.* 229; 50 *L. J.* (*Q. B.*) 497. The ruling in *R.* v. *Mayor, etc., of Poole*, 19 *Q. B. D.* 602, is admittedly not law on this point; *see* 19 *Q. B. D.* 683 *n.* It is still the practice, and useful for purpose of readily ascertaining the nature of the offence charged, to conclude indictments for offences at common law with the words "against the peace of our lord the King, his crown and dignity," and to conclude indictments for offences by statute with the words "against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity." But the statute and decisions above stated render the old learning on the subject obsolete.

Sect. 4.

Joinder of two or more defendants in one indictment.

Where several persons join in the commission of an offence, all or any number of them may be jointly indicted for it, or each of them may be indicted separately. Thus, if several commit a robbery, burglary, or murder, they may be indicted for it jointly, 2 *Hale*, 173, or separately; and the same where two or more together commit a battery, or are together guilty of extortion or the like. *R.* v. *Atkinson*, 1 *Salk.* 382. And though they have acted separately, yet if the grievance is the result of the acts of all jointly, all may be indicted jointly for the offence. *R.* v. *Trafford*, 1 *B. & Ad.* 874. Where money has been obtained under false pretences, and the false pretences were conveyed by words spoken by one defendant in the presence of the others, all of whom acted in concert together, they may all be indicted jointly. *Young* v. *R.*, 3 *T. R.* 98. The same rule applies where two or more persons join in singing a libellous song; *R.* v. *Benfield*, 2 *Burr.* 980, 985, or in any other mode of publishing a defamatory libel. But if the publication of each party be distinct, as if two booksellers, not being partners, sell the libel at their respective shops, they must be indicted separately. But two or more cannot be jointly indicted for perjury, *R.* v. *Philips*, 2 *Str.* 921, or for seditious or blasphemous words, or the like, because such offences are in their nature several. And even where several commit a joint act, which act, however, is not of itself illegal, but becomes so merely by reason of some circumstances applicable to each individual severally and not jointly, they must be indicted separately; 2 *Hawk. c.* 25, *s.* 89; thus several partners could be indicted jointly for exercising their trade, without having served an apprenticeship. *R.* v. *Atkinson*, 1 *Salk.* 382; *R.* v. *Weston*, 1 *Str.* 623.

Principals in the first and second degree, and accessories before and after the fact may all be joined in the same indictment; 2 *Hale*, 173; or the principals may be indicted separately, and the accessories may be indicted either before or after the conviction of the principals, as for a substantive offence. (*See ante*, pp. 16, 19, and 24 & 25 *Vict. c.* 94, *ss.* 2, 3.) It is said that several may be jointly indicted for severally erecting common inns, *ad commune nocumentum*, if it be said that they *separaliter erexerunt*, etc.; and the same as to keeping disorderly houses, etc.; 2 *Hale*, 174; but it is much better, and more usual in practice, to indict the proprietor of each house separately. As to separate trials of persons jointly indicted, *see post*, p. 186.

Misjoinder of defendants may be made the subject of a demurrer, motion in arrest of judgment, or writ of error; or the court may quash the indictment (*see post*, p. 120). But where there are different counts against different persons in the same indictment, this, though it may be a ground for moving to quash the indictment, is no cause for demurrer, *R.* v. *Kingston*, 8 *East*, 41, if the counts be such in substance as may be joined.

Upon an indictment against two persons charging them jointly with an offence, as stealing in the dwelling-house, *both* or either may be found guilty, but they cannot be found guilty of *separate parts* of the charge; and if they be found guilty separately, judgment cannot be passed upon one, unless a pardon be obtained or a *nolle prosequi* be entered as to the other. *R.* v. *Hempstead, R. & R.* 344. Before 14 & 15 *Vict. c.* 100, if two were charged jointly with receiving stolen goods, a joint act of receiving must have been proved: proof that one received in the absence of the other, and afterwards delivered to him, would not suffice; *R.* v. *Messingham*, 1 *Mood. C. C.* 257: *see R.* v. *Archer, Ib.* 143; *R.* v. *Parr*, 2 *M. & Rob.* 346: *R.* v. *Dovey*, 2 *Den.* 86; 20 *L. J.* (*M. C.*) 105; but the 14th section of that statute (*rep.* and re-enacted as 24 & 25 *Vict. c.* 96, *s.* 94) provides that if, upon the trial of two or more persons indicted for jointly receiving any property, it should be proved that one or more of such persons separately received any part of such property, it should be lawful for the jury to convict upon such indictment such of the said persons as should be proved to have received any part of such property; and this enactment extends to cases where, upon an indictment for joint receiving, it is proved that the prisoners separately received the *whole* of the stolen property. *R.* v. *Reardon, L. R.* 1 *C. C. R.* 31, 35; *L. J.* (*M. C.*) 171. Several receivers may be charged in the same indictment with separate and distinct acts of receiving. 24 & 25 *Vict. c.* 96, *s.* 93. *R.* v. *Pulham*, 9 *C. & P.* 280: *R.* v. *Hayes*, 2 *M. & Rob.* 155. Where several persons are indicted for burglary and larceny, one may be found guilty of burglary and larceny, and the others of the larceny only. *R.* v. *Butterworth, R. & R.* 520. On an indictment against A. and B. for larceny, with another count against B. for receiving, A. was acquitted; B. was found guilty, on evidence which proved that he was an accessory before the fact to the larceny, and a receiver, and the verdict against him was entered generally; it was held that he was not (since 11 & 12 *Vict. c.* 46, *s.* 1 (*rep.*), of which 24 & 25 *Vict. c.* 94, *s.* 1, is a re-enactment) entitled to an acquittal for the larceny. *R.* v. *Hughes, Bell*, 242; 29 *L. J.* (*M. C.*) 71.

Sect. 5.

JOINDER OF SEVERAL OFFENCES IN DIFFERENT COUNTS IN ONE INDICTMENT.

We have already seen (*ante*, p. 82) that if a defendant is charged with two or more offences in the same count of an indictment, the count will be bad for duplicity. Different considerations apply to charging a defendant with different offences in different counts of the same indictment. Each count in an indictment is for the purposes of evidence and judgment a separate indictment. *Latham* v. *R.*, 5 *B. & S.* 635: and *see hereon Selvester* v. *U. S.*, 170 *U. S.* 262, where is pointed out the error in *R.* v. *Hayes* (1727, 2 *Ld. Raym.* 1518), where the contrary was held.

Joinder of different treasons.]—In an indictment for high treason, there may be different counts, each charging the defendant with a different species of treason against the King and his government, such as compassing the King's death, levying war, adhering to the King's enemies, within 25 *Edw.* 3, *st.* 5, *c.* 2, and the conspiracies to imprison or do bodily harm to the King, within 36 *G.* 3, c. 7, *s.* 1. And this power is extended by statute to treason felony, 11 & 12 *Vict. c.* 12, *s.* 5. *See R.* v. *Mitchel*, 6 *St. Tr., N. S.* 599, 619.

Joinder of different felonies.]—Although it is no objection in point of law to an indictment that it charges the prisoner with several different felonies in different counts, *R.* v. *Heywood*, *L. & C.* 451; 33 *L. J.* (*M. C.*) 133; *R.* v. *Holman*, 9 *Cox*, 201 (*C. C. R.*); *Castro* v. *R.*, 6 *App. Cas.* 229, 244; 50 *L. J.* (*Q. B.*), at p. 504, yet as a matter of practice a prisoner ought not, in general, to be charged with different felonies in different counts of an indictment; as, for instance, a murder in one count and a burglary in another, or a burglary in the house of A. in one count, and a distinct burglary in the house of B. in another, or a larceny of the goods of A. in one count and a distinct larceny of the goods of B., at a different time, in another, because such a course of proceeding is calculated to embarrass the prisoner in his defence. As to whether an indictment may be quashed in such a case, *see post*, *s.* 11 (p. 120). It is well established by a long series of decisions that the joining of two felonies in one indictment (except where the same facts may constitute several felonies, *Campbell* v. *R.*, 11 *Q. B.* 799, 812) is so necessarily unfair to the prisoner that the judge ought, upon an application being made to him, to put the prosecutor to his election and send them to two trials. *Castro* v. *R.*, 6 *App. Cas.*, at p. 244; 50 *L. J.* (*Q. B.*), at p. 504. Thus, where an indictment charged the prisoner in three several counts with three several felonies in sending three separate threatening letters, *Byles*, J., compelled the prosecutor to elect upon which count he would proceed. *R.* v. *Ward*, 10 *Cox*, 42. But the joining of several different felonies in different counts in the same indictment is no ground for arrest of judgment. *Young* v. *R.*, 3 *T. R.* 98: *R.* v. *O'Donnell*, 7 *St. Tr., N. S.* 637, 706: *R.* v. *Hinley*, 2 *M. & Rob.* 524: *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1; 11 *Cl. & F.* 155; 8 *Eng. Rep.* 155. It is said that if objection is taken before plea, the court may quash the indictment. *See post*, *s.* 11, p. 120. When it is taken after the jury are sworn, it is established practice to put the prosecutor to his election upon which charge he will proceed. *Young* v. *R.*, 3 *T. R.* 98, 106: *R.* v. *Heywood*, *ubi supra*: *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1, 784, *Tindal*, C. J.: *R.* v. *Mitchel*, 6 *St. Tr., N. S.* 599; except in those cases where a statute permits the joinder of counts for distinct felonies. But

upon an indictment for receiving stolen goods, if it appears that the articles were received at different times, the prosecutor must elect as to the receipt of which articles he will prosecute for; but the mere *probability* that the goods were received at different times is no ground for putting the prosecutor to his election. *R.* v. *Dunn*, 1 *Mood. C. C.* 146: *R.* v. *Hinley*, 2 *M. & Rob.* 524. On the trial of an indictment for robbery, the jury may convict of an assault with intent to rob; 24 & 25 *Vict. c.* 96, *s.* 41; so that the necessity of several counts in such a case is done away with. Where the defendant was indicted under 7 *W.* 4 & 1 *Vict. c.* 85, *ss.* 2, 4, (*rep.*) in several counts, for stabbing, with intent to murder, with intent to maim and disable, and with intent to do some grievous bodily harm, it was held that the prosecutor was not bound to elect upon which count he would proceed, although the judgment was by the statute different, being on the first count capital, and on the others transportation. *R.* v. *Strange*, 8 *C. & P.* 172; *Campbell* v. *R.*, 11 *Q. B.* 799, 812. And where to these counts was added a count for a common assault, and the prisoner being found guilty of a felonious assault, the verdict was entered on the count for stabbing with intent to do grievous bodily harm, under 7 *W.* 4 & 1 *Vict. c.* 85 *s.* 11 (*rep.*), the conviction was held good. *R.* v. *Jones*, 8 *C. & P.* 776; 2 *Mood. C. C.* 94; *see also R.* v. *Ferguson*, *Dears.* 427; 24 *L. J.* (*M. C.*) 61. In a case of arson, the indictment contained five counts, each charging a firing of a house of a different owner: but it being opened that the five houses were in a row, and the same fire burnt them all, the judge would not put the prosecutor to elect, it being all one transaction. *R.* v. *Trueman*, 8 *C. & P.* 727; *and see R.* v. *Fussell*, 6 *St. Tr., N. S.* 723. The application for a prosecutor to elect is an application to the *discretion* of the judge founded on the supposition that the case extends to more than one charge, and may therefore be likely to embarrass the prisoner in his defence. *Id.*: *R.* v. *Hinley*, 2 *M. & Rob.* 524. It is expressly provided by 24 & 25 *Vict. c.* 96, *s.* 92, that in any indictment for feloniously stealing any property, it shall be lawful to add a count or several counts for feloniously receiving the same property knowing it to be stolen, and in any indictment for feloniously receiving any property knowing it to be stolen, it shall be lawful to add a count for feloniously stealing the same; and the prosecutor of such indictment is not to be put to any election, but the jury may find a verdict of guilty on either count, against all or any of the persons charged. But a count for stealing certain property ought not to be joined with a count for receiving the same *and other* property; and if it is, the prosecutor will be put to his election. *R.* v. *Ward*, 2 *F. & F.* 19. A defendant may be charged as an accessory before the fact in one count, and as accessory after the fact in another count, to the same felony, without putting the prosecutor to his election, and may be convicted on both counts. *R.* v. *Blackson*, 8 *C. & P.* 43 (*per Parke*, B., after consulting *Patteson*, J.); *and see R.* v. *Mitchel*, 6 *St. Tr., N. S.* 599, 620, 621. Where the defendant was charged as principal in one count, and as accessory after the fact in another count, to the same felony, the prosecution was compelled to elect upon which count they would proceed. *R.* v. *Brannon*, 14 *Cox*, 394, *Cockburn*, C.J. But this decision appears to have been given without due regard to *s.* 3 of the Accessories Act, 1861 (*ante*, p. 20), and in *R.* v. *Tuffin*, Guildford Assizes, July 22, 1903, *Darling*, J., held upon a similar indictment that the decision in *R.* v. *Blackson* should be preferred to that in *R.* v. *Brannon*. A defendant may be indicted as a principal in the first degree in one count, and as principal in the second degree in another count. *R.* v. *Gray*, 7 *C. & P.* 164. And a receiver may be indicted as an accessory in one count, and for a substantive felony in another count; and although, in his discretion, the judge may put the prosecutor to his election, he will not

do so whenever it is clear that there is only one offence, and the joinder of counts cannot prejudice the defendant. *R.* v. *Austin*, 7 *C. & P.* 796: *R.* v. *Hartall*, *Id.* 475: *R.* v. *Wheeler*, *Id.* 170; *R.* v. *Pulham*, 9 *C. & P.* 280.

In indictments for embezzlement, the prosecutor may charge any distinct number of acts of embezzlement, not exceeding three, which may have been committed against the same master within six months inclusive; 24 & 25 *Vict. c.* 96, *s.* 71. The proper course is to charge the several acts in several counts. And in indictments for larceny, it is lawful to insert several counts against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them. 24 & 25 *Vict. c.* 96, *s.* 5. And if the larcenies are all charged in one count the indictment will not be quashed; but the prosecutor will be put to elect as to the three takings proved on which he will proceed. *R.* v. *Nicholls*, 68 *J. P.* 452 (*C. C. R.*). Where under this section the prisoner is charged in the same indictment with more larcenies than one, the indictment ought to aver that the subsequent larcenies were committed within six months of the first larceny charged. So where an indictment contained a charge of stealing on the 13th of February, and another charge of stealing on the 15th of the same month, but did not aver that the larcenies were within six months of each other, *Pollock*, C.B., put the prosecution to elect on which charge to proceed. *R.* v. *Lonsdale*, 4 *F. & F.* 56. By 24 & 25 *Vict. c.* 96, *s.* 6, if, upon the trial of any indictment for larceny, it shall *appear* that the property alleged to have been stolen was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than six calendar months elapsed between the first and the last of such takings; and in either of such last-mentioned cases, the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calender months from the first to the last of such takings. As to indictments where the offence charged is *continuous*, *see* *R.* v. *Hinley*, 2 *Mood. & Rob.* 524: *R.* v. *Bleasdale*, 2 *C. & K.* 765, *Erle*, J.: *R.* v. *Shepherd*, *L. R.* 1 *C. C. R.* 118: *R.* v. *Firth*, *L. R.* 1 *C. C. R.* 172: *R.* v. *Henwood*, 11 *Cox*, 526 (*C. C. R.*).

So, upon an indictment for embezzlement, if the offence upon the evidence appear to be larceny, the jury may acquit the prisoner of the embezzlement, and find him guilty of simple larceny, or of larceny as clerk or servant; or upon an indictment for larceny, if upon the evidence it appear to be embezzlement, the jury may acquit of the larceny, and find the party guilty of the embezzlement. 24 & 25 *Vict. c.* 96, *s.* 72.

In framing an indictment under 46 & 47 *Vict. c.* 3 (*Explosive Substances Act*, 1883), it is provided by *s.* 7, *sub-s.* 2 of that Act, that the same criminal Act may be charged in different counts as constituting different crimes under that Act, and upon the trial of any such indictment the prosecutor shall not be put to his election as to the count on which he must proceed.

Although a prosecutor is not, in general, permitted to charge a defendant with different felonies in different counts, yet he may charge the same felony in different ways in several counts, in order to meet the facts of the case, or join counts, where they relate to one and the same transaction. *R.* v. *Fussell*, 6 *St. Tr., N. S.* 723, 726; or where the evidence applicable to each is the same. *R.* v. *Basset*, 1 *Cox*, 51: as, for instance, if there be a doubt whether the goods stolen, or the house in which a burglary or larceny was committed, be the goods or house of A. or B.,

they may be stated in one count as the goods or house of A., and in another as the goods or house of B. *See R.* v. *Egginton*, 2 *B. & P.* 508; 5 *R. R.* 689; *Campbell* v. *R.*, 11 *Q. B.* 799, 812. And the verdict may be taken generally on the whole indictment. *R.* v. *Downing*, 1 *Den.* 52; 2 *C. & K.* 382. But, inasmuch as the word "felony" is not *nomen collectivum* (as "misdemeanor" is, *see Ryalls* v. *R.*, 11 *Q. B.* 781, 795), if the verdict and judgment in such a case is against the defendant for "the felony aforesaid," it will be bad unless the verdict and judgment are warranted by each count of the indictment. *Campbell* v. *R.*, 11 *Q. B.* 799, 814.

The proper course is to enter up the verdict and judgment separately on each count. *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1; *Latham* v. *R.*, 5 *B. & S.* 635.

On the abolition of the benefit of clergy in 1827 it was specially provided that the change in the law should not prevent the joinder in any indictment of any counts which might have been joined before the passing of the Act. 7 & 8 *G.* 4, *c.* 28, *s.* 6.

Joinder of counts for felony and misdemeanor.]—The joinder of a count for *felony*, with a count for misdemeanor, would be held bad on demurrer, or, after a *general* verdict, on motion in arrest of judgment. *Young* v. *R.*, 3 *T. R.* 98, 108; *Starkie, Cr. Pl.* 43. The reason is that the challenges and the incidents of trial are not the same in felony and misdemeanor, and therefore felony and misdemeanor could not be tried together. *Castro* v. *R.*, 6 *App. Cas.* at p. 244: and it is universal practice not to join such counts. But where an indictment contains a count for felony, and also a count for misdemeanor, and the prisoner is convicted of the felony alone, such joinder of counts for felony and misdemeanor furnishes no ground for arresting the judgment. *R.* v. *Ferguson, Dears.* 427; 24 *L. J.* (*M. C.*) 61: *R.* v. *Jones*, 2 *Mood. C. C.* 94: 8 *C. & P.* 172. On an indictment for felony the jury can convict of the attempt to commit the felony if the jury are satisfied that the felony was not completed. 14 & 15 *Vict. c.* 100, *s.* 9.

Joinder of different misdemeanors.]—Indictments for misdemeanors may contain several counts for different offences, even, as it seems, though the judgments upon each be different. *Young* v. *R.*, 3 *T. R.* 98, 105, 106: *R.* v. *Towle, R. & R.* 314: 3 *Price*, 145; 2 *Marsh.* (*C. P.*) 466: *R.* v. *Johnson*, 3 *M. & Sel.* 539; 16 *R. R.* 352: *R.* v. *Kingston*, 8 *East*, 41, 46: *and see R.* v. *Benfield*, 2 *Burr.* 980, 984: *R.* v. *Jones*, 2 *Camp.* 131; *Dick. Q. S.* 190 *n.* (*t*); *Pritchard Q. S.* (2nd ed.) 151; *Starkie's Cr. Pl.* 43. Even where several persons were charged in different counts with offences of the same nature, the court held that it was no ground for a demurrer, though it might be for an application to the discretion of the court to quash the indictment. *R.* v. *Kingston*, 8 *East.* 41, 46. Still, if an indictment for misdemeanor contains several counts charging distinct misdemeanors against the defendant committed on totally different occasions and relating to different subject matters, and the presiding judge sees that the accused may be embarrassed in his defence by the number of charges, the probability is that he would either quash the indictment or put the prosecutor to his election upon which charge he would proceed. *R.* v. *Castro, L. R.*, 5 *Q. B. D.* 490, 501, 510: *Castro* v. *R.*, 6 *App. Cas.* 229, 245; 49 *L. J.* (*Q. B.*), 747; 50 *L. J.* (*Q. B.*) 497. Though not illegal, it is hardly fair to put a man upon his trial on an indictment containing forty counts, involving several distinct charges of false pretences; for it would be almost impossible that he should not be grievously prejudiced as regards each one of the charges by the evidence which is being given upon the others. In such a case it

would not be unreasonable for the defendant to make an application that each count or each set of counts should be taken separately; *per Hawkins*, J., *R.* v. *King* [1897] 1 *Q. B.* 214, 216: 66 *L. J.* (*Q. B.*) 81. If the joinder is embarrassing, the court may put the prosecutor to his election; *R.* v. *Fussell*, 6 *St. Tr., N. S.* 723; *Wilde*, C. J., *Parke*, B., and *Maule*, J.; or, it is said, may quash the indictment. But there is no precedent for the adoption of this course, and on principle it is difficult to see the right of the court to quash a count unless it is bad or illegally found. In *R.* v. *Braun*, 9 *Cox*, 284, *Martin*, B., on an indictment charging conspiracy and offences against the bankruptcy law, required the prosecution to elect on *which* set of counts they would go to the jury. Where two defendants were indicted for a conspiracy and a libel, and at the close of the case for the prosecution there was evidence against both as to the conspiracy, but against one only as to the libel, the judge then put the prosecutor to elect upon which charge he would proceed. *R.* v. *Murphy*, 8 *C. & P.* 297. On an indictment for conspiracy to defraud by making false lists of goods destroyed by fire, one set of counts related to a fire in June, 1864, and another to a fire in November, 1864. The prosecution was compelled to elect which charge of conspiracy should be first tried, and to confine the evidence wholly to that in the first instance. *R.* v. *Barry*, 4 *F. & F.* 389. And on an indictment against the manager and secretary of a joint-stock bank containing many counts, some charging that the defendants concurred in publishing false statements of the affairs of the bank, and others that they conspired together to do so, the prosecutors were put to elect on which set of counts they would rely. *R.* v. *Burch*, 4 *F. & F.* 407. Hereon see *R.* v. *Solan*, 21 *N. Z. L. R.* 217, 220. The exercise of the judge's discretion upon this point could not be reviewed by writ of error. *R.* v. *Castro*, 5 *Q. B. D.* 490, 501; 49 *L. J.* (*Q. B.*), at p. 752; and although where two separate felonies are charged in separate counts of the same indictment it is almost a matter of course for the judge, upon application, to compel the prosecutor to elect upon which charge he will proceed, it is by no means a matter of course for the judge to put the prosecutor to his election, where two or more separate misdemeanors are charged in different counts in the same indictment. *Castro* v. *R.*, 6 *App. Cas.* at pp. 244, 245; 50 *L. J.* (*Q. B.*) at pp. 504, 505. If, where there are several counts charging different offences in law, the judgment be entered up generally upon all, that the defendant "*for his said offences*" be adjudged, etc., and it appears that any count was bad in law, the judgment will be reversed on error. *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1; 11 *Cl. & F.* 155: 8 *Eng. Rep.* 155. To prevent this, it is now usual, in cases of misdemeanor, to pronounce and enter up the same judgment separately, on each count of the indictment.

Where a prisoner is indicted for an offence, it is not necessary to add another count for an attempt to commit it; because upon an indictment for felony or misdemeanor, if upon the trial it appear that the defendant merely attempted to commit the offence, but did not complete it, the jury may acquit him of the offence charged, and find him guilty of the attempt. 14 & 15 *Vict. c.* 100, *s.* 9 (*see post*, p. 219). If upon an indictment for obtaining money or goods by false pretences, the offence upon the evidence turn out to be larceny, the defendant notwithstanding may be convicted of the false pretences. 24 & 25 *Vict. c.* 96, *s.* 88. So, upon an indictment for any misdemeanor, if the facts given in evidence to prove the misdemeanor amount in law to a felony, the defendant shall not on that account be acquitted of the misdemeanor, unless the court think fit to discharge the jury, and order the defendant to be indicted for the felony. 14 & 15 *Vict. c.* 100, *s.* 12. But this provision applies only where the

facts given in evidence prove the *act charged* in the indictment; therefore, where on indictment for misdemeanor in having carnal knowledge of a girl between ten and twelve years of age, under 9 *G.* 4, *c.* 31, *s.* 17 (*rep.*), the girl was proved to be under ten years of age, and consequently a felony had been committed, it was ruled that the above section did not apply, that the indictment could not be amended under 14 *&* 15 *Vict. c.* 100, *s.* 1 (*ante*, p. 52), and that the prisoner must be acquitted, and the defendant if acquitted cannot be again tried on the same facts for the offence actually disclosed. *R.* v. *Shott*, 3 *C. & K.* 206, *Maule*, J.; *sed quære*, *see* 2 *Taylor Ev.* (9th ed.) 1128 *n.*

In these cases it is unnecessary to prefer a second bill, or to add a second count (where that can be done) for the offence of which the defendant may be thus convicted.

It has been held that the court will not order counts to be struck out of an indictment, because it is the finding of a grand jury, and not the mere suggestion of the party as in a civil pleading. *R.* v. *Pewtress*, 2 *Str.* 1026.

Sect. 6.

The Caption.

The caption is no part of the indictment. 2 *Hale* 165: *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1, 35; *Arm. & Trevor* (*Ir.*) 41. It is merely a copy of the entry of the style, and commission of the court where the indictment is preferred, and of the proceedings leading up to the finding of the bill (*R.* v. *Martin*, 6 *St. Tr., N. S.* 925, 1091; 12 *Ir. L. R.* 399), which is prefixed as a kind of preamble to the indictment upon the record, when the record is made up for the purposes of a count of error, or when it is returned to a *certiorari*. The following is a form of the caption to an indictment in a court of quarter sessions:—

"Westmoreland: *Be it remembered that at the general quarter sessions of the peace of our sovereign lord the King, holden at Appleby, in and for the county aforesaid, the —— day of ——, in the —— year of the reign of our sovereign lord Edward the Seventh, of the United Kingdom of Great Britain and Ireland, and of the British dominions beyond the seas King, Defender of the Faith, before A. B. and C. D., Esquires, and other their associates, justices of our said lord the King, assigned to keep the peace of our said lord the King in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors, in the said county committed, by the oath of*" [the grand jurors, naming them] "*good and lawful men of the county aforesaid, sworn and charged to inquire for our said lord the King, and for the body of the county aforesaid, it is presented, in manner and form as appears by the indictment hereunto annexed.*"

By the Court,
A. B., Clerk of the Peace.

(*See Short & Mellor Cr. Off. Pr.* 103, 107: 2 *Hale* 165: *R.* v. *Fearnley*, 1 *Leach*, 425; 1 *T. R.* 316; *and the forms*, 4 *Went.* 41, 105, 132, 150, 174, 222; 6 *Went.* 1, 357, 373; 2 *Hawk. c.* 25, *ss.* 118, 126, 127, 128; 2 *Salk.* 605: *R.* v. *Warre*, 2 *Str.* 698. The words "sworn and charged" are not essential. *R.* v. *Martin*, 6 *St. Tr., N. S.* 925, 1091, and cases there cited. *See* also the form of caption suggested in *Short and Mellor Crown Office Practice*, p. 704.)

In *R.* v. *McKeever* [1871] *Ir. Rep.*, 5 *C. L.* 86, a caption describing a session as held before "A. B., Esq., deputy chairman" of Quarter Sessions, was held sufficient.

A proper caption should show that the court of trial had jurisdiction, and that the indictment was found by a sufficient number of grand jurors. It has been usual to insert the names of twelve grand jurors at the least in the caption, and *Hale* says that this is necessary; for it may be that the presentment was by a less number than twelve, in which case it is not good; 2 *Hale*, 167; but in *Aylett* v. *R.*, 3 *Bro. P. C.* 529; 1 *Eng. Rep.* 1479; 6 *A. & E.* 247, *n.*, where it was objected upon error that the caption did not contain the names of any of the jurors, the House of Lords, after consulting the judges, affirmed the judgment of the court of King's Bench, that this was not essential; and in *R.* v. *Marsh*, 6 *A. & E.* 236, *Denman*, L.C.J., agreed that the insertion of the names is not necessary. *See also R.* v. *Darley*, 4 *East*, 174, 176, *n.*: *R.* v. *Davis*, 1 *C. & P.* 470. The caption ought to state them to be jurors *of the county*; *Whitehead* v. *R.*, 7 *Q. B.* 582. It should also state them to be good and lawful men (*probi et legales homines*), *Id.*, 2 *Hale*, 167, and early cases collected in *Huband, Grand Jury* (*Ir.*), 201, 202. But the court will presume them to be so even if the statement is not made. *Mansell* v. *R.*, 8 *St. Tr., N. S.* 831; 8 *E. & B.* 54; 27 *L. J.* (*M. C.*) 4; and *see Martin* v. *R.*, 6 *St. Tr., N. S.* 925; 12 *Ir. L. R.* 399. No objection can be sustained to the caption of an indictment for an allegation that the grand jurors were "sworn and affirmed," without showing that those who were sworn were persons who ought to have been affirmed, or that those who were affirmed were persons who ought to have been sworn. *Mulcahy* v. *R.*, *L. R.* 3 *H. L.* 306, 322: *Ir. Rep.* 1 *C. L.* 13. As to the mode of rectifying a mistake in the caption, *see R.* v. *Justices of Middlesex*, 5 *B. & Ad.* 1113, and *R.* v. *Marsh*, *ubi supra*.

The caption if erroneously drawn up may be amended. *R.* v. *Darley*, *ubi supra*: *R.* v. *Davis*, *ubi supra*: *Faulkner's case*, 1 *Wms. Saunders* (6th ed.), 248.

There is, it would seem, only one original general caption for the whole sessions. *R.* v. *Marsh*, 6 *A. & E.* 236, 249, *Williams*, J., *Coleridge*, J. Objection may be taken to the caption by demurrer; *R.* v. *Fearnley*, 1 *T. R.* 316; or by writ of error, whether the error be of fact or law. *R.* v. *Marsh*, *ubi supra*, at 243, *Denman*, L.C.J.: *R.* v. *McKeever* [1871]. *Ir. Rep.* 5 *C. L.* 86.

Sect. 7.

WITHIN WHAT TIME THE BILL MUST BE PREFERRED.

At common law, there is no time limited for commencing a suit by the King; and therefore, in all cases of treason, felony, and misdemeanor, where a time is not limited by statute, the indictment may be preferred at any length of time after the offence. In the case of offences punishable summarily, even where the accused may elect to be tried on indictment, the summary proceedings must be instituted within six months of the offence, unless it is a continuing offence: *London County Council* v. *Worley* [1894] 2 *Q. B.* 826; or unless another limitation is given by statute for the particular prosecution. 11 & 12 *Vict. c.* 43, *s.* 11; *see Douglas, Summary Jurisdiction Procedure* (8th ed.), pp. 52–59. In criminal cases within the *Summary Jurisdiction Acts*, the laying of the information is the commencement of the prosecution; *Beardsley* v. *Giddings* [1904] 1 *K. B.* 847: *Brooks* v. *Bayshaw* [1904] 68 *J. P.* 514: *R.* v. *Priestley* [1886] 49 *J. P.* 148;

but *quære* when though the information is laid before process is granted after the expiration of the time limited. The oldest authorities seem to treat the arrest as the commencement of the prosecution at common law; 2 *Hale*, 72; but under the different statutes creating limitations (stated below) there have been somewhat varying interpretations of what constituted the commencement of the prosecution.

The following are the chief statutory limitations on the prosecution of indictable offences:—

Treason.]—Indictments for such high treasons as caused corruption of blood (with the exception of treason, by "designing, endeavouring, or attempting any assassination on the body of the King by poison, or otherwise" (7 & 8 *W.* 3, *c.* 3, *s.* 6), must be found by the grand jury within three years next after the offence committed, if the offence have been committed within England, Wales, Berwick-upon-Tweed (7 & 8 *W.* 3, *c.* 3, *s.* 5), or Scotland (*see* 7 *Anne*, *c.* 21, *Fost.* 249); but if committed on the high seas or in a foreign country, there is no time limited for the prosecution.

Blasphemy.]—An "information" for blasphemy by words spoken must be laid within four days of the speaking, and the prosecution must be within three months of the information. 9 *W.* 3, *c.* 35 (9 & 10 *W.* 3, *c.* 32, *Ruffhead*), *s.* 2; *cf.* 19 *G.* 2, *c.* 21, *s.* 12, as to profane swearing.

Riot.]—Prosecutions for offences against the *Riot Act* (1 *G.* 1, *st.* 2, *c.* 5) must be commenced within twelve months after the offence committed (*s.* 8).

Unlawful drilling.]—Prosecutions under the *Unlawful Drilling Act*, 1820 (60 *G.* 3 & 1 *G.* 4, *c.* 1), must be "commenced within six calendar months after the offence committed" (*s.* 7).

Night poaching.]—Prosecutions by indictment under the *Night Poaching Act*, 1828, must be "commenced within twelve calendar months after the commission of the offence." 9 *G.* 4, *c.* 69, *s.* 4. For the cases hereon *see post*, p. 97.

Revenue offences.]—"Indictments, or informations brought or exhibited for any offence against the Customs Acts, in any court or before any justice, shall be brought or exhibited within three years next after the date of the offence committed." 39 & 40 *Vict.* *c.* 36, *s.* 257. *See R.* v. *Thompson*, 16 *Q. B.* 832; 20 *L. J.* (*M. C.*) 183; 5 *Cox*, 166, on the similar provisions of a repealed *Customs Act*.

Penal statutes.]—All indictments or informations upon any penal statute, whereby the forfeiture is limited to the King, must be brought within two years after the offence committed; if the forfeiture be limited to the King and prosecutor, the suit must be in one year; and in default thereof, the same must be sued for by the King within two years after that year ended; but where a statute limits a shorter time, the suit must be brought within such time limited. 31 *Eliz.* *c.* 5, *s.* 5. As to informations instituting summary proceedings, this Act is repealed by 11 & 12 *Vict.* *c.* 43, *s.* 36.

Charges against officials.]—Prosecutions for "any act done in pursuance, or execution, or intended execution, of any Act of Parliament, or of any

public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, shall not lie or be instituted unless commenced within six months next after the act, neglect, or default complained of, or "in case of a continuance of injury or damage" (*e.g.*, in case of a public nuisance) "within six months next after the ceasing thereof." 56 & 57 *Vict.* c. 61, *s.* 1 (*a*). This Act expressly or impliedly repeals the particular limitation clauses in prior public general Acts. *See s.* 2, *Schedule.*

Corrupt or illegal practices.]—A proceeding against a person in respect of the offence of a corrupt or illegal practice or any other offence at parliamentary elections must be commenced within one year after the offence was committed, or if it was committed in reference to an election with respect to which an inquiry is held by election commissioners must be commenced within one year after the offence was committed, or within three months after the report of such commissioners is made, whichever period last expires, so that it be commenced within two years after the offence was committed. The issue of a summons, warrant, writ, or other process, shall be deemed to be a commencement of a proceeding, where the service or execution of the same on or against the alleged offender is prevented by the absconding or concealment or act of the alleged offender; but save as aforesaid the service or execution of the same on or against the alleged offender, and not the issue thereof, shall be deemed to be the commencement of the proceeding. 46 & 47 *Vict.* c. 51, *s.* 51. The same period of limitation applies to proceedings for similar offences at municipal elections, as the above section is incorporated in the *Municipal Elections (Corrupt and Illegal Practices) Act*, 1884 (47 & 48 *Vict.* c. 70), by sect. 30 of the later Act; and it also applies to municipal elections in the city of London, 47 & 48 *Vict.* c. 70, *s.* 35; and to offences in connection with elections for county councils (51 & 52 *Vict.* c. 41, *s.* 75), district or parish councils and boards of guardians (56 & 57 *Vict.* c. 73, *s.* 48), and metropolitan boroughs (62 & 63 *Vict.* c. 14).

Offences against girls.]—Prosecutions for the offences of unlawfully and carnally knowing, or attempting to have unlawful carnal knowledge, of any girl being of or above the age of thirteen years and under the age of sixteen years, must be commenced not more than six months after the commission of the offence. 48 & 49 *Vict.* c. 69, *s.* 5: as amended by 4 *Edw.* 7, *c.* 15, *s.* 27. Commencement of a prosecution for rape within the six months is sufficient though in the result the accused is indicted and convicted under this section. *R.* v. *West* [1898] 1 *Q. B. C.* 174. 18 *Cox*, 675 (*C. C. R.*).

Registration of births and deaths.]—A prosecution on indictment for an offence under the *Births and Deaths Registration Act*, 1874, must be commenced within three years after the commission of such offence. 37 & 38 *Vict.* c. 88, *s.* 46.

Marriages.]—Prosecutions for the felony of unduly solemnizing marriage must be commenced "within the space of three years after the offence committed." 4 *G.* 4, *c.* 76, *s.* 21. A like limitation applies to prosecutions for offences under the *Marriage Act*, 1836 (6 & 7 *Will.* 4, *c.* 85, *s.* 41). Perjury under the *Marriage Act*, 1840 (3 & 4 *Vict.* c. 72), *s.* 4, must be prosecuted before "the expiration of eighteen calendar months from the solemnization of such marriage."

Merchandise Marks.]—No prosecution for an offence against the

Merchandise Marks Act, 1887, shall be commenced after the expiration of three years next after the commission of the offence, or of one year next after the first discovery thereof by the prosecutor, whichever expiration first happens. 50 & 51 *Vict.* c. 28, *s.* 15.

Commencement of prosecution.]—The commencement of prosecution is the preferring of the indictment or laying of the information. The time is calculated by excluding the day on which the offence is said to have been committed, and including the day on which the prosecution begins. *Pellew* v. *Inhabitants of East Wonford*, 9 *B. & C.* 134: *Williams* v. *Burgess*, 12 *A. & E.* 635: *Radcliffe* v. *Bartholomew* [1892] 1 *Q. B.* 161: 61 *L. J.* (*M. C.*) 63. Sundays are included in computing the time unless expressly excluded. *R.* v. *Middlesex Justices*, 2 *Dowl.* (*N. S.*) 719, 724: *Maxwell on Statutes* (3rd ed.), 490. In Acts passed since 1850 "month" means calendar month. 52 & 53 *Vict.* c. 63, *s.* 3.

In *R.* v. *Willace*, 1 *East*, *P. C.* 186, it was held, upon the repealed statutes relating to coin, that the information and proceeding before the magistrate, upon the defendant's being taken, was to be deemed the "commencement of the prosecution" within the meaning of those Acts. Proof by *parol* that the prisoner was apprehended for high treason respecting the coin, within three months after the commission of an offence for high treason against the coin within 8 & 9 *W.* 3, *c.* 26, *s.* 1 (*rep.*), was held insufficient, where the indictment was after the three months, and the warrants to apprehend and to commit and the depositions taken before the justices were not produced. *R.* v. *Phillips*, *R. & R.* 369. The head note in this case seems to be inaccurate. *See R.* v. *Jack*, 6 *Queensland L. J.* 60, 63, *Griffith*, C.J.

The provisions of the *Night Poaching Act*, 1828 (9 *G.* 4, *c.* 69), *s.* 4, are satisfied if information is laid and warrant is issued *and executed* within the year. *R.* v. *Brooks*, 1 *Den.* 217; *C. & K.* 402; 2 *Cox*, 436. So, where the warrant of commitment for the offence was within the time limited, but the indictment not till afterwards, this was held sufficient. *R.* v. *Austin*, 1 *C. & K.* 621. The mere issuing of a warrant to apprehend the defendant has been held not to be a commencement of the prosecution, within 9 *G.* 4, *c.* 69, *s.* 4, unless it be shown to have been executed within the time limited for the commencement of the prosecution. *R.* v. *Hull*, 2 *F. & F.* 16: *R.* v. *Casbolt*, 11 *Cox*, 385. And proof of the existence of a warrant to apprehend the defendants is not evidence of the commencement of such a prosecution, although the warrant was issued within the twelve months prescribed by that section, and although it recites the laying of the information. The information itself must be given in evidence. *R.* v. *Parker*, *L. & C.* 459; 33 *L. J.* (*M. C.*) 135. Where a man was indicted in 1869 for night poaching alleged to have been committed in 1863, and pleaded guilty, he was allowed to withdraw that plea and to plead not guilty, and an acquittal was directed on failure to produce an information and warrant showing that the prosecution had been commenced within twelve calendar months. *R.* v. *Casbolt*, 11 *Cox*, 385. In *R.* v. *Killminster*, 7 *C. & P.* 228, an indictment for night poaching was preferred against the defendant within twelve months after the commission of the offence, and was ignored; four years afterwards another bill was found against him for the same offence, and upon an objection that the proceeding was out of time, *Coleridge*, J., doubted whether the first indictment was not a proceeding sufficient to entitle prosecutor to proceed: he reserved the point, but the defendant was acquitted upon the merits. *See also Adam* v. *Bristol Inhabitants*, 2 *A. & E.* 389; *S. C. sub nom. Sarah Till Adam, etc.*, 4 *N. & M.* 144; 4 *L. J.* (*K. B.*) 35.

Sect. 8.

INDICTMENT, HOW FOUND.

In ordinary cases, upon furnishing the clerk of assize, clerk of arraigns, or clerk of the indictments at the assizes, or the clerk of the peace at sessions, with the particulars of the offence, he will draw the indictment; but in cases where more than ordinary care may be requisite in framing the indictment, it is better to get it drawn by counsel, and then let it be engrossed on plain parchment, without stamp. Indorse on it the names of the witnesses intended to be examined before the grand jury.

"No clerk of assize, clerk of the peace or other person whatsoever . . . shall demand or receive more than two shillings for the drawing of any bill of indictment," against any felon against whom witnesses have been bound by recognizance to appear before a court of assize. 10 *W.* 3, *c.* 12 (*c.* 23, *Ruffhead*), *s.* 7. "If any clerk of assize, clerk of the crown, clerk of the peace, clerk of the indictments, or other proper office or their clerks or deputies, shall draw any bill of indictment defective, they shall draw new bills without demanding any fee or reward whatsoever, or forfeit the sum of £5 with full costs of suit" (*Id. s.* 8).

The grand jurors are summoned by the sheriff, or if he is disqualified for any cause, by the coroner. *See R.* v. *McGuire* [1898] 34 *New Brunswick* 430, and as to objections to the grand jurors, *post*, p. 101.

The grand jurors must be sworn or affirmed before they can find a bill of indictment laid before them. The form of oath as administered to the foreman is as follows:

"*You, as foreman of the grand inquest for our Sovereign lord, the King, for the body of this county of* ——, *shall diligently enquire and true presentment make of all such matters and things as shall be given you in charge, or shall otherwise come to your knowledge touching this present service. The King's counsel, your fellows' and your own you shall observe and keep secret: you shall present no one through envy, hatred or malice: neither shall you leave any one unpresented through fear, favour or affection, gain, reward, or the hope thereof: but you shall present all things truly and indifferently as they shall come to your knowledge, according to the best of your skill and understanding. So help you God.*" (*See* 2 *Hale*, 161).

The other jurors take a similar oath. When all the grand jurors are sworn they are charged by the presiding judge as to the bills of indictment to be sent before them and advised as to whether the evidence (as disclosed by the depositions taken before the committing magistrates) is such as to constitute a *primâ facie* case against the accused: but they are entitled to exercise their own discretion on each bill when it comes before them. After being charged they retire to the grand jury chamber to consider the bills. As a general rule the solicitor for the prosecution is not admitted to the chamber: but at the Central Criminal Court the solicitor is admitted in very difficult or complicated cases, by written order of the clerk of the court (Rules, Dec. 12, 1892, *r.* 6).

It has always been usual in England to swear the witnesses to be called before the grand jury: *R.* v. *Dickinson*, *R.* & *R.* 401. In Ireland they were neither sworn nor examined until 1816 (56 *G.* 3, *c.* 87).

At common law it was necessary that some officer of the court (which term includes the crier), after the indictment was engrossed (*R.* v. *Tew*, *Dears.* 429; 24 *L. J.* (*M. C.*) 62) should administer the oath to the witnesses in open court, and then the indictment was laid by the proper officer before the grand jury. The *Grand Jury Act*, 1856 (19 & 20 *Vict.*

c. 54) dispensed with the swearing of the witnesses in open court (s. 2). Under that Act the "foreman" of the grand jury, or any other member of the grand jury who may for the time being act on behalf of the foreman in the examination of witnesses in support of any bill or indictment (s. 3), is authorised and required to administer an oath (or an affirmation, where by law it is required or allowed to be taken in lieu of an oath (s. 3) to all persons who appear before the grand jury to give evidence in support of any bill of indictment, and all such persons, attending before any grand jury to give evidence, may be sworn and examined upon oath by the grand jury touching the matters in question. The name of every witness examined or intended to be so examined *shall* be indorsed on the bill of indictment, and the foreman of the grand jury *shall* write his initials against the name of each witness so sworn and examined touching such bill of indictment. The Act does not affect the fees by law payable to any officer of any court for swearing witnesses. Similar provisions are made as to Ireland by 1 & 2 *Vict.* c. 37, which repealed 56 *G.* 3, c. 87. It would seem that the enactments as to endorsing the names of the witnesses and initialling the names of those sworn before the grand jury are directory only. *O'Connell* v. *R.*, 11 *Cl. & F.* 155, 405; 8 *Eng. Rep.*, 155, 404; 5 *St. Tr., N. S.* 1, 899, *Lord Campbell*: *R.* v. *Townsend*, 28 *Nova Scotia*, 468: *R.* v. *Buchanan*, 12 *Manitoba*, 190, 193.

It used to be held that two indictments founded on the same facts, one for capital felony under a statute, and another for a misdemeanor at common law, ought not to be preferred at the same time. *See R.* v. *Doran* (1790), 1 *Leach*, 538: *R. v. Smith*, 3 *C. & P.* 412: *R.* v. *Flower*, *Id.* 413, and it was usual to grant one indictment as to put the prosecutor to his election upon which indictment he would proceed. But if this course were not taken no objection or arrest of judgment could be taken after verdict. *Young* v. *R.*, 3 *T. R.* 98, 106, *Buller*, J. But the High Court will not *quash* them if found. *R.* v. *Stockley*, 3 *Q. B.* 238; 11 *L. J.* (*M. C.*) 105. And it is now common practice to send up two indictments, where on the facts it is not clear whether a felony or a misdemeanor has been committed.

Indictments for offences within the *Vexatious Indictments Act*, 1859 (22 & 23 *Vict.* c. 17), must not be sent before the jury unless the procedure prescribed by the statutes (*ante*, p. 7) has been followed; and, if presented or found in contravention of the statutes, may be quashed. *See post*, p. 120.

After the indictment has been taken to the grand jury-room, it comes under the consideration of the grand jury in its turn. The witnesses for the prosecution are then called in, in the order in which their names are indorsed on the indictment, and are sworn and examined by the grand jury. Refusal to be sworn is punishable as contempt of court. *R.* v. *Lord Preston*, 12 *St. Tr.* 645; and if there should appear to a majority of the jury (consisting of twelve at least) "probable evidence" of the offence charged (2 *Hale*, 157), the clerk of the grand jury will indorse on the indictment, "*True Bill*;" but if the majority should be of opinion that the offence has not been sufficiently proved, the words "*No true bill*" are in that case indorsed on the indictment. Afterwards, the foreman, accompanied by the other grand jurors, carries the indictments so indorsed into court, and delivers them to the clerk of arraigns or the court, who thereupon states to the court the substance of each, and the indorsement upon it. In strict legal parlance, an indictment is not so called, until it has been found a "*true bill*" by the grand jury; before that it is named a "bill of indictment" merely.

The grand jury may present an indictment on their own knowledge,

nor can any inquiry be made as to whether witnesses were properly sworn before them (*see form of oath, ante*, p. 98, *R.* v. *Russell, C. & Mar.* 247: *R.* v. *Bullard*, 12 *Cox*, 353): but they may if they think fit require the same evidence, written and parol, as may be necessary to support the indictment at the trial. They are not, however, usually very strict as to the documentary evidence; they often admit copies where the originals alone are evidence; and sometimes even evidence by parol of a matter which should be proved by written evidence. But as they may insist on the same strictness of proof as must be observed at the trial, it is prudent in all cases to be provided, at the time the bill is preferred, with the same evidence with which you intend afterwards to support the indictment. In *R.* v. *Clements*, 2 *Den.* 251; 20 *L. J.* (*M. C.*) 193 (*C. C. R.*), the deposition of the prosecutrix, which had been allowed by the judge to be read in evidence before the grand jury after a statement by counsel for the prosecution that she was so ill as to be unable to travel, that the deposition had been taken by the magistrate in the presence of the prisoners, who had an opportunity for cross-examination, and was signed by the prosecutrix and the magistrate, and that witnesses to prove all the above facts were in attendance, was held to have been rightly so read; but the point as to whether evidence on oath should have been first given does not seem to have been raised. In *R.* v. *Philip*, 1 *F. & F.* 105, *Erle*, J., the evidence of a medical man was held necessary as a condition precedent to the deposition being read before the grand jury (cf. *R.* v. *Wilson*, 12 *Cox*, 622, *Lush*, J.). And in *R.* v. *Beaver*, 10 *Cox*, 274, *Byles*, J., held that this could not be done unless the presiding judge has, by evidence taken in the presence of the accused, satisfied himself of the existence of the facts required by *s.* 17 of 11 *& 12 Vict. c.* 42, to make the deposition admissible. But this decision is adversely criticised in a note (at p. 275), and in a subsequent case, *R.* v. *Bullard*, 12 *Cox*, 353, the same judge, on the foreman of the grand jury coming into court and asking for the deposition of an absent witness, without whose evidence they had no material to find the bill, granted the application, without any proof that the deposition was admissible as evidence under 11 *& 12 Vict. c.* 42, *s.* 17, observing that the grand jury were not bound by any rules of evidence, that they were a secret tribunal, and might lay by the heels in gaol the most powerful man in the country by finding a bill against him, and for that purpose might even read a paragraph from a newspaper. So in *R.* v. *Gerrans*, 13 *Cox*, 158, where it was stated by counsel for the prosecution that a witness was unable to attend the trial through illness, *Denman*, J., permitted his deposition to be presented to the grand jury without any preliminary proof that the witness was ill, or that his deposition had been regularly taken, and directed that the grand jury should be told that the court permitted them to look at the deposition, and to act upon it if they thought proper. And in *R.* v. *Lynch* (*K. B. D.* 19, Dec., 1902) *Lord Alverstone*, L.C.J., allowed the deposition of a witness absent through illness to be read before the grand jury without requiring to hear evidence as to his condition, stating that such evidence was unnecessary.

Where a witness refuses to give evidence before the grand jury, they cannot use his deposition as evidence to enable them to find the bill. *R.* v. *Rendle*, 11 *Cox*, 209, *Channell*, B.

An improper mode of swearing the witnesses before the grand jury will not vitiate the indictment. *R.* v. *Russell, C. & Mar.* 247. *See O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1: 11 *Cl. & F.* 155; 8 *Eng. Rep.* 155. A witness who gives false evidence before a grand jury is indictable for perjury (19 *& 20 Vict. c.* 54, *s.* 1), and the other witnesses examined on the same bill

are good witnesses to prove it. *R.* v. *Hughes*, 1 *C. & K.* 519; but a grand juror is not an admissible witness in such a case: *Id.*; and *see R.* v. *Marsh*, 6 *A. & E.* 236, 237.

If witnesses will not come forward voluntarily to give evidence before the grand jury, you may sue out a *subpœna* or *subpœna duces tecum*, either at the crown office in London, or with the clerk of the arraigns in the country, for the assizes, or with the clerk of the peace for the sessions, and serve each of them with a copy, or *subpœna* ticket, as it is termed. Or, if the witness be in prison, he may, if in civil custody, be brought up by *hab. corp. ad testificandum*, if in criminal custody, he may be brought up by an order from a judge, under 16 & 17 *Vict.* c. 30, s. 9: and whether in civil or criminal custody under an order of a secretary of state, under s. 11 of the *Prison Act*, 1898 (61 & 62 *Vict.* c. 41). (*See Book I., Part II., chap. ii. sect.* 5, *par.* 6, *post.*)

The grand jury have nothing to do with the defence (2 *Hale*, 157) and are not entitled to hear the evidence of the defendant, nor of his witnesses under the *Criminal Evidence Act*, 1898 (61 & 62 *Vict.* c. 36). *R.* v. *Rhodes* [1899] 1 *Q. B.* 77. Nor is it their business to inquire into the sanity of the accused, which is for a petty jury to determine: nor have they any authority to ignore a bill on the ground of insanity. *R.* v. *Hodges*, 8 *C. & P.* 195.

Qualification.]—Grand jurors must be *probi et legales homines*, and ought to be of the same county where the crime was committed. A grand juror at common law must not be an alien or an outlaw; he must be returned by the proper officer, and not at the instance of the prosecutor. *Bacon, Abr. III., Juries A.*, 725.

The grand jurors of county sessions of the peace must be qualified under s. 1 of the *Juries Act*, 1825 (6 *Geo.* 4, *c.* 50) (*post*, p. 192). In quarter-session boroughs every burgess may be a grand juror unless exempt or disqualified (45 & 46 *Vict. c.* 50, *s.* 186, *sub-s.* 1). Grand jurors at assizes need not be freeholders, *Anon. R. & R.* 177. British peers are not, but an Irish peer, who is a member of the House of Commons, is liable to serve upon the grand jury at the assizes. *Lord Headley's case* (1806), *R. & R.* 117. No man who has been or shall be attainted of any treason or felony, or convicted of any crime that is infamous, unless he shall have obtained a free pardon, nor any man who is under outlawry, is or shall be qualified to serve on juries or inquests in any court or on any occasion whatsoever." 33 & 34 *Vict. c.* 77, *s.* 10. Since the abolition of attainder (33 & 34 *Vict. c.* 23, *s.* 1) and repeal of statutes referring to infamous crimes, it is difficult to say whom this *s.* disqualifies. *But see* 24 & 25 *Vict. c.* 96, *s.* 46.

Objections to Grand Jurors.]—In Ireland it has been held that the proper mode of objecting to a grand juror is by plea in abatement and not by challenge. *R.* v. *Sheridan*, 31 *St. Tr.* 543. In England it is not clear that the objection would not be taken by way of challenge: 2 *Hale*, 155; 2 *Hawk. c.* 25, *s.* 16; *R.* v. *Lewis*, 7 *St. Tr.* 250; *R.* v. *Sheares*, 27 *St. Tr.* 255, 267; 8 *Rep. C. L. Commrs.*, 1841, *c.* 2, *art.* 15. It may also be taken in arrest of judgment: *R.* v. *Jackson*, 25 *St. Tr.* 885.

Finding the Bill.]—The bill must be found by a majority of the jurors, and that majority must consist of twelve at least; 2 *Hale*, 161; *R.* v. *Clynard, Cro. Eliz.* 654; for which reason it is that the number of persons on the grand jury by inveterate practice never exceeds twenty-three, nor is less than twelve; 2 *Burr.* 1088, *n.*: *R.* v. *Marsh*, 6 *A. & E.*, 236, 241, *Denman*, L.C.J.; 6 *L. J.* (*M. C.*) 153.

The finding must be indorsed on the indictment, and is "parcel of the indictment and the perfection of it," and "touches it principally, for it is the life of it." *R.* v. *Ford, Yelv.* 99. And the bill as found must be delivered in open court; *R.* v. *Thompson*, 1 *Cox*, 268; and it should be signed by the foreman; but absence of the signature is not fatal if the bill was delivered by the foreman in open court and read in his presence. *R.* v. *Sidoli*, 1 *Lewin*, 55.

It is said that the grand jury cannot find *billa vera* as to part, and *ignoramus* as to the other part of an indictment; for they ought to find the whole or nothing. 2 *Hawk. c.* 25, *s.* 2: *R.* v. *Ford, Yelv.* 99: *R.* v. *Serjant*, 1 *Sid.* 414. Thus, if upon an indictment for libel, they find "*quoad* the words *billa vera*," "*sed utrum malitiose ignoramus*," the finding is void. 1 *Leon*, 287. But this has reference only to the same count in the indictment: for it is clear that they may find *billa vera* as to one count, and *ignoramus* to another. *R.* v. *Fieldhouse*, 1 *Cowp.* 325. They cannot, however, find the bill conditionally; as, for instance, "*si messuagium sit in possessione domini regis, tunc billa vera.*" *R.* v. *Lord Cromwell, Yelv.* 15. Upon an indictment for murder against A. and B., the grand jury found *billa vera* as to A., and as to B., manslaughter only. The court, after holding that such a finding was possible, decided that the best course was to proceed on the indictment so far as it found murder, and to have a new indictment on the manslaughter charge. *R.* v. *Carew*, 3 *Bulstr.* 206; 1 *Rolle Rep.* 407. In *R.* v. *Bubb*, 4 *Cox*, 455, 457, a similar finding was on the authority of the case above cited, and 1 *Chit. Cr. L.* 322, treated as good for the murder and nugatory as to the manslaughter. And they may find *billa vera* as to A., and *ignoramus* as to B.; *R.* v. *Cholmley, Cro. Car.* 464; or they may find bills against one or both of them for manslaughter, although, in such a case, it is more usual for the grand jury to return the indictment to the court, with a desire that it may be altered to a bill for manslaughter, and, when so altered (which may readily be done), to find a true bill generally. Upon an indictment for murder, however, the jury even under the old law could not find *billa vera se defendendo. R.* v. *Powle*, 2 *Rolle Rep.* 52. Nor can they do so now, as such a finding would be practically a finding of no offence. *See* 24 *&* 25 *Vict. c.* 100, *s.* 7.

Since 5 *&* 6 *Vict. c.* 38 (*post*, p. 126) the grand jurors of the sessions can find bills which the sessions have no jurisdiction to try. *R.* v. *Allum*, 2 *Cox*, 62, *Parke*, B.; *R.* v. *Atkinson*, 1 *Wms. Saund.* (6th ed.) 249, *note* 1. Prior to that Act the contrary was held. *R.* v. *Rigby* [1839] 8 *C. & P.*, 770: *R.* v. *Bainton*, 2 *Str.* 1088. Where such a bill is found the proper course is to transmit it to the assizes for trial, or for the judge of assize to remove it to his court by *certiorari* under 5 *&* 6 *Vict. c.* 38, *s.* 2 (*see post*, p. 129). *See R.* v. *Wildman*, 12 *Cox*, 354; *Keating*, J. For form of order to transmit, *see Archbold, Q. S.* (5th ed.) 238; *Pritchard, Q. S.* (2nd ed.).

Indictments found at the sessions, and transmitted by the justices to the assizes, must be tried at the assizes, although they be not removed by *certiorari*. *R.* v. *Wetherell, R. & R.* 381. The power of the justices at quarter sessions to remit indictments found there for trial at the assizes is not affected by 52 *&* 53 *Vict. c.* 12 (*Assizes Relief Act*, 1889): *see s.* 5 of that statute. Such transmission is, however, a matter in the discretion of the justices, and the judge of assize has no power to order it, even although the defendant may, after the finding of the indictment at sessions, have been bound by recognizance to appear and plead to it at the assizes. *R.* v. *Wildman, ubi supra.*

Although the grand jury have been formally discharged, yet if they

have not left the precincts of the court, nor separated, they may be recalled and charged with other bills. *R.* v. *Holloway*, 9 *C. & P.* 43.

If a bill is thrown out, it can be preferred to the same grand jury during the same assizes or sessions. *R.* v. *Simmonite*, 1 *Cox*, 30, *Wightman*, J.: *R.* v. *Newton*, 2 *M. & Rob.* 503, *Wightman*, J. There are, however, authorities to the contrary; *R.* v. *Humphreys*, *C. & Mar.* 601, *Patteson*, J.: *R.* v. *Austin*, 4 *Cox*, 385; and it is not proper to do so unless new evidence is available. A fresh bill may, however, be preferred and found at the next assizes or sessions if no time be limited for preferring it, or if the time have not elapsed. It is usual to detain a prisoner a bill against whom is ignored until the grand jury are discharged to see whether any other bill will be sent up and found against him. *See R.* v. *Simmonite*, *ubi supra*.

The grand jury are not liable to action or prosecution for anything done by them with reference to finding a bill of indictment. *Floyd* v. *Barker*, 12 *Co. Rep.* 23: *Earl of Macclesfield* v. *Starkey*, 10 *St. Tr.*, 1329, 1413.

And evidence by grand jurors as to what passed in the grand jury room will not be received. *R.* v. *Marsh*, 6 *A. & E.* 236, 237.

Sect. 9.

Process, after Indictment found, to compel Appearance of the Accused.

Proceedings by writ.]—If a defendant against whom an indictment has been found is present in court, or in the custody of the court, he may at once be arraigned upon the indictment, without any previous process. 2 *Hawk. c.* 27; 1 *Chit. Cr. L.* 338. Where the defendant is in the custody of another court, the court is to remove him by *habeas corpus ad respondendum*, and bring him up to plead. "Where recognizances shall have been entered into for the appearance of any person to take his trial for any offence at any court of criminal jurisdiction, and a bill of indictment shall be found against him, and such person shall be then in the prison belonging to the jurisdiction of such court, under warrant of commitment, or under sentence for some other offence, it shall be lawful for the court, by order in writing, to direct the governor of the said prison to bring up the body of such person, in order that he may be arraigned upon such indictment without writ of *habeas corpus*, and the said governor shall thereupon obey such order." 30 & 31 *Vict. c.* 35, *s.* 10. The attendance of the prisoner can also, it would seem, be obtained under a secretary of state's order. 61 & 62 *Vict. c.* 41, *s.* 11. Where a prisoner after his committal for trial, but before trial had been removed to a lunatic asylum by warrant from the secretary of state, under 27 & 28 *Vict. c.* 29 (*rep.*), whether he is or is not under recognizance to appear he could be brought up for trial by a *habeas corpus* issued by the judge of assize. *R.* v. *Peacock*, 12 *Cox*, 21, *Brett*, J. But it is doubtful whether this power exists in the case of a warrant of the secretary of state, issued under *s.* 2 of the *Criminal Lunatics Act*, 1884 (47 & 48 *Vict. c.* 64). *See Ex parte Collins* (*Q. B. D. Feb.* 16, 1899); 34 *L. J. Newsp.*, 132; 43 *Sol. Journ.* 280.

When an indictment for a misdemeanor has been found, a writ of *venire facias ad respondendum* may be issued either by the King's Bench Division, a judge of assize, or a court of quarter sessions. *Com. Dig. Process*, *A.* 1; 5 *Edw.* 3, *c.* 11. On default in appearance a writ of *distringas* may be issued.

In the case of indictments in the High Court against the inhabitants of a county, parish, or district, or against a corporation aggregate, writs of *venire facias* and *distringas* are issued to compel appearance. *Cr. Off. Rules*, 1886, *r.* 98. When the indictment is found in or removed to the High Court, the proper procedure in the case of defendants not parties to the removal, nor bound by recognizances to answer, is by issue of a writ of *venire facias*, or in the case of an information to issue a *subpœna* to answer, or *venire facias*: *r.* 94. If the defendant does not appear within four days of the return day specified in a *subpœna* he may be attached; *r.* 95. If he does not appear within four days of a return by the sheriff to a *venire facias* the prosecutor may issue a writ of *distringas*: *r.* 96. And if default in appearance is made after execution of the *distringas* the prosecutor may sue out a *capias ad respondendum*: *r.* 98.

The form of a writ of *venire facias* is as follows:—

Edward, etc., to the sheriff of ——, *greeting. We command you that you cause to come before us in* [the King's Bench Division of our High Court of Justice at the Royal Courts of Justice, London] *on the* —— *day of* ——, A. B. *to answer to us for certain misdemeanors whereof he is indicted: and have you there then this writ. Cr. Off. Rules*, 1886, *form* 52). *Witness, etc.*

This writ was issued by ——.

The form of a *distringas* is as follows:—

Edward, etc., to the sheriff of the county of ——, *greeting. We command you that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and distrain* A. B., *of* ——, *in your county* [yeoman], *by all his lands and tenements, etc., and that you answer for the issues thereof, etc.; and that you have his body before our justices assigned to keep our peace, and also to hear and determine divers felonies, trespasses and other misdemeanors in the said county committed, at* —— *in your said county, on the* —— *day of* —— *next ensuing, to answer unto us concerning divers trespasses, contempts and offences of which he is indicted* [or, *to answer unto us, upon certain articles presented against him the said* A. B.] *and have you there then this writ. Witness* C. D. *and* E. F. [two justices of the peace] *at* ——, *the* —— *day of* ——, *in the* —— *year of our reign.*

If the defendant appears to the writ of *distringas*, a *supersedeas* may be obtained, either to stay the execution of the writ, or to procure a return of the amount levied. *Cr. Off. Rules*, 1886, *r.* 115, and *form* 171: *Bac. Abr. tit. Attorney, B.* But if the defendant fails to appear within the time limited, and the sheriff makes a return that he has no lands, a writ of *capias ad respondendum* may be issued, and if he cannot be taken upon the first *capias*, second and third writs of *capias* called *alias* and *pluries*, may issue. 4 *Bl. Com.* 389: as to the duties and power of the sheriff see *Bengough* v. *Rossiter*, 4 *T. R.* 506; 2 *H. Bl.* 419. *R.* v. *Yandell*, 4 *T. R.* 521. Upon an indictment for felony a writ of *capias* is issued in the first instance; but this mode of proceeding is now rarely adopted, except as a step towards outlawry. *See post*, p. 109.

The following is the form of the writ of *capias*:—

Edward, etc., to the sheriff of the county of ——, *greeting. We command you that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take* A. B., *of* ——, *in your county* [labourer], *if he should be found in your bailiwick, and him cause to be safely kept, so that you have his body before our justices assigned to keep our peace, and also to*

hear and determine divers felonies, trespasses and other misdemeanors in the said county committed at —— in your county, on the —— day of —— next ensuing, to answer unto us concerning divers trespasses, contempts, and of which he is indicted, and have you there then this writ. Witness C. D. *and* E. F. [two justices of the peace] *at ——, the —— day of ——, in the —— year of our reign.*

If the proceedings above fail the prosecutor can proceed to outlawry, *post*, p. 109.

Proceeding by warrant of a justice.]—Proceedings in ordinary cases are regulated by *s.* 3 of the *Indictable Offences Act*, 1848 (11 *&* 12 *Vict. c.* 42), by which it is provided that "where any indictment shall be found by the grand jury in any court of oyer and terminer or general gaol delivery, or in any court of general or quarter sessions of the peace, against any person who shall then be at large, and whether such person shall have been bound by any recognizance to appear to answer to the same or not, the person who shall act as clerk of the indictments at such court of oyer and terminer or gaol delivery, or as clerk of the peace at such sessions at which the said indictment shall be found, shall at any time afterwards, after the end of the sessions of oyer and terminer or gaol delivery or sessions of the peace at which such indictment shall have been found, upon application of the prosecutor, or of any person on his behalf, and on payment of a fee of one shilling, if such person shall not have already appeared and pleaded to such indictment, grant unto such prosecutor or person a certificate (*infra*) of such indictment having been found; and upon production of such certificate to any justice or justices of the peace for any county, riding, division, liberty, city, borough, or place in which the offence shall in such indictment be alleged to have been committed, or in which the person indicted in and by such indictment shall reside or be, or be supposed or suspected to reside or be, it shall be lawful for such justice or justices, and he and they are hereby required to issue his or their warrant (*see infra*) to apprehend such person so indicted, and to cause him to be brought before such justice or justices, or any other justice or justices for the same county, riding, division, liberty, city, borough, or place, to be dealt with according to law; and afterwards, if such person be thereupon apprehended and brought before any such justice or justices, such justice or justices, upon its being proved upon oath or affirmation before him or them that the person so apprehended is the same person who is charged and named in such indictment shall, without further inquiry or examination, commit (*see infra*) him for trial, or admit him to bail, in manner hereinafter mentioned. . . ." (*See* BAIL, *post*, p. 110).

The forms scheduled to the *Indictable Offences Act*, 1848, are as follows:—

(F)

Form of certificate of indictment being found.]—*I hereby certify that at* [a court of oyer and terminer and general gaol delivery, *or a* court of general quarter sessions of the peace], *holden in and for the* [county] *of ——, at ——, in the said* [county], *on —— a bill of indictment was found by the grand jury against* A. B., *therein described as* A. B., *late of ——* [labourer], *for that he* [*etc.*, stating shortly the offence], *and that the said* A. B. *hath not appeared or pleaded to the said indictment. Dated this —— day of ——*, 190 .

J. D., *clerk of the indictments on the —— circuit*, [*or clerk of the peace of and for the said* [county]].

(G)

Form of warrant to apprehend a person indicted.]—*To the constable of* ——, *and to all other peace officers in the said* [county] *of* ——. *Whereas it hath been duly certified by* J. D., *clerk of the indictments on the* —— *circuit* [or *clerk of the peace of and for the* [county] of ——] [that, etc., stating the certificate]: *These are therefore to command you, in his Majesty's name, forthwith to apprehend the said* A. B., *and to bring him before* [me], *or some other justice or justices of the peace in and for the said* [county], *to be dealt with according to law. Given under my hand and seal this* —— *day of* ——, *in the year of our Lord* ——, *at* ——, *in the* [county] *aforesaid.*

J. S. (L.S.)

(H)

Form of warrant of commitment of a person indicted.]—*To the constable of* ——, *and to the keeper of the* [common gaol *or* house of correction], *at* ——, *in the said* [county] *of* ——. *Whereas by* [my] *warrant under* [my] *hand and seal, dated the* —— *day of* ——, *after reciting that it had been certified by* J. D. [etc., as in the certificate], [*I*] *commanded the constable of* —— *and all other peace officers of the said county, in his Majesty's name, forthwith to apprehend the said* A. B., *and to bring him before* [me], *the undersigned,* [one] *of his Majesty's justices of the peace in and for the said* [county]; *or before some other justice or justices of the peace in and for the said* [county], *to be dealt with according to law: and whereas the said* A. B. *hath been apprehended under and by virtue of the said warrant, and being now brought before* [me], *it is hereupon duly proved to* [me] *upon oath that the said* A. B. *is the same person who is named and charged in and by the said indictment: These are therefore to command you, the said constable, in his Majesty's name forthwith to take and safely convey the said* A. B. *to the said* [house of correction] *at* —— *in the said* [county], *and there to deliver him to the keeper thereof, together with this precept; and I hereby command you the said keeper to receive the said* A. B. *into your custody in the said house of correction, and him there safely to keep until he shall be thence delivered by due course of law. Given under my hand and seal this* —— *day of* ——, *in the year of our Lord* ——, *at* ——, *in the* [county] *aforesaid.*

J. S. (L.S.)

Backing justice's warrants.]—If the person against whom a justice's warrant has been issued with respect to an indictable offence has escaped or gone into, or resides, or is supposed to reside or be "in any place in England or Wales, out of the jurisdiction of the justice issuing such warrant," upon proof alone being made on oath of the handwriting of the justice issuing such warrant, it is lawful for any justice of the peace for the county or place in which the person against whom the warrant has been issued is, or is supposed to be, to indorse the warrant in the following form; and such indorsement shall be sufficient authority for the execution of the warrant in that county or place. 11 & 12 *Vict.* c. 42, s. 11. An arrest under a warrant not backed by a justice of the county or borough within which it is executed is illegal. *R.* v. *Cumpton*, 5 *Q. B. D.* 341; 49 *L. J.* (*M. C.*) 41. A warrant issued by a Metropolitan Police Magistrate in respect of an offence committed within the Metropolitan Police District may be executed outside that district without backing by any of the constables to whom it is directed. 2 & 3 *Vict.* c. 71, s. 17.

Under 11 & 12 *Vict.* c. 42, ss. 12, 13, 14, English warrants may be backed

in Ireland, Scotland, or the Isles of Man, Guernsey, Jersey, Alderney or Sark. English warrants may also be executed in Ireland, after endorsement by the inspector-general or a deputy or assistant inspector of the Irish Constabulary, under 14 & 15 *Vict. c.* 93, *s.* 29, and 30 & 31 *Vict. c.* 19, *s.* 1.

The form of indorsement used is as follows:—

(K)

[—— *to wit: Whereas proof upon oath hath this day been made before me, one of his Majesty's justices of the peace for the said* [county] *of* ——, *that the name of* J. S. *to the within warrant subscribed is of the handwriting of the justice of the peace within mentioned: I do therefore hereby authorize* W. T., *who bringeth to me this warrant, and all other persons to whom this warrant was originally directed, or by whom it may lawfully be executed, and also all constables and other peace officers of the said* [county] *of* ——, *to execute the same within the said last-mentioned* [county], *and to bring the said* A. B., *if apprehended within the same* [county], *before me* [or *before some other justice or justices of the peace of the same county*], *to be dealt with according to law. Given under my hand this* —— *day of* ——, 190 .

J. L.

Offenders fleeing from the United Kingdom.]—Where the offender has fled to a British possession or a place to which the *Foreign Jurisdiction Acts* apply, the warrants for his arrest are executed under the *Fugitive Offenders Act*, 1881 (44 & 45 *Vict. c.* 69).

Where the accused has fled to a foreign country to which the *Foreign Jurisdiction Acts* do not apply, his surrender is obtainable under the Extradition Treaty in force with such country, or in some cases by application to the foreign government, independently of any treaty. The procedure to be followed depends on the terms of the treaty or the requirements of the foreign government. *See Clarke* on *Extradition* (4th ed.); *Biron* and *Chalmers* on *Extradition*. For the text of the treaties *see Statutory Rules and Orders* (*ed.* 1904), *vol.* 5, *tit.* "*Fugitive Criminal.*" The *Extradition Acts* of 1870, 1873, and 1895, in the main regulate only procedure for extradition from British dominions, but they forbid the trial of fugitives surrendered by foreign states, except on charges founded on the facts on which their surrender was made.

When the defendant is already in prison.]—If the person against whom the indictment has been found is "confined in any gaol or prison for any other offence than that charged in the said indictment, at the time of such application and production of the said certificate to such justice or justices as aforesaid (*ante*, p. 105), it shall be lawful for such justice or justices, and he and they are hereby required, upon it being proved before him or them upon oath or affirmation that the person so indicted and the person so confined in prison are one and the same person, to issue his or their warrant (see *post*, 108), directed to the gaoler or keeper of the gaol or prison in which the person so indicted shall then be confined as aforesaid, commanding him to detain such person in custody until by his Majesty's writ of *habeas corpus* he shall be removed therefrom, for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of his custody by due course of law." 11 & 12 *Vict. c.* 42, *s.* 3.

(I.)

Form of warrant to detain a person indicted who is already in custody for another offence.]—*To the keeper of the* [common gaol *or* house of correction], *at* ——, *in the said* [county] *of* ——: *Whereas it hath been duly certified by* J. D., *clerk of the indictments on the* —— *circuit* [or *clerk of the peace of and for the county of*——], *that* [etc., stating the certificate] : *And whereas* [I am] *informed that the said* A. B. *is in your custody in the said* [common gaol] *at* —— *aforesaid, charged with some offence or other matter; and it being now duly proved, upon oath before* [me] *that the said* A. B. *so indicted as aforesaid and the said* A. B. *in your custody as aforesaid are one and the same person; These are therefore to command you, in his Majesty's name, to detain the said* A. B. *in your custody in the* [common gaol] *aforesaid, until by his Majesty's writ of habeas corpus he shall be removed therefrom for the purpose of being tried upon the said indictment or until he shall otherwise be removed or discharged out of your custody by due course of law. Given under my hand and seal this* —— *day of* ——, *in the year of our Lord* ——, *at* ——, *in the* [county] *aforesaid.*

J. S. (L.S.)

Proceeding by bench warrant.]—By a long course of practice, it is an established rule that any court before which an indictment is found may forthwith issue a bench warrant for arresting the party charged, and bringing him immediately before such court, to answer such indictment. 8 *Rep. Crim. Com. L.* 99; *Dick. Sess.* 230 (6th ed.); *and see* 5 *Ed.* 3, *c.* 11; 34 *Ed.* 3, *c.* 1; *Cro. Cir. Comp.* 15 (10th ed.); 1 *Chitty, Cr. L.* 340; *Archbold Q. S.* (5th ed.) 99; *Pritchard, Q. S.* (2nd ed.) 194. In 3 *Burn's J., tit.* "*Process*," 1338 (30th ed.), it is said that the practice refers only to cases of *misdemeanor*. If the warrant is issued at the assizes, it is signed by a judge: if at sessions, by two justices of the peace. *Hawkins, bk.* 2, *c.* 27, *s.* 8, says that the warrant is granted when the court is sitting. This statement applies to commissions of the peace, and is only another way of saying that the court is not continuous, and the act must be done in sessions. Where the party against whom the indictment has been found is already under recognizance to appear and answer any indictment that may be preferred against him, and he does not appear, the prosecutor may bespeak a bench warrant, which will be signed by the justices at the close of the sessions; for the sessions being in law but one day, the defendant has the whole period of the sessions to appear. 2 *Salk.* 607; *Cro. Cir. Comp.* 15 (10th ed.). When a prosecutor applies for a bench warrant at the Central Criminal Court, a recognizance to prosecute with effect against the defendant is required. *Reg. Gen., Jan.* 1847; *Car. & M.* 254. It is said that at that court the warrant is only current for the session in which it is issued. *Archbold, Q. S.* (5th ed.) 99. *See R.* v. *Nichols*, 64 *J. P.* 217, *Fulton*, Recorder. This opinion probably rests on the theory that the court is not a continuing court, which was held to be erroneous by *Wright*, J.; in *R.* v. *Madge & Armstrong, Q. B. D.*, May 8, 1894, 29 *Law. Jour. Newsp.* 301, and *Times*, May 9, 1894, *Wright and Collins*, JJ., cited *R.* v. *Parke* (1903), 2 *K. B.* at 440. It is not now the practice to grant a bench warrant unless immediate arrest is necessary, or it is shown that the party charged was about to quit the country; *R.* v. *Whittaker* 2, *F. & F.* 1; and it is not granted for the arrest of defaulting witnesses. *R.* v. *Crawford*, 6 *Cox*, 481 (*Ir.*).

The following is the form of a bench warrant:—

County of London.]—*To all constables, headboroughs, and other his Majesty's officers and ministers within the county of London, and to every one of them whom it may concern: These are to will and require, and in his Majesty's name to charge and command you, upon sight hereof, to bring before us his Majesty's justices of the peace for the county aforesaid, at the sessions of the peace* [or *general quarter sessions of the peace*] *now holden at the Sessions House on Clerkenwell Green, in and for the said county, the body of* A. B., *who stands indicted before us at this same session for a trespass and assault* [nature of the offence], *if the court be then and there sitting, or if not, before us or some other of his Majesty's justices of the peace for the same county, to find sufficient sureties for his personal appearance at this present sessions, to answer the said indictment and all such other matters as on his Majesty's behalf shall be objected against him: and if he cannot be taken during this present session, that then, as soon after as he shall be taken, you bring or cause him to be brought before us or some other of his Majesty's justices of the peace of the said county to find sufficient sureties: that is to say, two sureties in £—— each for his personal appearance at the next session of the peace to be holden for the said county, to answer as aforesaid, and further to be dealt with according to law. Hereof you are not to fail at your peril. Dated in open session at the Sessions House, Clerkenwell Green, aforesaid, this —— day of ——, in the year of our Lord ——.*

C. D. *and* E. F.

Warrant by judge of the High Court.]—Under 48 *G.* 3. *c.* 58, *s.* 1, any judge of the King's Bench Division of the High Court of Justice upon affidavit or certificate of the fact (*R.* v. *Redfern*, 2 *A.* & *E.* 387) that an indictment has been found, or information filed in that court, against any person for an offence other than treason or felony, may issue his warrant for apprehending him and taking him before a judge of the High Court or a justice of the peace, to be by him held to bail with two sufficient sureties as the court specified in the warrant for appearance in the King's Bench Division at the time mentioned in the warrant to answer the indictment or information; and if such defendant neglects or refuses to provide bail, the judge or justice before whom he is brought may commit him to prison. After the termination of the assizes or sessions of the peace, upon a certificate from the clerk of assize, or the clerk of the peace (*see form, ante*, p. 105), a judge of the King's Bench Division, or a justice of the county in which the indictment has been found, may, by warrant under his hand, cause the party indicted to be arrested, and, in default of bail, commit him for trial. *R.* v. *Downey*, 17 *Q. B.* 281; 15 *L. J.* (*M. C.*) 29; 4 *Bl. Com.* 319. The statute does not preclude the use of a *capias ad respondendum* (*ss.* 1, 3), but that is now only needed as a step to outlawry. For form of warrant, *see Short & Mellor, Crown Office Practice, p.* 607 (*No.* 44); 8 *Rep. Crim. L.* 348.

As to *process* on coroners' inquisitions, *see post*, p. 159.

Outlawry.]—Where an indictment for treason, felony, or misdemeanor has been found by a grand jury against any person, whether a peer or a commoner, and summary process proves ineffectual to the apprehension of the defendant, process of outlawry is issued:—outlawry being a punishment inflicted upon an offender by the law for contumacy, in refusing to render himself amenable to the justice of the King's courts. (*a*) *Doct. & Stud. dial.* 2, *cap.* 3; *Bac. Abr. Outlawry; Com. Dig., Utlagary*; 1 *Chitty, Crim. L.* 347; 2 *Hale*, 194; 2 *Hawk. c.* 27, *s.* 113. An outlawry

(*a*) As to New South Wales law of outlawry, *see R.* v. *Jemmy Governor* [1900] 21 *N. S. W. R.* (*Law*), 278.

in treason or felony still amounts to a *conviction* and *attainder* of the offence charged in the indictment, as much as if the offender had been found guilty by a jury; 4 *Bl. Com.* 319; 2 *Hawk. c.* 48, *ss.* 21–25; 33 & 34 *Vict. c.* 23, *s.* 1; but outlawry, in a case of misdemeanor, does not enure as a conviction for the offence, but merely as a conviction of the contempt for not answering. *R.* v. *Tippin*, 2 *Salk.* 494. Process of outlawry may be awarded by justices of oyer and terminer, and also by justices of the peace at quarter sessions, on indictments taken before them; 3 *Burn's J., Process*, 1339 (30th ed.); *Dick. Q. Sess.* 228 (6th ed.); but the practice of proceeding to outlawry in courts of quarter sessions seems to have become obsolete: 8 *Rep. Crim. L.* 103; and the usual course is to remove the indictment found at sessions by *certiorari*, and proceed to outlawry in the King's Bench Division. The most scrupulous exactness is required in all the proceedings in outlawry, which may be set aside on writ of error for any informality. 1 *Chitty, Crim. L.* 347. Although outlawry is still an integral, and has been described as an essential part of the criminal law (*R.* v. *Wilkes*, 4 *Burr.* 2527, 2551, *Lord Mansfield*, C.J.), proceedings in outlawry are exceedingly rare, and may almost be said to be extinct. *Short & Mellor, Crown Office Practice*, 384. It is therefore sufficient to refer to that work, which contains a full account of the proceedings in outlawry, and to the *Crown Office Rules*, 1886, *rr.* 99–121, which now regulate the practice in outlawry and reversal of outlawry, when the proceedings are in the King's Bench Division. Under *s.* 1, *sub-s.* 2, of the *Statute Law Revision Act*, 1888 (51 *Vict. c.* 3), the Lord Chancellor may, if he thinks fit, by order extend the Crown Office Rules in force for the time being, as to proceedings in outlawry, to proceedings in outlawry in courts of assize, oyer and terminer, and gaol delivery, and in other courts in England, with such modifications as to him may seem expedient, and as from the date of the order the old statutes as to outlawry scheduled to that Act are to be repealed. No order had up to the end of 1904 been made by the Lord Chancellor, and the old statutes remain in force as to the courts last named.

Sect 10.

BAIL.

Nature of bail.]—Bail are sureties taken by a person duly authorized, for appearance at a certain day and place, to answer and be justified by law. *Hale's Sum.* 96; *Dalt. c.* 166, *pt.* 2. The defendant is placed in the custody of his bail; who may re-seize him (1 *Hale*, 124; *Dalton, c.* 166, *pt.* 2) if they have reason to suppose that he is about to fly, and bring him before a justice, who will commit the prisoner in discharge of the bail; *R.* v. *Butcher*, Peake, 226 (3rd ed.): 3 *R. R.* 678; and any attempt to rescue him from their custody is illegal. *Id.*

When granted.]—Bail in treason or felony is discretionary in the High Court or courts having jurisdiction to try the offence. *R.* v. *McCartie*, [1859] 11 *Ir. C. L. R.* 188, 192: *R.* v. *Platt*, 1 *Leach*, 157. Bail in misdemeanor is said to be of right at common law. *R.* v. *Spilsbury* [1898] 2 *Q. B.* 615, 620: *R.* v. *Badger*, 4 *Q. B.* 468, 472; 12 *L. J.* (*M. C.*) 66; 4 *St. Tr., N. S.* 1387: *Re Frost*, 4 *T. L. R.* 757, *Coleridge*, L.C.J.; *and see* 31 *Car.* 2, *c.* 2: 2 *Hawk. c.* 15, *ss.* 7, 13, 16. Refusal or delay by any judge or magistrate to bail any person bailable is by the common law an offence against the liberty of the subject. 4 *Bl. Com.* 297. It is also

a violation of the *Habeas Corpus Act*, 1679 (31 *Car.* 2, *c.* 2) and of the *Bill of Rights* (1 *Will. & M., Sess.* 2, *c.* 2). But the duty of a magistrate in respect of admitting a prisoner to bail is judicial, and not merely ministerial, and therefore an action will not lie against him without proof of malice for refusing to admit to bail a person charged with a misdemeanor, entitled to be admitted to bail. *Linford* v. *Fitzroy*, 13 *Q. B.* 240; 18 *L. J.* (*M. C.*) 108: *R.* v. *Badger*, 4 *Q. B.* 468; 12 *L. J.* (*M. C.*) 66: *Osborne* v. *Gough*, 3 *B. & P.* 551. *See Bac. Abr., Bail*; *Com. Dig. Bail*, *F.* 5, *K.* 6.

Bail is not to be withheld merely as a punishment. The requirements as to bail are merely to secure the attendance of the accused at the trial. *R.* v. *Rose*, 67 *L. J.* (*Q. B.*) 289: 17 *Cox*, 717 (*C. C. R.*).

The proper test of whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. *Re Robinson*, 23 *L. J.* (*Q. B.*) 286; *R.* v. *Scaife*, 10 *L. J.* (*M. C.*) 144; 9 *Dowl, Pr. Cas.* 553.

The test should be applied by reference to the following considerations:

(1) The nature of the accusation. *R.* v. *Barronet*, 1 *E. & B.* 1; 22 *L. J.* (*M. C.*) 25: *Dears.* 51: *R.* v. *Butler* [1881] 8 *L. R. Ir.* 39: 14 *Cox*, 530.

(2) The nature of the evidence in support of the accusation. *Re Robinson* (*ubi supra*); *R.* v. *Butler* (*ubi supra*): *R.* v. *McCormick*, [1864] 17 *Ir. C. L. R.* 411.

(3) The severity of the punishment which conviction will entail. *Re Robinson* (*ubi supra*). The character or behaviour of the accused is said to be irrelevant. (*Id.*)

(4) Whether the sureties are independent, or indemnified by the accused. *See R.* v. *Butler*, 8 *L. R. Ir.* 39; 14 *Cox*, 530: *Hermann* v. *Jeuchner*, 15 *Q. B. D.* 561; 54 *L. J.* (*Q. B.*) 340; *Consolidated Exploration, &c., Co.* v. *Musgrave* [1900] 1 *Ch.* 37; 64 *J. P.* 89: *contra*, *R.* v. *Broome*, 18 *L. T., O. S.* 19, *Martin*, B., followed by *Fulton*, Recorder, in *R.* v. *Stockwell* [1902] 66 *J. P.* 376.

It is not usual to grant bail on charges of murder; *Re Barthelemy*, 1 *E. & B.* 8; *Dears.* 60; or after indictment found; *R.* v. *Chapman*, 8 *C. & P.* 558 (*and see post*, p. 115), except where the trial is adjourned. *Anon.* 2 *Lewin*, 260. As to the proper mode of taking a recognizance at quarter sessions, see *ex parte Jeffreys*, 52 *J. P.* 280. As to bail in the High Court, *see post*, p. 116. If insufficient bail has been taken, or if the sureties become afterwards insufficient, the accused may be ordered by any magistrate to find sufficient sureties, and in default may be committed to prison; and the justice who admitted a defendant to bail upon insufficient securities is responsible if the defendant does not appear. *Hale's Sum.* 97.

Who may be bail.]—The bail must be of ability sufficient to answer for the sum in which they are bound. 2 *Hawk. c.* 15, *s.* 4. They are usually householders; but it is for the magistrate or judge to act upon his discretion as to the sufficiency of the bail; *R.* v. *Saunders*, 2 *Cox*, 249; 1 *Burn's J., Bail*, 373 (30th ed.); 1 *Chitty, Crim. L.* 99; and the proposed bail may be examined upon oath as to his means, though in criminal cases no justification of bail is requisite. *R.* v. *Hall*, 2 *W. Bl.* 1110; *Tidd's Prac.* 250; 1 *Chitty, Crim. L.* 100. And the court or magistrate may, at discretion, order that reasonable notice shall be given to the prosecutor and the police, to enable him or them to inquire or object as to the sufficiency of the bail. No person convicted of any crime by which he has become infamous was allowed to be surety for any person

charged or suspected of an indictable offence. *R.* v. *Edwards*, 4 *T. R.* 440; 2 *R. R.* 427. It is not expedient to accept the solicitor of the accused as bail for his client. *R.* v. *Scott-Jarvis* (*Q. B. D., Times, 20th Nov.*, 1876): *Douglas, Summary Jurisdiction Procedure* (8th ed.) 371. Nor is a person who has been indemnified by the accused; *supra* (3). Persons in custody cannot be bail. Infants cannot be bail; nor could a married woman at common law; but since the *Married Women's Property Act*, 1882, married women having separate estate are accepted as bail. Personation of bail is a felony under 24 & 25 *Vict. c.* 98, *s.* 34.

Where persons who have become bail for any defendant discharge themselves by taking and surrendering him before the court or magistrate by whom he has been bailed, it is competent for the defendant to find new sureties. 2 *Hale*, 124; *Hawk. c.* 15, *s.* 3.

Bail by justices of the peace: when discretionary.]—"Where any person shall appear or be brought before a justice of the peace charged with any felony, or with any assault with intent to commit any felony, or with any attempt to commit any felony, or with obtaining or attempting to obtain property by false pretences, or with a misdemeanor in receiving property stolen or obtained by false pretences, or with perjury or subornation of perjury, or with concealing the birth of a child by secret burying or otherwise, or with wilful or indecent exposure of the person, or with riot, or with assault in pursuance of a conspiracy to raise wages, or assault upon a peace officer in the execution of his duty, or upon any person acting in his aid, or with neglect or breach of duty as a peace officer, or with any misdemeanor for the prosecution of which the costs may be allowed out of the county rate." [*For a list of these offences, see post, ch. vi.*, p. 247: *they seem to include common assault. R.* v. *Waldron*, 18 *Cox*, 373.] "Such justice of the peace *may, in his discretion*, admit such person to bail, upon his procuring and producing such surety or sureties as in the opinion of such justice will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offence; and thereupon such justice shall take the recognizance (*see infra*) of the said accused person and his surety or sureties, conditioned for the appearance of such accused person at the time and place of trial, and that he will then surrender and take his trial, and not depart the court without leave." 11 & 12 *Vict. c.* 42, *s.* 23; *and see* 1 *Chitty, Crim. L.* 95; 4 *Bl. Com.* 298: *Linford* v. *Fitzroy*, 13 *Q. B.* 240; 18 *L. J.* (*M. C.*) 108: *R.* v. *Rose*, 67 *L. J.* (*Q. B.*) 289; 18 *Cox*, 717: *and Short & Mellor, Cr. Off. Practice*, pp. 374, *et seq.*

When compulsory.]—"Where any person shall be charged before any justice of the peace with any indictable misdemeanor other than those hereinbefore mentioned, such justice, after taking the examinations in writing as aforesaid, instead of committing him to prison for such offence, *shall admit him to bail* in manner aforesaid, or if he have been committed to prison and shall apply to any one of the visiting justices of such prison or to any other justice of the peace for the same county, riding, division, liberty, city, borough or place, before the first day of the sitting or session at which he is to be tried, or before the day to which such sitting or session may be adjourned, to be admitted to bail, such justice shall accordingly admit him to bail in manner aforesaid." 11 & 12 *Vict. c.* 42, *s.* 23; *and see* 2 *Hale*, 127; 4 *Bl. Com.* 298; *Burn's J.* (30th ed.), *Bail*; 1 *Chitty, Crim. L.* 97; *and remarks of Lord Denman, Linford* v. *Fitzroy, supra.*

Under the *Bail Act*, 1898 (61 & 62 *Vict. c.* 7, *s.* 1), "where a justice has power under *s.* 23 of the *Indictable Offences Act*, 1848 (11 & 12 *Vict. c.* 42),

to admit to bail for appearance, he may dispense with sureties, if it is his opinion the so dispensing will not tend to defeat the ends of justice;" and it is his duty to admit to bail in all cases where there is a reasonable belief that the accused will attend to take his trial.

When forbidden.]—"No justice or justices of the peace shall admit any person to bail for treason, nor shall such person be admitted to bail, except by order of one of his Majesty's secretaries of state, or by the High Court of Justice (King's Bench Division), or a judge thereof in vacation. 11 & 12 *Vict. c.* 42, *s.* 23; 35 & 37 *Vict. c.* 66, *ss.* 16, 34; 38 & 39 *Vict. c.* 77, *s.* 19.

Bail on remand.]—11 & 12 *Vict. c.* 42, *s.* 23, applies only where the accused is committed for trial: and does not apply to bail on remand. There is some difference of opinion as to the power of the High Court to interfere where justices have refused bail on remand. *See Douglas, Summary Jurisdiction Procedure* (8th ed.), pp. 371, 372: but in *R.* v. *Beall* (*Q.B.D., July*, 1899), *Channell*, J., said that if the power existed the Court would be very slow to interfere with the justices' decision.

Form of recognizance of bail taken by a justice of the peace.]—The following is the form of the recognizance to be entered into by bail before a justice of the peace, prescribed by 11 & 12 *Vict. c.* 42:—

(S 1.)

Be it remembered, that on the —— day of ——, in the year of our Lord ——, A. B. *of ——* [labourer], L. M. *of ——* [grocer], *and N. O. of ——* [butcher], *personally came before* [us] *the undersigned, two of his Majesty's justices of the peace for the said* [county], *and severally acknowledged themselves to owe to our lord the King the several sums following: (that is to say), the said* A. B. *the sum of —— and the said* L. M. *and N. O. the sum of —— each, of good and lawful money of Great Britain, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said lord the King, his heirs and successors, if he the said* A. B. *fail in the condition indorsed. Taken and acknowledged the day and year first above mentioned, at ——, before us,* J. S.
J. N.

The condition of the within-written recognizance is such, that whereas the said A. B. *was this day charged before* [us], *the justices within mentioned for that* [etc. as in the warrant]; *if therefore the said* A. B. *will appear at the next court of oyer and terminer and general gaol delivery* [or *court of general quarter sessions of the peace*] *to be holden in and for the county of ——, and there surrender himself into the custody of the keeper of the* [common gaol] *there, and plead to such indictment as may be found against him by the grand jury for or in respect of the charge aforesaid, and take his trial upon the same, and not depart the said court without leave, then the said recognizance to be void, or else to stand in full force and virtue.*

(S 2.)

Notice of the said recognizance to be given to the accused and his bail.]—*Take notice, that you* A. B. *of ——, are bound in the sum of ——, and your sureties* [L. M. and N. O.] *in the sum of —— each, that you* A. B. *appear* [etc. as in the condition of the recognizance], *and not depart the said court without leave; and unless you the said* A. B. *personally appear and plead,*

before a justice of the peace, where it would be inconvenient to bring the prisoner and his bail before the court or judge in town; or, on just cause being shown, to order that a party not in custody shall be admitted to bail on surrendering to a warrant. At common law the powers of the court were exercised by means of a writ of *habeas corpus*. *Hale's Sum.* 104; 1 *Chit. Cr. L.* 98; *Burn's J., tit.* "*Bail*," 369 (30th ed.). Under the present practice of the Court, "applications for bail in felony or misdemeanor where the party is in custody, shall be *in the first instance* by summons before a judge at chambers for a writ of *habeas corpus*, or to show cause why the defendant should not be admitted to bail either before a judge at chambers or before a justice of the peace, in such an amount as the judge may direct." *Cr. Off. Rules*, 1886, *r.* 122. No summons to show cause before a judge at chambers for bail in felony shall be issued without the leave of a judge upon an *ex parte* application. *Rule* 305. For the requisite forms on applications for bail, *see Appendix to Cr. Off. Rules*, 1886, Nos. 69 to 77. Affidavits must be entitled "In the High Court of Justice, King's Bench Division." *Cr. Off. Rules*, 1886, *r.* 7.

If the judge at chambers refuses bail, a further application may be made to a divisional court, not by way of appeal, but *de novo*; *Short & Mellor, Cr. Off. Pract.* 382; but there is no appeal to the Court of Appeal from the decision of a divisional court of the King's Bench Division upon an application for bail by a prisoner. *R.* v. *Foote*, 10 *Q. B. D.* 378; 52 *L. J.* (*Q. B.*) 528.

To avoid expense and inconvenience it is now the practice in almost all cases, instead of applying for a writ of *habeas corpus*, to apply for a summons before a judge in chambers, to show cause why the prisoner should not be admitted to bail before a justice of the peace. If the order be made, upon its being produced to a justice, he will admit the prisoner to bail.

Where there is no inconvenience in the appearance of the prisoner and his bail in the court, counsel applies for a writ of *habeas corpus ad subjiciendum*, and also for a writ of *certiorari*, directed to the magistrate or coroner, as the case may be, to bring before the court the depositions on which the prisoner has been committed. The affidavits are entitled as in the case of a bail summons, and should verify the depositions (*R.* v. *Barthelemy*, 1 *E. & B.* 8; *Dears.* 60), and should be accompanied by a certified copy of the commitment, to which the accused is entitled as of right, under 31 *Car.* 2, *c.* 2, *s.* 4 (*see Cr. Off. Rules*, 1886, *r.* 35, *Forms* 172, 173), and by a copy of the depositions. If these are not obtained, a *certiorari* to bring them up is necessary.

Twenty-four hours' notice of bail, in cases of murder or manslaughter, must be served on the widow, if any there be, or next of kin of the deceased, and in other cases upon the prosecutor, and also on the coroner, or committing magistrate—*personal* service is not requisite. Returns having been duly made to the writs, when the prisoner is brought into court counsel moves that he be admitted to bail, and if there be no opposition the court will in its discretion admit the prisoner to bail, and the officer of the court will take the recognizance. In cases of felony the court usually requires *four* sureties; but for the inferior offences *two* are sufficient. *R.* v. *Shaw*, 6 *Dow. & Ry.* 154. The application to admit the prisoner to bail may be opposed by counsel, and affidavits may be used in answer to the application. When a prisoner is brought up to be bailed at chambers, the proceedings are nearly the same as those in court. *Short & Mellor's Cr. Off. Pr.* 380.

Bail in case of removed indictments.]—*See post, Certiorari*, p. 184.

Bail on coroner's inquisition.]—*See post*, p. 160.

Estreat of recognizance.]—If the condition of a recognizance entered into either by a party or by his sureties be broken, the recognizance may be forfeited, and on forfeiture the obligees become debtors to the Crown for the sums in which they are respectively bound.

Former practice.]—The ancient mode of enforcing a forfeited recognizance was to order its *estreat* into the Exchequer. The word "estreat" (*extractum*) means a true note of entries in the rolls of a court containing orders in favour of the revenue of the Crown: *Westm. c.* 2, *Termes de la Ley*. It was the duty of the clerks of all the King's courts to make up an accurate estreat roll showing the nature and details of all fines, forfeitures, etc., enforced by the court, and to return it to the Exchequer. The roll had to be verified by oath (4 *W. & M. c.* 24, *s.* 4); wilful misstatements were punishable (22 *& 23 Car.* 2, *c.* 22, *s.* 5); and failure to make the returns was ground for amercement (3 *G.* 1, *c.* 15, *s.* 12).

The sums not received before the return of the roll were levied by the sheriff under the orders of the Court of Exchequer until 1822 (3 *G.* 4, *c.* 46). The Court of Exchequer had jurisdiction over recognizances forfeited before justices of the peace in or out of sessions. The jurisdiction was abolished by 3 *G.* 4, *c.* 46, *s.* 2. *R.* v. *Yorkshire, West Riding, JJ.*, 7 *A. & E.*, 583, 590; 7 *L. J.* (*M. C.*) 9: *R.* v. *Thompson*, 3 *Tyr.* 73: *R.* v. *Hankins, M'Cl. & Y.* 27. But this change in the law did not affect the power of the court to bring up the recognizance by *certiorari* from sessions: *ex parte Pellow, M'Cl.* 111; 28 *R. R.* 683; *R.* v. *Brooke*, 59 *J. P.* 6, and did not affect the assizes: *R.* v. *Hankins, ubi supra.*

The powers of the Court of Exchequer passed in 1875 to the *H. C. J.*, and in 1880 to the *K. B. D.* (36 *& 37 Vict. c.* 66, *ss.* 16, 32, Order in Council, 16 Dec., 1880. *Statutory Rules and Orders Revised* (ed. 1904), *vol.* 12, p. 1, *tit.* "*Supreme Court England.*"

Present practice—Superior Courts.]—The practice of parliament, the Supreme Court, and courts of assize, respecting the estreat of recognizances, is governed by the *Fines Act*, 1833 (3 *& 4 W.* 4, *c.* 99), which repealed 22 *& 23 Car.* 2, *c.* 22. By *ss.* 26, 27, 28, provision is made for the rendering of an account to the Treasury, by the King's coroner and attorney, and the King's Remembrancer, of fines, amerciaments, penalties, and recognizances set, imposed or forfeited in the High Court, and for the estreat by those officers under order of the court or a judge of such fines, etc., levied and not received, and for their payment over of the fines, etc., as directed by the Treasury. By *s.* 29 it is provided, that an account in writing of all recognizances forfeited to or for the use of the crown, by or before any judge or judges of assize throughout England, shall within fourteen days next after such recognizances are forfeited be made out by the clerk of assize, with the names and residences of the parties liable to make payment thereof, and he shall make out *two* copies, one to be sent to the Treasury, and such recognizances shall, within the time last aforesaid, be duly certified and *estreated* by the clerk of assize into the court of Exchequer. Under 22 *& 23 Vict. c.* 21, *s.* 32, clerks of assize ceased to estreat fines, etc., into the court of Exchequer, and now enrol the fines and send a copy to the sheriff unless under *s.* 38 the Treasury requires return of the estreat to the King's Remembrancer. The court of Exchequer, under a writ of privy seal, had power over penalties and forfeitures occurring *at assizes*, and could compound, or, in its discretion, discharge, any recognizances. 33 *H.* 8, *c.* 39, *ss.* 40–42; *R.* v.

Hankins, M'Cl. & Y. 27, and *n.*, p. 31. The Treasury has a concurrent power under 3 & 4 *W.* 4, *c.* 99, *ss.* 33, 38.

The court has a discretion as to whether to order the estreat of a recognizance.

In *R.* v. *Doyen*, Lewes assizes, 1899, 34 *L. J. Newsp.* 645, a Frenchman was admitted to bail, his father being taken as surety, and went to France, where he became dangerously insane, so that, through no fault of the surety, he could not be produced at the trial. *Wills*, J., refused an application to estreat the recognizance, and said he could not make any order on the justices' clerk as to the amount, which was deposited with him.

In *R.* v. *Sangiovanni* [1904] 68 *J. P.* 54, an estreat of the recognizances of sureties for a person committed for trial had been ordered on his failure to surrender. *Fulton*, Recorder, directed that the estreat should not issue, on being satisfied that the sureties had taken all reasonable steps to secure the attendance of the defendant. On finding that he had left for the United States, they had informed the police, and had telegraphed at their own expense to have the defendant detained on arrival. In consequence of their action he was not allowed to land, and was forced to return in the ship; but this being a Belgian vessel, it took him to a Belgian port.

The estreat of recognizances on the Crown side of the King's Bench Division is regulated by the *Crown Office Rules*, 1886.

"Every recognizance acknowledged on the removal of an indictment, order, or other proceeding, or to prosecute any information granted by the King's Bench Division, or for the appearing or answering of any party in the said Division, or for good behaviour, *or for any other purpose*, shall after the acknowledgment thereof, be transmitted to the crown office and filed there." *R.* 123.

"No recognizance shall henceforth be forfeited, estreated, or put upon the estreat roll without the order of the court or a judge, nor unless an order or notice shall have been previously served upon the parties by whom such recognizances shall have been given, calling upon them to perform the conditions thereof, and no default shall be considered to be made in performing the conditions of a recognizance by reason of the trial of any indictment or presentment or the argument of any order or conviction or other proceeding having stood over where such indictment has been made a remanet, or such indictment or order has stood over by order of the court, or by consent in writing of the parties." *R.* 124.

"Whenever it has been made to appear to the court or judge that a party has made default in performing the conditions of any recognizance, into which he has entered, filed in the crown office, the court or a judge upon notice to the defendant and his sureties, if any, may order such recognizance to be estreated into the Exchequer without issuing any writ of *scire facias*." *R.* 126.

"No proceedings shall be taken in the crown office by *scire facias* upon recognizance." *R.* 127.

Practice at sessions of the peace.]—The practice for courts of quarter sessions as to the estreat of recognizances other than those of the defendant and his sureties is governed by *s.* 31 of the *Criminal Law Act*, 1826, (7 *G.* 4, *c.* 64), which provides that in every case where any person bound by recognizance for his or her appearance, or for whose appearance any other person shall be bound to prosecute or give evidence in any case of felony or misdemeanor, or to answer for any common assault, or to articles of the peace, or to abide an order in bastardy (*this form of recognizance was abolished by* 5 & 6 *W.* 4, *c.* 76, *s.* 70), shall therein make default, the officer

of the court by whom the estreats are made out shall prepare a list in writing, specifying the name of every person so making default and the nature of the offence in respect of which every such person, or his or her surety, was so bound, together with the residence, trade, profession or calling of every such person or surety, and shall in such list distinguish the principals from the sureties, and shall state the cause, if known, why each such person has not appeared, and whether by reason of the non-appearance of such person the ends of justice have been defeated or delayed: and every such officer shall and is hereby required before any such recognizance shall be estreated to lay such list, if at a court of oyer and terminer in any county besides Middlesex and London" (*i.e.* City) . . . "before one of the justices of these courts respectively; if at a court wherein a recorder or other corporate officer is the judge or one of the judges, before such recorder or other corporate officer; and if at a session of the peace, before the chairman or two other justices of the peace who shall have attended such court, who are respectively authorized and required to examine such list, and to make such order touching the estreating or putting in process of any such recognizance as shall appear to them respectively to be just; and it shall not be lawful for the officer of any court to estreat or put in process any such recognizance without the written order of the justice, recorder, corporate officer, chairman, or justice of the peace before whom respectively such list shall have been laid."

Subject to the special provisions of the Act above quoted, the general practice of courts of quarter sessions is governed by the *Levy of Fines Act*, 1822 (3 *G.* 4), *c.* 46, which directs (*s.* 2) that the clerk of the peace or town clerk shall copy on a roll such forfeited recognizances, and shall within such time as shall be fixed by the court of quarter sessions, not exceeding twenty-one days from the adjournment of such court, send a copy of such roll, with a writ of *distringas* and *capias* [*see forms, ante*, pp. 104, 105], or a writ of *fieri facias* and *capias*, to the sheriff of such county, which shall be the authority to him for proceeding to the immediate levying and recovering of such forfeited recognizances. Sect. 8 of the same Act requires the sheriff to return the writ and roll on the first day of the quarter sessions with a return of what has been done under it, and *s.* 5 of the *Levy of Fines Act*, 1823 (4 *G.* 4, *c.* 37), requires the clerk of the peace or town clerk to send to the Treasury within twenty days after the holding of quarter sessions a copy or extract of all rolls returned by the sheriff, with an account of the causes of the discharge by the court of any forfeiture, and the reason of the sheriff for any failure to levy a forfeited recognizance. In municipal boroughs in which the town clerk and clerk of the peace are not the same person, the latter is to discharge the duties imposed on the town clerk by the Act of 1822; *see* 45 & 46 *Vict. c.* 50, *s.* 222. By *s.* 17 of the *Quarter Sessions Act*, 1849 (12 & 13 *Vict. c.* 45), the provisions of the Acts of 1822 and 1823 as to the procedure with respect to forfeited recognizances are applied also to fines and amercements: as to which *see re Nottingham Corporation* (1897), 2 *Q. B.* 502: *R.* v. *Dover*, 1 *Cr. M. & R.* 726: 1 *Chit. Cr. L.* 726: 4 *Chit. Cr. L.* 487.

In the case of a recognizance by the defendant the order to forfeit is made after he is called, and on his failure to appear during the sessions, without any further notice or summons. In the case of sureties, *ss.* 5, 6, of 3 *G.* 4, *c.* 46, give a right of appeal to the sessions to all persons whose recognizances have been forfeited if they give proper security: and on the appeal the court may discharge the whole or part of the forfeiture, and discharge the obligee if in custody, and by *s.* 2 of the *Criminal Procedure Act*, 1853 (16 & 17 *Vict. c.* 30) courts of quarter sessions are

empowered to forfeit recognizances by principals or sureties to keep the peace or be of good behaviour, on proof of the conviction of the principal of any offence which is by law a breach of the conditions of the recognizance. The procedure of the Acts of 1822 (3 *Geo.* 4, *c.* 46) is applied to recognizances so forfeited.

Sect. 11.

INDICTMENT, IN WHAT CASES QUASHED.

In what cases.]—If an indictment or inquisition is bad on the face of it, or there is any such insufficiency, either in the caption or in the body of an indictment or inquisition, as will make erroneous any judgment whatsoever given on any part thereof, the court may in its discretion quash the indictment. 2 *Hawk. c.* 25, *ss.* 146–149; 1 *Chit. Cr. L.* 298: *R.* v. *Taylor*, 9 *Dowl.* 600. Thus, before 5 *&* 6 *Vict. c.* 38, indictments for perjury at common law or forgery found at sessions were quashed because the sessions had no jurisdiction to inquire of perjury or forgery. *R.* v. *Bainton*, 2 *Str.* 1088, and *see R.* v. *Rigby*, 8 *C. & P.* 770 (but *see ante*, p. 102). An indictment against six for exercising a trade was quashed because it was a distinct offence in each, and could not be made the subject of a joint prosecution. *R.* v. *Tucker*, 4 *Burr.* 2046: *R.* v. *Weston*, 1 *Str.* 623. In *R.* v. *Philips*, 2 *Str.* 921, judgment was arrested on an indictment of six for perjury (to which four pleaded and were convicted), on the ground that the offence was in its nature several, and two could not be indicted together for it. And in several instances indictments have been quashed, because the facts stated in them did not amount to an offence punishable by law; *see R.* v. *Burkett*, *Andr.* 230: *R.* v. *Sarmon*, 1 *Burr.* 516: *R.* v. *Wright*, 1 *Burr.* 543: *R.* v. *Philpotts*, 1 *C. & K.* 112; as, for instance, an indictment for contemptuous words spoken to a justice of peace, not stating that they were spoken to him whilst in the execution of his office. *R.* v. *Leafe*, *Andr.* 226: and an indictment against an overseer for misconduct in preparing electoral registers on the ground that the offence, if any, was not punishable on indictment. *R.* v. *Hall* [1891] 1 *Q. B.* 747: 60 *L. J.* (*M. C.*) 129. Where a defendant who has been committed for obtaining a chattel by false pretences, is indicted in one count for that offence, and in another count for obtaining another chattel by false pretences, without any authority obtained under 22 *&* 23 *Vict. c.* 17 (*The Vexatious Indictments Act*, 1859), or arising from the provisions of 30 *&* 31 *Vict. c.* 35 (which had not then been passed), to prefer such second charge, it was held that the judge at the trial should direct the second count to be quashed. *R.* v. *Fuidge*, *L. & C.* 390; 33 *L. J.* (*M. C.*) 74 (*ante*, p. 9). *See also R.* v. *Bradlaugh*, 15 *Cox*, 156 (*ante*, p. 10). A count of an indictment may also be quashed as being too general. On this ground a count under 32 *&* 33 *Vict. c.* 62 (*Debtors Act*, 1869), *s.* 13 (1) which alleged that the defendant did obtain credit from the prosecutor "by means of fraud other than by false pretences" without setting out the means, was quashed. *R.* v. *Bell*, 12 *Cox*, 37, *Montague Smith*, *J.* But the effect of *s.* 19 was not considered, and the case is virtually overruled by *R.* v. *Pierce*, 56 *L. J.* (*M. C.*) 85; 16 *Cox*, 213 (*C. C. R.*) (*ante*, p. 70). An indictment under 46 *&* 47 *Vict. c.* 51, which charged the defendant with "corrupt practices," at a parliamentary election, without setting out the nature of such corrupt practices as "bribery," etc., was quashed as being too general. *R.* v. *Norton*, 16 *Cox*, 59, *Pollock*, B., approved by the majority of the judges in *R.* v. *Stroulger*, 17 *Q. B. D.*

327; 55 *L. J.* (*M. C.*) 137 (*C. C. R.*). An indictment for obtaining money by false pretences was quashed by the judge at the trial, *after the case for the prosecution had closed*, on the judge discovering that the indictment did not contain the words "with intent to defraud." *R.* v. *James*, 12 *Cox*, 127, *Lush*, J. An indictment for libel was quashed, the expressions used in the alleged libel not being *primâ facie* libellous, and the indictment containing no averments or innuendoes showing that those expressions were intended to impute improper conduct to the prosecutor. *R.* v. *Yates*, 12 *Cox*, 233, *Quain*, J. So, the judge may in his discretion put the prosecutor to his election, or perhaps quash the indictment, where the defendant is charged with distinct felonies in different counts (*ante*, p. 86), or with different misdemeanors in different counts (*ante*, p. 91), or with several offences in the same count (*ante*, p. 82).

If the application be made on the part of the prosecution, the court will quash the indictment in all cases where it appears to be so defective that the defendant cannot be convicted on it, and where the prosecution appears to be *bonâ fide*, and not instituted from malicious motives, or for the purposes of oppression. If the prosecution be instituted by the attorney-general, an application to quash the indictment is never made upon the part of the prosecutor, because the attorney-general may himself enter a *nolle prosequi*, which will have the same effect (*see post*, s. 14). *R.* v. *Stratton*, 1 *Doug.* 239: *cf. R.* v. *Colling*, 2 *Cox*, 184, as to the procedure where the indictment has been removed by *certiorari*.

An application to quash may, it would seem, be made upon the part of the prosecution at any time before the defendant has been actually tried upon the indictment. *See R.* v. *Webb*, 3 *Burr.* 1468: 1 *W. Bl.* 460. But after judgment for the prisoner on demurrer, the indictment cannot be quashed at the instance of the prosecutor. *R.* v. *W. Smith*, 2 *M. & Rob.* 109. Where the application is made to the High Court, the rule is absolute in the first instance, if the defendant has not appeared and pleaded. *R.* v. *Stowell*, 1 *Dowl. N. S.* 320.

Before an application of this kind is made on the part of the prosecution, a new bill for the same offence must have been preferred against the defendant and found. *R.* v. *Wynn*, 2 *East*, 226. And when the court, upon such an application, orders the former indictment to be quashed, it is usually upon terms, namely, that the prosecutor shall pay to the defendant such costs as he may have incurred by reason of the former indictment. *R.* v. *Webb*, 3 *Burr.* 1468: 1 *W. Bl.* 460. *R.* v. *Dunn*, 1 *C. & K.* 730; that the second indictment shall stand in the same plight and condition to all intents and purposes that the first would have done if it were not quashed; *R.* v. *Glenn*, 3 *B. & Ald.* 373: *R.* v. *Webb*, *ubi supra*; and (particularly where there has been any vexatious delay upon the part of the prosecutor, *Id.*) that the name of the prosecutor be disclosed. *R.* v. *Glenn*, *ubi supra*.

Where the application is made upon the part of the defendant, the court have almost uniformly refused to quash an indictment, where it appeared to be for some enormous crime, such as treason or felony; *Com. Dig. Indictment* (*H.*); 2 *Hawk. c.* 25, *s.* 146; 1 *East*, *P. C.* 110: *R.* v. *Sheares*, 27 *St. Tr.* 255, 266; 1 *Chit. Cr. L.* 298: *R.* v. *Lynch* [1903] 1 *K. B.* 444: *R.* v. *Johnson*, 1 *Wils.* 325; or for forgery, perjury, subornation, or nuisance to highways. *R.* v. *Belton*, 1 *Salk.* 372; *Anon.*, 1 *Vent.* 369: *cf.* 1 *Sid.* 54; *R.* v. *Thomas*, 3 *D. & R.* 621: *R.* v. *Burnby*, 5 *Q. B.* 348; 13 *L. J.* (*M. C.*) 29: *R.* v. *Withers*, 4 *Cox*, 17. They have also refused to quash indictments for cheating, *R.* v. *Orbell*, 6 *Mod.* 42; for selling flour by false weights, *R.* v. *Crookes*, 3 *Burr.* 1841; for extortion or oppression, *R.* v. *Wadsworth*, 5 *Mod.* 13; for not executing a magistrate's warrant,

R. v. *Bailey*, 2 *Str.* 1211; against overseers for not paying money over to their successors, *R.* v. *King*, 2 *Str.* 1268, and the like. The court also will not quash indictments for not repairing highways or bridges, or for other public nuisances, *R.* v. *Belton*, 1 *Salk.* 372; *Anon.*, 1 *Vent.* 369: *R.* v. *Bishop*, *Andr.* 220: *R.* v. *Sutton*, 4 *Burr.* 2116, unless there be a certificate that the nuisance is removed; *R.* v. *Leyton*, *Cro. Car.* 584: *R.* v. *Wigg*, 2 *Salk.* 460; 1 *Ld. Raym.* 1165; nor will they quash an indictment for forcible entry, *R.* v. *Dyer*, 6 *Mod.* 96, unless, perhaps, where the possession has been afterwards given up.

But when it is made clear, either on the face of an indictment or by affidavit, that it has been found without jurisdiction, the court will quash it on motion by the defendant after plea pleaded; although in a doubtful case they will leave him to his writ of error, *R.* v. *Heane*, 4 *B. & S.* 947; 33 *L. J.* (*M. C.*) 115; or to his right to demur, *R.* v. *Brownlow*, 11 *A. & E.* 119, 127, 128; or to move in arrest of judgment. *R.* v. *Lynch* [1903] 1 *K. B.* 444: *R.* v. *Sheares*, 27 *St. Tr.* 359. It is said that a motion to quash will not be granted upon a trial of an indictment, at *nisi prius*, if the objections taken appear on the record. *R.* v. *Souter*, 2 *Stark.* (*N. P.*) 423. It is no ground for quashing an indictment for non-compliance with the provisions of the *Vexatious Indictments Act* (22 & 23 *Vict. c.* 17, *s.* 1), that the charge arising in one petty sessional division of a county, the committal is by justices sitting in and acting for another petty sessional division of the same county, such a committal being good in point of law. *R.* v. *Beckley*, 20 *Q. B. D.* 187; 57 *L. J.* (*M. C.*) 22.

Where two indictments against the same defendant, one for felony and the other for misdemeanor, had been removed into the court of Queen's Bench by *certiorari*, the court refused to quash them on an affidavit that they both related to the same transaction. *R.* v. *Stockley*, 3 *Q. B.* 238; 11 *L. J.* (*M. C.*) 105. *See ante*, p. 99.

Where an indictment is clearly bad in law the court may refuse to try it, and discharge the jury from giving a verdict, though there has been no demurrer or motion to quash. *R.* v. *Deacon*, *Ry. & M.* 27: *R.* v. *Tremearne*, *Id.* 147: *R.* v. *Hepper*, *Id.* 210: 1 *C. & P.* 608.

How.]—The application to quash an indictment is made to the court where the bill is found; except in cases of indictments at sessions or in other inferior courts, in which cases the application may be made to the High Court of Justice (K. B. D.) after removing the record by *certiorari*. But a court of quarter sessions has itself authority to quash an indictment found there, before plea pleaded. *R.* v. *Wilson*, 6 *Q. B.* 620; 14 *L. J.* (*M. C.*) 3.

It was formerly held that the application, if made upon the part of the defendant, must in all cases be made before plea pleaded; *Fost.* 231: *R.* v. *Rookwood*, *cas. temp. Holt*, 684; 13 *St. Tr.* 139; but this, while just and convenient, is not essential; *R.* v. *Wright*, 1 *Burr.* 543: *R.* v. *Chapple*, 17 *Cox*, 455; and where it is clear that an indictment has been found without jurisdiction, or has a substantial and apparent defect, the court will quash it on motion by the defendant *after* plea pleaded; *R.* v. *Heane*, 4 *B. & S.* 947; 33 *L. J.* (*M. C.*) 115; and even after the case for the prosecution had closed. *R.* v. *James*, 12 *Cox*, 127. Where an indictment had already, upon the application of the defendant, been removed into the court of King's Bench by *certiorari*, the court refused to entertain a motion by the defendant to quash the indictment after a forfeiture of his recognizance by not having carried the record down for trial; *Anon.*, 1 *Salk.* 380; and a motion to quash after *certiorari*, trial and conviction has been refused. *R.* v. *Marsh*, 6 *A. & E.* 236. A motion to quash an indictment for any

formal defect apparent on the face of it must be made before the jury are sworn, and upon its being made the court may amend the indictment, and proceed with the trial as if no such defect had existed. 14 & 15 *Vict. c.* 100, *s.* 25 (*ante*, p. 55).

SECT. 12.

INDICTMENT, WHEN AND WHERE TRIED.

When.]—Indictments for high treason or felony are usually tried at the same assizes or sessions at which they are preferred to and found by the grand jury. This practice accords with the requirements of *s.* 6 of the *Habeas Corpus Act*, 1679 (31 *Car.* 2, *c.* 2).

The same course is now pursued as to misdemeanors. By 14 & 15 *Vict. c.* 100, *s.* 27, "no person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or session of gaol delivery: provided always, that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, and upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent session without entering into any fresh recognizance for that purpose." This enactment abolished the old practice which entitled the defendant in cases of misdemeanor to postpone his trial till the next assizes or sessions. 4 *Bl. Com.* 351.

Postponement of trial.]—The trial may, however, be postponed to the next assizes or sessions at the instance of the prosecutor or the defendant, on showing to the court a sufficient cause for the delay, such as the sudden illness of the prisoner, or the unavoidable absence or illness of a necessary and material witness, the existence of prejudice in the jury, and the like. *See* 31 *Car.* 2, *c.* 2, *s.* 6: *R.* v. *D'Eon*, 3 *Burr.* 1513: *R.* v. *Jolliffe*, 4 *T. R.* 285: 2 *R. R.* 383: *R.* v. *Morphew*, 2 *M. & Sel.* 602: 15 *R. R.* 366: *R.* v. *Hunter*, 3 *C. & P.* 591: *R.* v. *Streek*, 2 *C. & P.* 413: *R.* v. *Stevenson*, 2 *Leach*, 546: *R.* v. *Chapman*, 8 *C. & P.* 558: *R.* v. *Owen*, 9 *C. & P.* 83: *R.* v. *Macarthy*, *C. & Mar.* 625: *R.* v. *Mobbs*, 2 *F. & F.* 18: *R.* v. *Langhurst*, 10 *Cox*, 353: *R.* v. *Taylor*, 11 *Cox*, 340: *R.* v. *Dripps*, 13 *Cox*, 25 (*Ir.*). In *R.* v. *Palmer*, 6 *C. & P.* 652, the Central Criminal Court postponed until the next session the presentment of a bill for arson to the grand jury, upon the ground of the illness of a witness sworn to be material, and refused to examine her deposition to ascertain whether she deposed to material facts. In *R.* v. *Heeson*, 14 *Cox*, 40, it was held by *Lush*, J., that the presentment of a bill to the grand jury cannot be postponed to the next assizes, on the ground that other and like charges may before that time be brought against the prisoner, and that if no bill was presented the prisoner would be entitled to her discharge on bail. His lordship said that the case of *R.* v. *Palmer*, *ubi supra*, was an application founded on the absence of a material witness for the crown, which was provided for by *s.* 6 of the *Habeas Corpus Act*, 1679 (31 *Car.* 2, *c.* 2). Where a witness for the Crown, on the ground of whose illness it is sought to postpone the trial, was not examined before the committing magistrate, the court will require an affidavit as to what the witness is expected to prove. *R.* v. *Savage*, 1 *C. & K.* 75: *R.* v. *Lawrence*, 4 *F. & F.*

901. In *R.* v. *Taylor*, 15 *Cox*, 8, *Baggallay*, L.J., postponed the presentment of a bill to the next assizes, on the ground that all the witnesses resided at a workhouse in which small-pox had broken out, and that their attendance at the assizes would be dangerous to the public, as they might carry infection, and admitted the prisoner to bail on his own recognizances to appear at the next assizes. The production by the prosecution at the trial of evidence not produced before the magistrate, and not communicated to the prisoner previously to the trial, may be ground for a postponement of the trial in the interests of the defendant. *R.* v. *Flannagan*, 15 *Cox*, 403. Where the defendant was indicted for having carnal knowledge of a girl under ten years old, and application by the prosecution for the postponement of the trial, with a view to the instruction of the girl, was refused. *R.* v. *Nicholas*, 2 *C. & K.* 216. It seems that the trial may be postponed, on the defendant's application, after the jury have been charged with the indictment, and before any evidence has been given in the case. *R.* v. *Fitzgerald*, 1 *C. & K.* 201. *See R.* v. *Downey*, 3 *Cr. & Dix* (*Ir.*) 314. Where the application is made by the defendant, he will be remanded and detained in custody until the next assizes or sessions; but where the application is made by the prosecutor, it is in the discretion of the court either to detain the defendant in custody or admit him to bail, or to discharge him on his own recognizances. *R.* v. *Beardmore*, 7 *C. & P.* 497: *R.* v. *Parish*, *Id.* 782: *R.* v. *Osborne*, *Id.* 799: *R.* v. *Bridyman*, *C. & Mar.* 271. After a bill has been found, if the offence be of a serious nature, or an absent witness has been kept out of the way by the defence, the court will not admit the prisoner to bail. *R.* v. *Chapman*, 8 *C. & P.* 558: *R.* v. *Guttridge*, 9 *C. & P.* 228: *R.* v. *Owen*, *Id.* 83: *R.* v. *Bowen*, *Id.* 509. *See Bail*, *ante*, pp. 110, 111.

Under the *Assizes Relief Act*, 1889 (52 & 53 *Vict. c.* 12), if a person committed for trial at sessions is not tried at the next sessions, the next court of assize may on his application try or discharge him or release him on bail, unless the delay is due to special reasons, such as the removal of the indictment by *certiorari*, or the impossibility of producing the witnesses for the crown. *S.* 3 (1) (3). If the next court of quarter sessions has not tried him before the next subsequent assizes, the judge of assize must try or discharge him. *S.* 3 (2).

S. 6 of the *Habeas Corpus Act*, 1679 (31 *Car.* 2, *c.* 2), provides for the release of persons committed for trial for high treason or felony if they are not indicted at the latest in the second term, assizes, or sessions after their committal.

Adjournment of trial.]—The powers as to adjourning a trial when once begun are dealt with under "*Trial*," *post*, p. 213.

Where.]—Indictments for felonies and misdemeanors are tried within the jurisdiction in which the offence is committed, or in which by some statute it may lawfully be tried (*ante*, p. 36, *et seq.*), and before the court in which the indictment is preferred, or into which it has been removed by *certiorari* or order of removal.

The following statement will show the courts competent to try any indictable offence, subject to the rules as to venue and national jurisdiction stated *ante*, pp. 36–51:—

High Court.]—The High Court of Justice (K. B. D.), as the successor of the court of King's Bench, has jurisdiction to try all indictable offences against the law of England. This jurisdiction is concurrent with that of the courts of oyer and terminer, or gaol delivery, or courts of quarter

sessions. The jurisdiction is not exercised except (1) Where the indictment is removed into the court by *certiorari*; (2) Where the indictment is found in the counties of London or Middlesex by a grand jury summoned under 35 & 36 *Vict. c.* 52, and *R. S. C.*, Jan. 15, 1903, made under *s.* 89 (3) of the *Local Government Act*, 1888 (*see post*, p. 195); (3) In the case of informations filed in the court (*see post*, p. 142). The court has special jurisdiction to try the following offences:—Wilful neglect or delay to deliver or transmit writs for the election of members of parliament (53 *G.* 3, *c.* 89, *s.*6); oppression and crimes by governors, etc., of colonies, or persons in public employment out of Great Britain (11 *W.* 3, *c.* 12; 42 *G.* 3, *c.* 85); offences by officials of the crown in India (10 *G.* 3, *c.* 47, *s.* 4; 13 *G.* 3, *c.* 63, *s.* 39; 21 *G.* 3, *c.* 70, *s.* 7). As to offences in India, *see Ilbert, Government of India*, 259, 265. None of these Acts appears to extend to treason or felony. *R.* v. *Shawe*, 5 *M. & Sel.* 403; 17 *R. R.* 370. Prosecutions under them have been rare. *See R.* v. *Jones*, 8 *East*, 31: *Picton's case*, 30 *St. Tr.* 225: *R.* v. *Eyre*, *L. R.* 3 *Q. B.* 487: *R.* v. *Turner* [1889] 24 *L. J. Newsp.* 466, 469, 479.

Courts of Assize, etc.]—Courts acting under a commission of assize only try such criminal offences as are sent to them for trial on a transcript of a record of the King's Bench Division of the High Court of Justice. *See Short & Mellor, Cr. Off. Pr.* 90, and *post, tit.* "*Certiorari.*" The ordinary circuit courts of oyer and terminer and gaol delivery have jurisdiction to try any offence triable at common law, or by statute, in the county or other district for which they are commissioned, and not specifically excluded from their jurisdiction. Courts of assize, oyer and terminer, and gaol delivery, were made part of the High Court by *ss.* 16, 29 of the *Judicature Act*, 1873: *R.* v. *Dudley*, 14 *Q. B. D.* 273, 560; *R.* v. *Parke* [1903] 2 *K. B.* 432, 436. Special commissions of oyer and terminer, etc., can be issued, but are now rare. The jurisdiction of these courts is concurrent with that of quarter sessions as to cases wherein the latter have jurisdiction.

Central Criminal Court.]—The Central Criminal Court is created by a commission of oyer and terminer and gaol delivery for the district allotted to it, and for the prisons appointed as its prisons (4 & 5 *W.* 4, *c.* 36, *ss.* 2-4; 44 & 45 *Vict. c.* 64, *s.* 2: *R.* v. *Boaler*, 17 *Cox*, 569: *R.* v. *Marshall*, 34 *L. J. Newsp.* 48). It has also a special admiralty jurisdiction (4 & 5 *W.* 4, *c.* 36, *s.* 22). The history of the court is to be found in 6 *St. Tr.*, *N. S.* 1135: and *see Leverson* v. *R.*, *L. R.* 4 *Q. B.* 394. Under the *Judicature Act*, 1873 (38 & 39 *Vict. c.* 66), *ss.* 16, 29, it has become a branch of the High Court. *R.* v. *Parke* [1903] 2 *K. B.* 432, 439, 442.

Courts of Quarter Sessions: 1. *Relation to courts of assize.*]—Where the quarter sessions of a county occur while the judge of assize is proceeding with the trial of prisoners in that county, after the grand jury have been discharged, it has been considered proper that the quarter sessions should not proceed with the trial of prisoners, but after disposing of their other business, should adjourn to a future day. *See* 9 *C. & P.* 790. But as the authority of a county or borough court of quarter sessions is not in law *determined or suspended* by the commission of assize, a trial at the sessions, during the continuance of the assizes in the same county, is valid in law. *Smith* v. *R.*, 13 *Q. B.* 738; 18 *L. J.* (*M. C.*) 207. As regards quarter sessions within the Central Criminal Court district, this rule is expressly recognized by 4 & 5 *W.* 4, *c.* 36, *s.* 21.

It was the duty of the sheriff under 3 *H.* 7, *c.* 3, and is the duty of the governor of the prison, to lay before the court a calendar of prisoners in

the prison for trial before it: 5 & 6 *W.* 4, *c.* 38, *s.* 3; 14 & 15 *Vict. c* 55, *s.* 19; and 28 & 29 *Vict. c.* 126, *s.* 62.

Some judges of assize have in recent years considered it their duty to deliver the gaols of the prisoners whom they found there, although the offences for which such prisoners had been committed were within the jurisdiction of quarter sessions, and although the prosecutor and his witnesses had been bound over to prosecute and give evidence at quarter sessions. The English statutes and decisions on this question are collected in *R.* v. *Clifford* [1895] 16 *New South Wales Rep. Law*, 12. By the *Quarter Sessions Act*, 1894 (57 & 58 *Vict. c.* 6), courts of quarter sessions have power to fix or alter the time for holding the then next quarter sessions, so as to prevent their clashing with the next assizes. The dates of borough quarter sessions are fixed by the recorder subject to the directions of the Home Secretary (45 & 46 *Vict. c.* 50, *s.* 165): *see Archbold, Q. S.* (5th ed.) 72, 75.

The *Assizes Relief Act*, 1889 (52 & 53 *Vict. c.* 12), provides (*s.* 1) that whenever any person has been committed to gaol or admitted to bail by a justice or justices under *s.* 22 or *s.* 25 of 11 & 12 *Vict c.* 42, charged with an indictable offence triable at quarter sessions, the persons bound over to prosecute and give evidence shall be bound over to attend for that purpose at the next practicable court of quarter sessions having jurisdiction to try such person for such offence, unless such justice or justices for special reasons think fit otherwise to direct; and where the persons are so bound over, the person charged shall be tried at the said court of quarter sessions, and a court of oyer and terminer or general gaol delivery shall not be required to deliver such person from gaol, unless the High Court of Justice shall by order direct that such person shall be indicted and tried at a court of oyer and terminer or general gaol delivery having jurisdiction to try him for such offence. *Sub-s.* 2 of *s.* 1, prescribes the procedure where the High Court has made the order mentioned in *sub-s.* 1. *S.* 3 prescribes the course of procedure where a prisoner having been committed to gaol on a charge for an indictable offence, and persons having been bound over to prosecute and give evidence at quarter sessions, the prisoner is not tried at those sessions.

2. *Jurisdiction.*]—The present form of the Commission of the Peace (prescribed by Order in Council of Feb. 22, 1878, and printed in *Statutory Rules and Orders Revised* (ed. 1904), *vol.* 1, *tit.* "*Clerk of the Crown*"), authorizes the justices to inquire "of all and all manner of crimes and trespasses, and all and singular other offences of which the justices of our peace may or ought lawfully to inquire," . . . except in cases of difficulty, which are to be transmitted to the assizes, "and to hear and determine all and singular the crimes, trespasses, and offences aforesaid according to the laws and statutes of our realm, as in the like case it has been accustomed or ought to be done." As to the jurisdiction of courts of quarter sessions under the commission of the peace, *see Archbold, Q. S.* (5th ed.) 269: *Keen.* v. *R.*, 10 *Q. B.* 923: 2 *Cox*, 341. A court of county or borough quarter sessions has jurisdiction to *try* any indictable offence except those in the annexed list. This jurisdiction rests on the *Quarter Sessions Act*, 1842 (5 & 6 *Vict. c.* 33, *s.* 1) except in the cases in italics, which depend on the particular statutes specified:—

1. Treason, or misprision of treason;
2. Murder;
3. Capital felony, or any felony, *except burglary* (59 & 60 *Vict. c.* 57), which when committed by a person not previously convicted of felony, is punishable by *penal servitude for life* (20 & 21 *Vict. c.* 3, *ss.* 2, 6);

4. Offences against the King's title, prerogative, person, or government, or against either House of Parliament;

5. Offences subject to the penalties of *præmunire*;

6. Blasphemy, and offences against religion;

7. Administering and taking unlawful oaths;

8. Perjury and subornation of perjury;

9. Making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor;

10. Forgery;

11. *Offences against the False Personation Act*, 1874 (37 & 38 *Vict.* c. 36, *s.* 3);

12. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern;

13. *Offences against s.* 9 *of the Night Poaching Act*, 1828 (9 *G.* 4, *c.* 69);

14. Bigamy and offences against the laws relating to marriage;

15. Abduction of women and girls, *and indictable offences against the Criminal Law Amendment Act*, 1885 (48 & 49 *Vict.* c. 69, *s.* 17);

16. Endeavouring to conceal the birth of a child;

17. Composing, printing, or publishing blasphemous, seditious, or defamatory libels;

18. Bribery [except bribery of and by members, etc., of corporations, within 52 & 53 *Vict.* c. 69, *s.* 6];

19. *Corrupt practices at parliamentary or municipal elections, including elections of county, district, and parish councils, and of boards of guardians* (17 & 18 *Vict.* c. 102, *s.* 10; 46 & 47 *Vict.* c. 51, *s.* 53; 47 & 48 *Vict.* c. 70, *ss.* 30, 35, & 36, *sch.*; 51 & 52 *Vict.* c. 41, *s.* 75; 56 & 57 *Vict.* c. 73, *s.* 48), *or elections in the city of London* (47 & 48 *Vict.* c. 70, *s.* 35; 50 & 51 *Vict.* c. *xiii.*); *or of metropolitan borough councils* (62 & 63 *Vict* c. 14);

20. Unlawful combinations and conspiracies, except conspiracies and combinations to commit any offence which the justices or recorder respectively have or has jurisdiction to try when committed by one person;

21. Stealing or fraudulently taking, or injuring or destroying, records or documents belonging to any court of law or equity, or relating to any proceeding therein;

22. Stealing, or fraudulently destroying or concealing, wills of testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate, or any interest in lands, tenements, or hereditaments;

23. *Misdemeanors against ss.* 77–86 *of the Larceny Act*, 1861 (which relate to frauds by persons entrusted with powers of attorney, factors, agents, trustees, and directors and officers of public companies, etc.), 24 & 25 *Vict.* c. 96, *s.* 87;

24. *Misdemeanors against the Larceny Act*, 1901 (1 *Ed.* 7, *c.* 10: fraudulent conversion of property by persons entrusted therewith);

25. *Offences against the Official Secrets Act*, 1889 (52 & 53 *Vict.* c. 52, *s.* 6 (3)).

Offences against the bankruptcy laws are now triable at quarter sessions: *see* 32 & 33 *Vict.* c. 62, *s.* 20, and 37 & 38 *Vict.* c. 96 (*Stat. Law Rev.*), which repealed the provision to the contrary in 5 & 6 *Vict.* c. 38, *s.* 1.

The jurisdiction of quarter sessions to try a person for the common law misdemeanor of attempting to commit suicide, is not taken away by 24 & 25 *Vict.* c. 100, *ss.* 11–16, which render an attempt to commit murder a felony, punishable by penal servitude for life; for attempting to kill one's self is not an attempt to commit murder within the meaning of that

statute. *R.* v. *Burgess*, *L. & C.* 258; 32 *L. J.* (*M. C.*) 55. Where an indictment charged that the defendants conspired by divers false pretences to defraud the prosecutor of his money; and it was objected that the facts ought to have been set out, so as to show that the false pretences were within the jurisdiction of the sessions, by which the indictment had been tried, the court of Queen's Bench held that, after verdict it must be taken that the jury had found the defendants guilty on facts, proving a conspiracy to defraud by such false pretences as were cognizable by the sessions. *Latham* v. *R.*, 5 *B. & S.* 635; 33 *L. J.* (*M. C.*) 197.

A court of quarter sessions cannot try an indictment against a corporation. *See ante*, p. 11; *post*, p. 130.

Courts of quarter sessions have power to transmit to the assizes for trial indictments found before them which they have no jurisdiction to try, or which from the nature of the charge should more properly be tried at assizes. The power arises under the commission of the peace, and is preserved by *s.* 5 of the *Assizes Relief Act*, 1889 (52 *&* 53 *Vict. c.* 12). It is specifically given as to quarter sessions within the Central Criminal Court district by 4 *&* 5 *W.* 4, *c.* 36, *s.* 19. These powers are distinct from the procedure by *certiorari*, *post*, p. 129.

Indictments found at the sessions and transmitted by the justices to the assizes must be tried at the assizes, although they be not moved by *certiorari*. *R.* v. *Wetherell*, *R. & R.* 331. An indictment was found at quarter sessions against the defendant, who was, upon a certificate of such finding, taken before a justice under 11 *&* 12 *Vict. c.* 42, *s.* 3, and bound by recognizances to appear and plead at the *assizes*. The indictment was not transmitted to the assizes, but remained in the custody of the clerk of the peace. It was held that the transmission of the indictment to the assizes was in the discretion of the justices, and that the judge of assize had no power to order such transmission, and that the indictment having been found at sessions and not transmitted for trial at the assizes, it could not be tried at the assizes. Another indictment against the defendant for the same offence having however been found by the grand jury at the assizes, it was held, that the defendant being bound by the above-mentioned recognizance, must be called upon it to plead to such second indictment. *R.* v. *Wildman*, 12 *Cox*, 354, *Keating*, J.

Change of place of trial.]—The King's Bench Division of the High Court of Justice has jurisdiction to change the place of trial of any felony or misdemeanor, whenever it is necessary for the purpose of securing, so far as possible, a fair and impartial trial. *R.* v. *Holden*, 5 *B. & Ad.* 347, 354, *Denman*, L.C.J.: *and see R.* v. *Boughton* [1895] 2 *Ir. Rep.* 386. For this purpose a writ of *certiorari* must issue to remove the indictment into the King's Bench Division, unless the court or a judge think fit to direct the trial to be held at the Central Criminal Court, under 19 *&* 20 *Vict. c.* 16, *post*, p. 136. Indictments may be removed from the Crown Court of Assize without a *certiorari*, because the court is made part of the High Court by the *Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66, *ss.* 16, 29. *R.* v. *Dudley*, 14 *Q. B. D.* 273, 560; 64 *L. J.* (*M. C.*) 32. An *order*, however, for their removal is requisite, which is obtained in the same way, and is subject to the same conditions, *certiorari*. *See Cr. Off. Rules*, *rr.* 28–34, *post*.

Sect. 13.

CERTIORARI.

The writ of *certiorari* is an original writ, usually issuing out of the King's Bench Division, when the crown would be *certified* of any record in any other court of record. *Fitz. N. B.* 245 *a.*; 36 & 37 *Vict. c.* 66, *s.* 34. **It may also, under** 4 & 5 *W.* 4, *c.* 36, *s.* 16, **be issued by the judges of the High Court who are in the commission of the Central Criminal Court, and by the recorder of the city of London, to remove from courts of quarter sessions having jurisdiction within the Central Criminal Court district, indictments found in such courts for offences cognizable by the Central Criminal Court under the Act; and may be issued under** 5 & 6 *Vict. c.* 38, *s.* 2, **by a judge of assize in respect of indictments found as taken before courts of quarter sessions (for any county or borough within his commission) in respect of offences which they have no jurisdiction to try (*ante*, p. 126). There seems, however, to be no power to remove by *certiorari* the order of a justice committing a person for trial for an indictable offence.** *See R.* v. *Roscommon. Justices* [1894] 2 *Ir. Rep.* 158. **The power to remove by *certiorari* an indictment found at quarter sessions is not affected by** 52 & 53 *Vict. c.* 12 (*Assizes Relief Act*, 1889). *See s.* 5. **The writ is directed in the King's name to the judges or officers of inferior courts, requiring them to return the records of a certain indictment or inquisition depending before them, in order that the party may have the benefit of a trial in the King's Bench Division, or before such justices as his Majesty shall assign to hear and determine the cause. For the removal of indictments into the King's Bench Division the writ is sued out of the King's Bench Division and issued from the crown office: that division of the High Court, as successor to the old court of King's Bench, having a general superintendence over all other courts of criminal jurisdiction, whether ancient or newly created (2 *Hawk. c.* 27, *s.* 22), and being the sovereign ordinary court of justice in criminal causes.** 4 *Bl. Com.* 320: 36 & 37 *Vict. c.* 66, *s.* 34. **This writ is frequently used in order the better to consider and determine the validity of indictments and the proceedings thereon, and to prevent a partial and insufficient trial, which it is apprehended would take place in the original jurisdiction.** 1 *Chit. Cr. L.* 371; 2 *Hale*, 210. **The effect of the writ is to remove all proceedings such as are described therein, which have taken place between the *teste* and return, although they may have been commenced after the *teste*.** *R.* v. *Battams*, 1 *East*, 298; 2 *Hawk. c.* 27, *s.* 73. **It may be applied for before or after the finding of any indictment.** 60 *G.* 3 & 1 *G.* 4, *c.* 4, *s.* 4. **The writ is of no effect unless it is delivered to the court below before the time for its return has expired.**

Form of the writ.]—**The following is the form of the writ of *certiorari* to remove an indictment into the King's Bench Division, addressed to the justices of quarter sessions:—**

Edward the Seventh, by the grace of God of the United Kingdom of Great Britain and Ireland and of the British dominions beyond the seas King defender of the faith, to the keepers of our peace and our justices assigned to hear and determine divers crimes, trespasses, and other offences committed within our county of D., *and to every of them, greeting: We, being willing for certain reasons that all and singular indictments of whatsoever felonies* [*or misdemeanors*] *whereof* A. B. *is* [if indictment not yet preferred, add, *or may be*] *before you indicted (as it said) be determined before us in the King's*

Bench Division of our High Court of Justice, and not elsewhere, do command you and every of you that you or one of you do forthwith send under your seals, or the seal of one of you, before us in our said court at the Royal Courts of Justice, London, all and singular the said indictments, with all things touching the same, by whatsoever name the said A. B. *may be called therein, together with this our writ, that we may cause further to be done thereon what right of and according to the law and custom of England we shall see fit to be done. Witness, Richard Everard, Baron Alverstone, at the Royal Courts of Justice, London, the day of , in the year of our Lord,* 190 .

The writ must bear the following indorsements:—

By order of court [or *of Mr. Justice , as the case may be*].
At the instance of the prosecutor [*or* defendant].
Recognizance by the prosecutor [*or* defendant] *in the sum of £ , with* [*two*] *sureties in the sum of £ each.*
This writ was issued by E. F., of , agent for C. D., of , solicitor for the prosecutor [*or defendant*].

[For other forms of the writ, *see Appendix to Cr. Off. Rules,* 1886, *Forms* 7, 8, & 9].

In what cases granted.]—The writ of *certiorari* is demandable as of right by the crown (*R.* v. *Eaton,* 2 *T. R.* 89; 1 *R. R.* 436; *R.* v. *Thomas,* 4 *M. & S.* 442; 16 *R. R.* 520), and issues as of course where the attorney-general or other officer of the crown applies for it, either as prosecutor or as conducting the defence on behalf of the crown; *Id.*: *R.* v. *Lewis,* 4 *Burr.* 2456, 2458; and this, even though the *certiorari* be expressly taken away by statute; for, as a general rule, the crown is not bound by statute unless expressly named therein: *Hardcastle on Statutes* (3rd ed.) pp. 383-402. (For form of attorney-general's fiat for application for *certiorari, see Appendix to Cr. Off. Rules,* 1886, *Form* 23.) By analogy to this rule, the *certiorari* was formerly granted almost of course to private prosecutors, who were said to represent the crown, at whose suit all indictments are preferred. But now, "no indictment, except indictments against bodies corporate not authorized to appear by solicitor in the court in which the indictment is preferred, shall be removed into the King's Bench Division, either at the instance of the prosecutor or of the defendant (other than the attorney-general acting on behalf of the crown), unless it be made to appear to the court or a judge, by the party applying, that a fair and impartial trial of the case cannot be had in the court below, or that some question of law of more than usual difficulty and importance is likely to arise upon the trial, or that a view of the premises in respect whereof any indictment is preferred, or a special jury, may be required for a satisfactory trial of the same." *Cr. Off. Rules,* 1886, *r.* 29, which supersedes 16 & 17 *Vict c.* 30, *s.* 4 (*rep.*), as to which *see R.* v. *Gate Fulford,* 6 *Cox,* 510. The reason for the provision as to bodies corporate is that they cannot appear by attorney in courts of oyer and terminer, or gaol delivery or at sessions of the peace. *R.* v. *Birmingham and Gloucester Rail. Co.,* 9 *C. & P.* 469, *Parke,* B.

The difficult points of law likely to arise must be specifically pointed out in order to induce the court to grant a *certiorari,* and must be stated in the rule. *R.* v. *Joule,* 5 *A. & E.* 539; *R.* v. *Josephs,* 8 *Dowl.* 178. If it be clearly made out that there is a fair and reasonable probability of partiality and prejudice in the jurisdiction within which the indictment

would otherwise be tried, the *certiorari* will be granted: *R.* v. *Lewis*, 2 *Str.* 704: *R.* v. *Fawle*, 2 *Ld. Raym.* 1452; *R.* v. *Waddington*, 1 *East*, 167; 6 *R. R.* 238: *R.* v. *Penprase*, 4 *B. & Ad.* 573; 1 *Nev. & M.* 312: *R.* v. *Hunt*, 3 *B. & Ald.* 444: *R.* v. *Holden*, 5 *B. & Ad.* 347; 2 *Nev. & M.* 167: *R.* v. *Lever*, 1 *Wil., Wol. & Hod.* 35: *R.* v. *Palmer*, 5 *E. & B.* 1024: as where a member of the court of magistrates was interested in the result of the trial: *R.* v. *Jones*, 2 *Har. & Wol.* 293 (but *see R.* v. *Fellows*, 1 *Har. & Wol.* 648; 4 *Dowl.* 607, *contra*): or where a magistrate, in the commission for the county, was indicted at the quarter sessions and circulated among the other magistrates a printed account of the charges. *R.* v. *Grover*, 8 *Dowl.* 325. So where the prosecutor or his solicitor is sheriff or under-sheriff, and could attend the grand jury when they considered the bill (*R.* v. *Webb*, 2 *Str.* 1068), the writ will be granted. Under some circumstances the court will grant a *certiorari* for the removal of an indictment for conspiracy: *R.* v. *Wilks*, 5 *E. & B.* 690; 25 *L. J.* (*Q. B.*) 47; *R.* v. *Rowlands*, 17 *Q. B.* 671; 2 *Den.* 364; 21 *L. J.* (*M. C.*) 81, even where one of several defendants makes the application without the consent of the others. *R.* v. *Foulkes*, 1 *L. M. & P.* 720; 20 *L. J.* (*M. C.*) 196; *R.* v. *Boxall*, 5 *A. & E.* 513: *R.* v. *Probert*, *Dears.* 30: *R.* v. *Jewell*, 7 *E. & B.* 140; 26 *L. J.* (*Q. B.*) 177. In those cases the writ was allowed on the application of one of several defendants, who was a responsible person, he entering into a recognizance to pay costs in case of the conviction of himself or of any of the other defendants. *See Cr. Off. Rules*, 1886, *r.* 30, *post*, pp. 133, 134.

In what cases refused.]—An indictment for not repairing bridges and the highways at the end thereof, where the inhabitants of the county are chargeable with the repair of the same, is not removable by *certiorari*, out of the county where such bridges or highways lie. 1 *Anne*, *st.* 1, *c.* 18, *s.* 5: *R.* v. *Hamworth*, 2 *Str.* 900: *R.* v. *Cumberland*, 6 *T. R.* 194; 3 *R. R.* 149; 3 *B. & P.* 354 (*H. L.*). But this Act cannot apply where the indictment is of the inhabitants of the county from which the petty jury comes. *See Short & Mellor*, *Cr. Off. Pr.* 205. An indictment against any person for keeping a bawdy-house, gaming-house, or other disorderly house is not removable by *certiorari* at the instance of the defendant. 25 *G.* 2, *c.* 36, *s.* 10. But where an indictment for keeping a disorderly house had been removed from the Middlesex Sessions to the Central Criminal Court, under 4 *& 5 W.* 4, *c.* 36, *s.* 16, the court granted a *certiorari* to remove the indictment into the Queen's Bench at the instance of the defendant, holding that where the indictment has been once removed by the prosecutor, 25 *G.* 2, *c.* 36, *s.* 10, which takes away the writ of *certiorari*, does not apply. *R.* v. *Brier*, 14 *Q. B.* 568; 19 *L. J.* (*M. C.*) 121. If an indictment charging an offence in which the *certiorari* is taken away by statute contains counts charging an offence where it is not taken away, the writ may still issue. *R.* v. *Saunders*, 5 *D. & R.* 611.

The writ is rarely if ever issued to remove an indictment after judgment in the court below except for the purpose of carrying the judgment into execution (*Short & Mellor*, *Cr. Off. Pr.* 93), or as a step ancillary to the grant of a writ of error (*post*, *ch. viii. sect.* 2), which is the proper mode of questioning the legality of the judgment on an indictment: *R.* v. *Dixon*, 6 *Mod.* 61, cited in *R.* v. *Nichols*, 13 *East*, 412 *n.*, 417 *n.*; 12 *R. R.* 486: *R.* v. *Pennegoes*, 1 *B. & C.* 142; 25 *R. R.* 334: *R.* v. *Lucas*, 2 *Fox & Sm.* (*K. B., Ir.*) 30; *ex parte Collins*, *Q. B. D.*, Dec. 19, 1899; 34 *L. J. Newsp.*, 132.

In *Short & Mellor*, *Cr. Off. Pr.* 93 *n.*, reference is made to a suggestion in an unreported case of *R.* v. *Boaler* (1888), that the writ might lie where

error would not. But in *R.* v. *Boaler* [1892] 17 *Cox*, 569, it was held that *certiorari* will not go to the Central Criminal Court to bring up an indictment after judgment. In *R.* v. *Seton*, 7 *T. R.* 373; 4 *R. R.* 466, the court quashed a *certiorari* granted before, but not lodged till after judgment in an indictment for misdemeanor, and in *R.* v. *Unwin*, 7 *Dowl.* 578 a *certiorari* was refused in a case where the defendant had surreptitiously secured an acquittal by failing to give the notice of trial usual at the sessions where he was indicted.

The court can grant, but usually refuses to issue, the writ for removal of an indictment for felony or misdemeanor after verdict and before judgment. 2 *Hawk. c.* 27, *s.* 28: 1 *Chit. Cr. L.* 380: *R.* v. *Oxfordshire*, 13 *East*, 411; 12 *R. R.* 486: *R.* v. *Garside*, 2 *A. & E.* 266: *R.* v. *Nichols*, *ubi supra*: *R.* v. *Boater*, 17 *Cox*, 569.

The court will not, ordinarily, at the prayer of the defendant, grant a *certiorari* for the removal of an indictment for perjury, forgery at common law, or other heinous misdemeanor where the delay would tend to defeat the prosecution, 2 *Hawk. c.* 27, *s.* 28: *R.* v. *Pusey*, 2 *Str.* 717; or for murder, *R.* v. *Mead*, 3 *D. & R.* 301: *R.* v. *Thomas*, 4 *M. & Sel.* 442; 16 *R. R.* 520; unnatural crime, *R.* v. *Holden*, 5 *B. & Ad.* 347; 2 *Nev. & M.* 167, or the like. *See R.* v. *Penprase*, 4 *B. & Ad.* 573; 1 *Nev. & M.* 312. So the court will not, in general, except by the consent of the prosecutor, remove an indictment from a court of competent jurisdiction where any of the judges of the High Court preside. *See R.* v. *Kingston* (*Duchess*), 1 *Cowp.* 283; 20 *St. Tr.* 355. The writ will not usually be granted to remove an indictment from the Central Criminal Court, or any other court in which judges of the Supreme Court sit, on the ground that a difficult question of law will arise: *R.* v. *Templar*, 1 *Nev. & P.* 91: *R.* v. *Wartnaby*, 4 *A. & E.*, 435; and *see Short & Mellor, Cr. Off. Pr.* 96.

Time when granted.]—The writ may be sued out in cases of misdemeanor, though at the time the indictment is not *in esse*; and it is sufficient if the indictment be found at any period before the writ is returnable. 60 *G.* 3, *& 1 G.* 4, *c.* 4, *s.* 4. The proper time for either party to apply for a *certiorari* is before issue joined on the indictment: 1 *Chit. Cr. L.* 380; but the *certiorari* is not too late, if delivered before the jury are sworn to try the case. 60 *G.* 3, *c.* 4, *s.* 3 (*rep.*): *see R.* v. *Passman*, 2 *Dowl.* 529; 1 *A. & E.* 603.

Mode of obtaining the writ.]—In all cases (except where the attorney-general applies for the writ on behalf of the crown) the application must be founded upon affidavit, suggesting some adequate ground for removal. *See ante*, p. 130.

The following form of an affidavit in support of an application for a *certiorari* to remove an indictment into the King's Bench Division, is given in *Appendix to Cr. Off. Rules*, 1886, *form* 2:—

In the High Court of Justice,
King's Bench Division.
I, A. B., *of, etc. make oath and say as follows:*
1. *That at the general quarter sessions of the peace holden at in and for the county of , on or about the day of , a bill of indictment was preferred to the grand jury who returned a true bill* [or that it is intended to prefer a bill of indictment, as the case may be].
2. *That in my judgment and belief, nice and intricate questions or points*

of law will arise on the trial of the said indictment, which will render it important that the same should be tried before one of the learned judges of the High Court of Justice, and particularly, that a question will, as I am advised, be raised as to whether [state the particular question that will arise, or that a question will arise upon the construction of an Act of Parliament].

3. *That, in my judgment and belief, it will be material and necessary that the said indictment should be tried by a special jury, which cannot be had, unless the said indictment be removed into this honourable court. And that I* [or as the case may be] *will cause a special jury to be had if the said indictment shall be so removed.*

4. *That I verily believe that it will be important and necessary that a view of the place and premises in question should be had by some of the jurymen to be impannelled, to try the issue joined upon the said indictment, which I am informed and believe can only be had by the said indictment being removed into this honourable court.*

[NOTE.—Where the view is to be had in the county where the bill is preferred *certiorari is unnecessary. See R.* v. *Martin, L. R.* 1 *C. C. R.* 378; 41 *L. J.* (*M. C.*) 113, *and see post*, p. 212.]

5. *That, by reason of* [here state what has occurred to create prejudice], *I verily believe that strong prejudices have been created in the minds of some of the justices who may preside at the sessions upon the trial of the said indictment. And also among that class of persons in the said place, from whom the common jurors are selected for the trials at the said sessions, and some of whom are likely to be called upon the jury for the trial of the said indictment, unless the same be removed into this honourable court. And therefore, that a fair and impartial trial of the same cannot be had at the said sessions.*

6. *That* [add any other allegation which may be likely to induce the court or a judge to grant the writ of *certiorari*, consistent with the facts and circumstances of the case required to be removed.]

[Omit any of the foregoing allegations which may not be applicable to the case.]

The affidavits, if sworn in England, must be sworn before a judge, district registrar, commissioner to administer oaths, *see* 52 *&* 53 *Vict. c.* 10 (*Commissioners for Oaths Act*, 1889), first or second class clerk in the Crown Office Department, or officer empowered under the Rules of the Supreme Court to administer oaths. *Cr. Off. Rules*, 1886, *r.* 9. As to the persons before whom affidavits may be sworn out of England, *see Id. r.* 11. The affidavits must be entitled, "In the High Court of Justice, King's Bench Division." *Id. r.* 7. "Every application for a writ of *certiorari*, or for an order to remove an indictment found at the assizes into the King's Bench Division, at the instance of any person other than the attorney-general on behalf of the crown, shall, during the sittings, be made to a divisional court of the said division by motion for an order *nisi* to show cause, and in the vacation or when there is no sitting of a divisional court to a judge at chambers for a summons to show cause: Provided that where, from special circumstances, the court or a judge may be of opinion that the writ should issue forthwith, the order may be made absolute, or an order be made in the first instance, either *ex parte* or otherwise, as the court or judge may direct." *Cr. Off. Rules*, 1886, *r.* 28. No summons to show cause before a judge at chambers shall be issued for a writ of *certiorari* without the leave of a judge upon an *ex parte* application. *Id. r.* 305. For forms of summonses at chambers, *see Appendix to Cr. Off. Rules*, 1886, *Forms* 3 *&* 5, and for form of judge's order for *certiorari* to remove indictment into the King's Bench Division, *see Id. Form* 4; and

for form of judge's order to remove indictment from assizes or Central Criminal Court into the King's Bench Division, *see Id. Form* 6.

Allowance.]—"No writ of *certiorari* for the removal of an indictment, or order to remove an indictment found at the assizes, shall be allowed by the court to whom it may be directed, unless the person (other than the attorney-general acting on behalf of the crown and the prosecutor of an indictment against a body corporate) at whose instance it has been issued shall have entered into a recognizance by himself, if he is the prosecutor, with sufficient sureties, conditioned on the return of such writ to make up the record, and give notice of trial and proceed to trial of the indictment at the next assizes to be held for the county wherein the indictment was found, or if in London or Middlesex forthwith at the sittings of the High Court of Justice, and to pay the costs of the defendant subsequent to the removal of the indictment, if he be acquitted; and if the party removing is the defendant, until he shall have entered into a recognizance with sufficient sureties conditioned to appear and plead (and in cases of felony in open court) to the said indictment, and give notice of trial, and proceed to trial of the indictment at the next assizes to be held for the county wherein the indictment was found, or if in London or Middlesex forthwith at the sittings of the High Court of Justice, and personally to appear from day to day at the trial of such indictment, and if necessary in the King's Bench Division of the High Court of Justice, and not depart till he shall be discharged by the court, and to pay the costs of the prosecution subsequent to the removal of the indictment, if the defendant or any of the defendants, if more than one, be convicted." *Cr. Off. Rules*, 1886, *r.* 30. A *certiorari* obtained by one of several co-defendants removes the indictment as to all. *R.* v. *Boxall*, 4 *A. & E.* 513.

This rule generalizes a provision made as to certain misdemeanors by 21 *Jas.* 1, *c.* 8, *s.* 4, and as to appeals from judgments and orders of quarter sessions by 5 *G.* 2, *c.* 19, *ss.* 2, 3.

On removing an indictment containing seven counts into the High Court, the prosecutors bound themselves to pay the defendant's costs if she were acquitted on the indictment. Defendant having been acquitted on five out of the seven counts, it was held that this was not an acquittal upon the indictment within the meaning of the recognizance, and that she could not claim her costs of the counts on which she had been acquitted. *R.* v. *Bayard* [1892] 2 *Q. B.* 181; 17 *Cox*, 502.

"If the person at whose instance any writ of *certiorari* for the removal of an indictment, or order to remove an indictment found at the assizes, shall have been awarded, shall not before the allowance thereof enter into a properly conditioned recognizance, the court to which such writ or order may be directed shall proceed to the trial of the indictment, as if such writ or order had not been awarded." *Cr. Off. Rules*, 1886, *r.* 31.

The "allowance" of the writ mentioned in this rule means by the person to whom it is directed. *R.* v. *Abergele*, 5 *A. & E.* 795: *R.* v. *Dunn*, 8 *T. R.* 217: *R.* v. *Jones*, 9 *Dowl.* 504.

When the *certiorari* is granted, the divisional court or judge at chambers on granting it fixes the amount of the recognizances (to be entered into before a judge, or a justice of the county or place in which the party resides), and the amount of the recognizances is indorsed on the writ. By *r.* 30, *supra*, the prosecutor of an indictment against a body corporate is not bound to enter into recognizances on the removal of an indictment by *certiorari*, because the corporation can plead only in the High Court. *R.* v. *Birmingham and Gloucester Rail. Co.*, 9 *C. & P.*

469. The rule in this respect follows the construction put upon 16 & 17 *Vict. c.* 30, *s.* 5 (*rep.*), in *R.* v. *Mayor, etc., of Manchester*, 7 *E. & B.* 453; 26 *L. J.* (*M. C.*) 65. As to the mode of entering into recognizances when they are required from a parish, etc., or other such large *quasi* corporate body, *see R.* v. *Abergele*, 5 *A. & E.* 795. When they are required from a corporation, it is the practice to allow one of the members of the corporation, on behalf of himself and the rest of the corporation, to enter into the recognizance, with such sureties as may be required. *Short & Mellor, Cr. Off. Pr.* 17.

For the forms of recognizances by prosecutor and defendant on *certiorari* to remove indictment into the King's Bench Division, *see Cr. Off. Rules*, 1886, *Forms* 10, 11.

The following is the form of the rule to compel the defendant to put in better bail:—

The King against *A. B.* — *Unless the defendant shall put in better bail within four days next after notice of this rule to him or his attorney given, let a* procedendo *issue.*

ALVERSTONE.

The recognizance must be lodged, together with the writ, with the clerk of the peace or clerk of assize, as the case may be; and after they are lodged all proceedings upon the indictment in the court below are stayed.

"All recognizances to be entered into for the allowance of any writ of *certiorari*, or order to remove an indictment found at the assizes, or any writ of *certiorari* for the removal of any order, conviction, inquisition, or other proceeding removed thereby, shall be certified into the King's Bench Division with the writ of *certiorari* or order of removal." *Cr. Off. Rules*, 1886, *r.* 32. The recognizance when acknowledged must be transmitted to and filed in the Crown Office. *Cr. Off. Rules*, 1886, *r.* 123.

Where a defendant has entered into insufficient recognizances, the court will discharge them, and compel him to give better security. *R.* v. *Hooper*, 1 *Chit. Rep.* (*K. B.*) 491.

Return to writ.]—The return is made by indorsing on the writ of *certiorari* the following memorandum:—*The execution of this writ appears by the schedules hereunto annexed. The answer of A. B., Esquire, one of the keepers of the peace and justices within mentioned.* This memorandum must be signed and sealed by A. B. The schedules mentioned in it as thereunto annexed, are the indictment and other documents to be returned in pursuance of the *certiorari*. *See Appendix to Cr. Off. Rules*, 1886, *Form* 21.

Sending back the record.]—If the writ of *certiorari* has been improvidently issued, *e.g.*, if it appears to have been obtained by misrepresentation of the facts, the court (or a judge at chambers, *R.* v. *Scaife*, 18 *Q. B.* 773; 2 *Den.* 513; 3 *C. & K.* 211; 21 *L. J.* (*M. C.*) 221) may award a writ of *supersedeas* to the *certiorari* and a *procedendo* to carry back the indictment, and so send back the record to the original jurisdiction, there to be dealt with as if no *certiorari* had issued. *See* 1 *Burn's J.* 648 (30th ed.); 4 *Co. Inst.* 67. The same course may be taken if the defendant neglects to perform the condition of the recognizance, or if bad or insufficient bail be put in. *R.* v. *Jones*, 9 *Dowl.* 504: *R.* v. *Dunn*, 8 *T. R.* 217; *R.* v. *Abergele*, 5 *A. & E.* 795; *Com. Dig. Certiorari* (*G.*); 1 *Chitty Cr. L.* 397. And where the defendants in a case originally removed from quarter

sessions by *certiorari*, having obtained a rule in the Queen's Bench for a new trial, neglected to bring down the record and proceed to trial at the assizes, a writ of *procedendo* was awarded, and the record was sent back to sessions, where the parties were tried and sentenced to transportation. *R.* v. *Scaife, ubi supra.*

For the form of writ of *supersedeas* to *certiorari* and *procedendo* to carry back indictment, *see Appendix to Cr. Off. Rules*, 1886, *Form* 169.

Trial at Central Criminal Court of indictments removed by certiorari.]—By 19 & 20 *Vict. c.* 16, *s.* 1 ("*Palmer's Act*"), the court of King's Bench in term time, or any judge thereof in vacation, is authorized, whenever any indictment or inquisition for any felony or misdemeanor committed or supposed to have been committed at any place out of the jurisdiction of the Central Criminal Court shall have been removed by *certiorari* in the King's Bench, to order, if it appear to be expedient to the ends of justice, that such indictment or inquisition shall be tried at the Central Criminal Court. Or such court or judge may, in any such case of felony or misdemeanor, order a *certiorari* to issue to the court before which the indictment or inquisition shall be pending, or shall thereafter be found, or to the coroner before whom such inquisition shall have been or shall thereafter be taken, to remove the indictment or inquisition directly into the Central Criminal Court (*s.* 3). Provisions are made for the transmission of the indictment or inquisition, and for the return of the recognizances, depositions, etc., into that court (*ss.* 2, 4); for the removal of the offender to the prison appointed for the Central Criminal Court (*s.* 5); for his arraignment, pleading and trial at the Central Criminal Court (19 & 20 *Vict. c.* 16, *ss.* 6, 7); for the allowance of the expenses of prosecutions (*s.* 13); and otherwise in relation to the objects of the Act. The powers of the Court of King's Bench were transferred to the High Court of Justice (King's Bench Division) by 36 & 37 *Vict. c.* 66, *s.* 34. The court has refused to make it a condition, under 19 & 20 *Vict. c.* 16, *s.* 24 (*rep.* and superseded by *Cr. Off. Rules*, 1886, *r.* 30), that the prosecutor should furnish the defendant with evidence which it was suggested had been obtained by the prosecutor since the depositions were taken. *R.* v. *Palmer*, 5 *E. & B.* 1024.

"An application for an order that an indictment or inquisition removed into the King's Bench Division shall be tried at the Central Criminal Court, or a motion to remove an indictment or inquisition by *certiorari* into the Central Criminal Court for trial under 19 & 20 *Vict. c.* 16, shall, during the sittings, be made to the King's Bench Division by motion for an order *nisi:* and in the vacation, where there is no sitting of a divisional court, to a judge at chambers for a summons; and the order may be made absolute or granted upon such terms as to recognizance or otherwise as the court or judge may consider reasonable." *Cr. Off. Rules*, 1886, *r.* 42. No appeal lies from the refusal of the King's Bench Division to grant a *certiorari* to remove an indictment to the Central Criminal Court under 19 & 20 *Vict. c.* 16. *R.* v. *Rudge*, 16 *Q. B. D.* 459; 55 *L. J.* (*M. C.*) 112.

Costs in certiorari.]—The provisions of 7 *G.* 4, *c.* 64, *post, ch. vi., Costs*, do not apply to the costs incurred on an indictment removed by *certiorari*. *R.* v. *Richards*, 2 *Man. & Ry.* 405; 8 *B. & C.* 420: *R.* v. *Johnson*, 1 *Mood. C. C.* 173; *R.* v. *Treasurer of Exeter*, 5 *Man. & Ry.* 167. *See post, ch. vi., Costs.* The liability to costs on the removal of an indictment by *certiorari* was first imposed by 21 *Jas.* 1, *c.* 8, *s.* 4, and 5 & 6 *W. & M. c.* 11, *s.* 3 (*rep.*), and was extended by 16 & 17 *Vict. c.* 30, *s.* 5 (*rep.*). It is now regulated by *Cr. Off. Rules*, 1886, *r.* 30 (*ante*, p. 134). Under 16 & 17 *Vict. c.* 30,

s. 5, it was held that the prosecutor is entitled to costs in the case of an indictment removed by the defendant by *certiorari*, where the defendant is convicted, though the prosecutor is not the party grieved or injured. *R.* v. *Oastler*, *L. R.* 9 *Q. B.* 132; 43 *L. J.* (*Q. B.*) 42; and as *s.* 5 is embodied in *Cr. Off. Rules*, 1886, *r.* 30 (*ante*, p. 134), *R.* v. *Oastler* would be an authority on the construction of that rule. But a defendant who removes the indictment is not liable to costs, although he be found guilty by a jury, if judgment be arrested. *R.* v. *Turner*, 15 *East*, 570. [As to costs where a new trial is ordered, *see post*, *ch. viii. s.* 4.] If a defendant die after verdict and before judgment, his bail will be liable for the costs to the extent of their recognizances; *R.* v. *Turner*, 3 *B. & C.* 160: *R.* v. *Finmore*, 8 *T. R.* 409; but under ordinary circumstances the prosecutor is not entitled to costs till the court has pronounced judgment, for it may be that judgment will be arrested. *R.* v. *Turner*, 15 *East*, 570. If an indictment against several defendants be removed into the King's Bench Division without the consent of all of them, those who did not consent to the application for the *certiorari* are not liable for the costs, even though they have pleaded to the indictment and have been convicted upon it. *R.* v. *Hassell*, 5 *Dowl.* 531. But under 16 & 17 *Vict. c.* 30, *s.* 5 (*rep.*), where the *certiorari* was applied for at the instance of one of two defendants, the judge might in his discretion make it a condition of the recognizance that the defendant applying for the writ should pay the prosecutor's costs, in case either he or the other defendant should be convicted, *R.* v. *Jewell*, 7 *E. & B.* 140; 26 *L. J.* (*Q. B.*) 177; and an express provision to that effect is contained in *Cr. Off. Rules*, 1886, *r.* 30 (*ante*, p. 134). The prosecutor is not entitled to the costs of any counts of the indictment on which the defendant has been acquitted, *R.* v. *Hawdon*, 11 *A. & E.* 143, nor to costs incurred prior to the *certiorari*. *R.* v. *Passman*, 1 *A. & E.* 603, 606, *n.*: *R.* v. *Higgins*, 5 *Dowl.* 375; 6 *L. J.* (*M. C.*) 9. The defendant is to pay all reasonable costs occasioned by the removal of the indictment by the *certiorari*, or incurred in consequence of it, in order to carry the prosecution to its legal conclusion; *R.* v. *Gilbie*, 5 *M. & Sel.* 520; and the amount of costs is not limited by the recognizance. *R.* v. *Teal*, 13 *East*, 4; 10 *R. R.* 516. If a prosecutor, being entitled to costs, die after taxation of costs, his personal representatives are entitled to them.

The prosecutor's liability to pay costs to the defendant, if acquitted, only arises where the prosecutor has entered into the recognizance with the condition mentioned in *r.* 30 *of the Cr. Off. Rules*, 1886 (*ante*, p. 134). To entitle the defendant to costs he must be acquitted on all counts of the indictment. *R.* v. *Bayard* [1892], 2 *Q. B.* 181; 17 *Cox*, 572. If the prosecutor has merely entered into a recognizance conditioned to prosecute with effect, and to do and perform such orders and things as the court shall direct, he is not liable to costs. *R.* v. *East Stoke*, 6 *B. & S.* 536; 34 *L. J.* (*M. C.*) 190.

The costs are now taxed in the Supreme Court Taxing Office, and payment is enforced by estreat of the recognizances under *Cr. Off. Rules*, 124, 126, which is effected by order of the court made after calling upon the party liable to perform the conditions. 16 & 17 *Vict. c.* 30, *s.* 6, which permitted attachment, was repealed in 1892. As to costs of special jury, *see R.* v. *Moate*, 3 *B. & Ad.* 237; 1 *L. J. K. B.* 78; 37 *R. R.* 421.

As to the cases in which the defendant may, by reason of poverty or bankruptcy, have relief from the payment of the costs, *see R.* v. *Thornton*, 4 *Ex.* 820; 19 *L. J.* (*M. C.*) 113: *R.* v. *Hills*, 2 *E. & B.* 176; 22 *L. J.* (*Q. B.*) 322.

As to the costs in cases where the indictment, after its removal by

certiorari, is tried at the Central Criminal Court, under 19 & 20 *Vict. c.* 16, *ss.* 25, 26, *see post, ch. vi., Costs.*

Change of venue.]—The removal of an indictment by *certiorari* at common law does no more than change the court of trial, and does not affect the venue. The original practice was to try the indictment at bar in the Court of King's Bench, unless after issue joined a writ of *nisi prius* were issued with the attorney-general's consent to try in the proper county. 2 *Co. Inst.* 421. The court was by 6 *Hen.* 8, *c.* 6 empowered thus to remit indictments of felonies. In the case of an offence committed outside the Central Criminal Court District, if it is desired to change the venue, this can be effected by obtaining an order under 19 & 20 *Vict. c.* 16, *s.* 3, for the trial of the offence in that court. On the removal of a case from that court the venue is determined by the court on issuing the *certiorari* and stated in the writ. *Cr. Off. Rules*, 1886, *r.* 41, which provides that "every writ of *certiorari* for removing an indictment from the Central Criminal Court shall specify the county or jurisdiction in which the same shall be tried; and a jury shall be summoned, and the trial proceed, in the same manner in all respects as if the indictment had been originally preferred in that county or jurisdiction." The true construction of this rule is, that the King's Bench Division has discretion to name in the *certiorari* the county or jurisdiction in which the trial is to take place, and that by the jurors summoned from that jurisdiction the same issues shall be tried that would have been tried in the Central Criminal Court had the indictment not been removed. *R.* v. *Castro, L. R.* 9 *Q. B.* 350, 355; 43 *L. J.* (*Q. B.*) 105, 107.

In cases not dealt with as above it is necessary to obtain an order to change the venue, which may be made by a judge of assize without *certiorari*, or by the King's Bench Division after the grant of a *certiorari* and joinder of issue. *Short & Mellor, Cr. Off. Pr.* 204. The right to make such an order appears to be established as to felonies. *See R.* v. *Penprase*, 4 *B. & Ald.* 573: *R.* v. *Holden*, 5 *B. & Ad.* 347; and *R.* v. *Barrett, Ir. Rep.*, 4 *C. L.* 285: 18 *W. R.* 671: *R.* v. *Fay, Ir. Rep.* 6 *C. L.* 436: *R.* v. *M'Eneany* [1878] 2 *L. R. Ir.* 236: *R.* v. *Phelan*, 14 *Cox*, 579 (*Ir.*). And it is certainly established as to misdemeanors. But it is not exercised unless (1) demanded as of right by the attorney-general acting on behalf of the crown; (2) the inhabitants of a county are indicted and all are interested in the verdict: *R.* v. *Southampton* (*Inhabitants*), 17 *Q. B. D.* 424; (3) a view in another county is necessary: *Clerk* v. *R.* 9 *H. L. C.* 184: 31 *L. J.* (*Q. B.*) 175; *R.* v. *Sheldon*, 32 *L. T.* (*N. S.*) 27; or (4) a fair trial cannot be had in the original venue. *R.* v. *Simpson*, 5 *Jur.* 462: *R.* v. *Dunn*, 11 *Jur.* 287: *R.* v. *Patent Eureka Co.*, 13 *L. T., N. S.* 365: *R.* v. *Hunt*, 3 *B. & Ald.* 444; 2 *Chit. Rep.* (*K. B.*) 130; *R.* v. *Harris*, 3 *Burr.* 1330: *R.* v. *Duggan, Ir. Rep.* 7 *C. L.* 94; *R.* v. *Boughton* [1895] 2 *Ir. Rep.* 386. Mere possibility of prejudice is not a sufficient reason for change of venue. *R.* v. *King*, 2 *Chit. Rep.* (*K. B.*) 217: *R.* v. *Stephenson*, 5 *Jur.* 341. Any extra expense caused by the change falls on the person who applies for it. *R.* v. *Newton*, 1 *Cox*, 195. It is usual, but not necessary, to change the venue to the nearest county on the same circuit in which a fair trial can be had. *Anon.*, 6 *Jur.* 131: *R.* v. *Browne*, 6 *Jur.* 168: *R.* v. *Palmer*, 5 *E. & B.* 1024, 1028; *Campbell*, L. C. J. *See Short & Mellor, Cr. Off. Pr.* 204. As to the trial in a county at large of offences committed in counties of cities, *see ante*, p. 44. An application to change the venue is made during the sittings to a Divisional Court of the King's Bench Division, in vacation to a judge. *Short & Mellor, Cr. Off. Pr.* 205.

Trial at bar.]—Where an indictment has been removed by *certiorari* into the King's Bench Division the attorney-general, if prosecuting on behalf of the crown, has the right to demand a trial at bar; *R.* v. *Hales*, 2 *Str.* 816: *R.* v. *Castro*, *L. R.* 9 *Q. B.* 350; but not where he applies merely as counsel for a private prosecutor. *R.* v. *Hales*, *ubi supra*. *See Dixon* v. *Farrer*, 17 *Q. B. D.*, pp. 666, 667, *per Wills*, J. The most recent instances of trials at bar are *R.* v. *Jameson* [1896] 2 *Q. B.* 425: 65 *L. J.* (*M. C.*) 218. In *R.* v. *Lynch* [1903] 1 *K. B.* 744, no demand was made by the attorney-general for a trial at bar, as treason committed abroad is triable before the King's Bench Division under 35 *Hen.* 8, *c.* 2, *s.* 1.

Sect. 14.

NOLLE PROSEQUI.

A *nolle prosequi* to stay proceedings upon an indictment or information pending in any court may be entered, by leave of the attorney-general, at the instance of either the prosecutor or the defendant, at any time after the bill of indictment is found, and before judgment. *R.* v. *Dunn*, 1 *C. & K.* 730; *R.* v. *Colling*, 2 *Cox*, 184. "This power of the attorney-general is not subject to any control by the courts; but does not interfere with the right of a judge to allow a case to be withdrawn on the application of a private prosecutor." *R.* v. *Comptroller of Patents* [1899] 1 *Q. B.* 909, 914, *per Smith*, L. J. If the office of attorney-general is vacant, *semble* that the solicitor-general may give leave to enter a *nolle prosequi*; *Id.*, *and see* 42 *&* 43 *Vict. c.* 22, *s.* 9. Leave is never given except upon good cause shown, and it is never refused when the interests of justice require it. It is distinct from and has not the same effect as offering no evidence and submitting to acquittal. *Elworthy* v. *Bird*, 2 *Bing.* 258: 9 *Moore C. P.* 430. It appears to be preferable to an application to discharge the recognizances of the prosecutor and witnesses. *See R.* v. *Freakley*, 6 *Cox*, 75. The following is the form of the attorney-general's *fiat* or warrant to the coroner and attorney of the King's Bench Division to enter a *nolle prosequi*, in order to admit a prisoner, indicted for a conspiracy, as a witness for the crown:—

Whereas at the general quarter sessions of the peace holden for the West Riding of the county of York, etc., an indictment was found by the grand jury of the said Riding against H. S., T. S., G. E. *and* S. C., *for a conspiracy falsely to charge* J. H. *to be the father of a bastard child, whereof the said* H. S. *was pregnant, which indictment has since been removed into the King's Bench Division of his Majesty's High Court of Justice; and whereas it is represented to me on the part of the prosecutor of the said indictment, that he considering that the said* H. S. *was rather an object of the conspiracy of the other defendants than a willing actress in it, and from recent information that she is comparatively innocent; and considering that the ends of justice would be best answered were she in a situation to undergo examination as a witness upon the subject-matter of the indictment, is desirous, with the advice of his counsel, to have a* nolle prosequi *entered as against the said* H. S., *and that he prays the same accordingly; these are therefore to authorize and require you to enter or cause to be entered a* nolle prosequi *upon the said indictment as to the said* H. S. *And for so doing this shall be your warrant. Dated, etc.*

To J. R. M., *Esq., coroner and attorney of the King's Bench Division of his Majesty's High Court of Justice.*

Where the application is made at the instance of the prosecutor, the opinion of counsel as to the desirability of having the defendant examined as a witness is laid before the attorney-general, who will order the *nolle prosequi* to be entered without issuing any summons to the defendant: but where the application proceeds from the defendant, the attorney-general will direct his clerk to summon the prosecutor to show cause before him at his chambers why proceedings should not be stayed, and on hearing the parties grant his warrant, if he thinks the circumstances of the case demand it.

The attorney-general may, however, on an *ex parte* application by the defendant, and without calling the prosecutor before him, enter a *nolle prosequi* to an indictment. *R.* v. *Allen*, 1 *B. & S.* 850; 31 *L. J.* (*M. C.*) 129.

The usual occasion of granting a *nolle prosequi* is either where in cases of misdemeanor a civil action is depending for the same cause; *R.* v. *Fielding*, 2 *Burr.* 719; *Jones* v. *Clay*, 1 *B. & P.* 191; or where any improper and vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed offence; *R.* v. *Guerchy*, 1 *W. Bl.* 515; or if it be clear that an indictment is not sustainable against the defendant. *R.* v. *Pond*, 1 *Comyns Rep.* 312; 1 *Chitty Cr. L.* 479. Where an indictment is preferred against a defendant for an assault, and at the same time an action of trespass is commenced in one of the civil courts for identically the same assault, upon affidavit of the facts, and hearing the parties, the attorney-general will, if he sees fit, order a *nolle prosequi* to be entered to the indictment, or compel the prosecutor to elect whether he will pursue the criminal or civil remedy. *R.* v. *Fielding*, 2 *Burr.* 719; 1 *Chitty Cr. L.* 479.

The following may be the form of the affidavit in such a case:—

I, A. B., *of the parish of* ——, *in the county of* ——, *etc., make oath and say, that I, this deponent, did see the clerk of the peace of the county of* —— *sign a certificate hereto annexed, on the* —— *day of* ——, *at* ——, *and that since* [*or before*] *the time of preferring the indictment, in the said certificate mentioned, I was served with a copy of a writ of summons, issuing out of the King's Bench Division of his Majesty's High Court of Justice, at the suit of* C. D., *the prosecutor of the said indictment, requiring me within eight days to cause an appearance to be entered for me in the said King's Bench Division, in an action of trespass at the suit of the said* C. D.; *and that on the* —— *day of* —— *I, this deponent, did receive a notice of a declaration being filed against me at the suit of the said* C. D., *the prosecutor of the said indictment, in the master's office of the said King's Bench Division, for assaulting him, the said* C. D., *which said declaration and indictment, I say, are for the same assault and not for different offences.*

A certificate from the clerk of assize or clerk of the peace, stating the substance of the indictment, and the time when it was preferred, must be annexed to this affidavit. *Cro. Circ. Comp.* 25 (10th ed.). *For form of certificate, see ante*, p. 105). And if the attorney-general think the case a proper one for his interference, he will sign a warrant under his hand and seal, directed to the clerk of the peace, if the indictment has been found at sessions, directing him to enter a *stet processus*. *R.* v. *Fielding*, 2 *Burr.* 719: *Jones* v. *Clay*, 1 *B. & P.* 191. If the cause of the application be the vexatious conduct of the prosecutor, the attorney-general may direct the proceedings to be removed into the King's Bench Division, where counsel will be heard in support of the *nolle prosequi*. *R.* v. *Guerchy*, 1 *W. Bl.* 545. A *nolle prosequi* may be entered as to one of several defendants at

any time before trial. *R.* v. *Teal*, 11 *East*, 307. And on motion for a new trial in the King's Bench on an indictment for a conspiracy against several defendants, the counsel for the crown, at the suggestion of the court, and having received the assent of the attorney-general (the attorney-general appearing as counsel for one of the defendants), entered a *nolle prosequi* as to two defendants, when the rule for a new trial was refused as to the rest; *R.* v. *Rowlands*, 17 *Q. B.* 671, 685; 2 *Den.* 364; 21 *L. J.* (*M. C.*) 81; *and see R.* v. *Hempstead*, *R. & R.* 344; and *R.* v. *Butterworth*, *R. & R.* 520. In *R.* v. *Leatham*, 30 *L. J.* (*Q. B.*) 205: 8 *Cox*, 498; 3 *E. & E.* 658; when the defendant had been found guilty on several counts of an information for bribery, the solicitor-general entered a *nolle prosequi* on one of them after a rule *nisi* for a new trial: and in *R.* v. *Rowlands*, *ubi supra*, on application for a rule *nisi* to arrest the judgment on an indictment for a conspiracy, a *nolle prosequi* was entered on three counts of an indictment, as to the sufficiency of which some doubts were entertained, and the court pronounced judgment on the remaining good counts, a verdict having been taken on each count. The following is the form of entering a *nolle prosequi* on record, given in *Appendix to Cr. Off. Rules*, 1886, *Form* 120:—

Afterwards on the —— day of ——, before our said lord the King at the Royal Courts of Justice, London, come as well the said coroner and attorney of our said lord the King, in the King's Bench Division of his Majesty's High Court of Justice, who for our said lord the King in this behalf prosecutes in his proper person, as the said A. B. *by his solicitor. And the said coroner and attorney for our said lord the King says that he will not further prosecute* (*ait se nolle ulterius prosequi*) *the said* A. B. *upon the indictment* [or *information*] *aforesaid. Whereupon all and singular the premises being seen and fully understood by the court now here, it is considered and adjudged, by the said court here, that all proceedings upon the said indictment* [or *information*] *against the said* A. B. *be altogether stayed, and that the said* A. B. *be discharged of and from the said indictment* [or *information*].

[NOTE.—*In the case of an information filed by the attorney-general, his name must be used instead of that of the King's coroner and attorney.*]

A *nolle prosequi* puts an end to the prosecution (*see Gilchrist* v. *Gardner*, 12 *N. S. W. Rep.* (*Law*) 184, and English authorities there cited) but does not operate as a bar or discharge or an acquittal on the merits. *Goddard* v. *Smith*, 6 *Mod.* 261: 3 *Salk.* 215: *R.* v. *Ridpath*, 10 *Mod.* 152; and the party remains liable to be re-indicted. It has been said that fresh process may be awarded on the same indictment. *Goddard* v. *Smith*, *ubi supra*; *Com. Dig. Indict.* (*K.*): but this *dictum* appears not to be law. See the judgment in *R.* v. *Allen*, 1 *B. & S.* 850; 31 *L. J.* (*M. C.*) 129; *R.* v. *Mitchel*, 3 *Cox*, 93; 6 *St. Tr., N. S.* 545; *and Short & Mellor, Crown Office Practice*, 249.

CHAPTER II.

INFORMATION.

SECT. 1. *Preliminary*, p. 142.
2. *Information* ex officio, p. 142.
3. *Information by the Master of the Crown Office*, p. 144.

SECT. 1.

PRELIMINARY.

PROSECUTIONS by information in respect of indictable misdemeanors or upon penal statutes, are not now in use before courts of oyer and terminer, or gaol delivery, or before courts of quarter sessions (*Archbold, Quarter Sessions* (5th ed.) 292). Informations on penal statutes are subject to the provisions of 18 *Eliz. c.* 5, and 31 *Eliz. c.* 5, except where the proceedings are of a civil nature, or are taken under the *Summary Jurisdiction Acts*. Informations for misdemeanor are still occasionally laid before the *K. B. D.* of the High Court. These are dealt with in *sects.* 2 *&* 3, *post*. Informations in that court in customs and revenue cases are now treated as civil proceedings for purposes of evidence: *see the Crown Suits Act*, 1865 (28 *&* 29 *Vict. c.* 104), *s.* 34 (which got rid of doubts expressed in *Att.-Gen.* v. *Radloff*, 10 *Ex.* 84: 23 *L. J.* (*Ex.*) 240), and *s.* 259 of the *Customs Consolidation Act*, 1876 (39 *&* 40 *Vict. c.* 36). Informations in *quo warranto*, are now civil proceedings: 47 *&* 48 *Vict. c.* 61, *s.* 15.

SECT. 2.

INFORMATION EX OFFICIO.

What and in what cases.]—The information *ex officio* is a formal written suggestion on behalf of the King of a misdemeanor committed filed by the King's attorney-general (or, in the vacancy of that office, by the solicitor-general, *R.* v. *Wilkes*, 4 *Burr*, 2527; 19 *St. Tr.* 1075; 2 *Eng. Rep.* 244; 4 *Bro. P. C.* 360) in the King's Bench Division of the High Court of Justice, without the intervention of a grand jury. The attorney-general for the Duchy of Lancaster cannot file an *ex officio* information in the High Court. *Att.-Gen. of Duchy of Lancaster* v. *Duke of Devonshire*, 14 *Q. B. D.* 195: 54 *L. J.* (*Q. B.*) 271.

It lies at common law for misdemeanors only, and not for treason or felony; *Com. Dig. Information* (*A.* 1): *R.* v. *Prynn*, 5 *Mod.* 459: *R.* v. *Berchet*, 1 *Show.* 106: *R.* v. *Magee, Rowe* (*Ir. K. B.*) 416; nor for misprision of treason: for wherever any capital offence is charged, or an offence so highly penal as misprision of treason, the law of England requires that

the accusation should be warranted by the oath of twelve men, before the defendant be put to answer it: 2 *Hawk. c.* 26 *s.* 3. The usual objects of an information *ex officio* are properly such enormous misdemeanors as peculiarly tend to disturb or endanger the King's government, or to molest or affront him in the regular discharge of his royal functions; 4 *Bl. Com.* 308; such, for instance, as seditious or blasphemous writings or speeches (*R.* v. *Horne*, 2 *Cowp.* 672: 20 *St. Tr.* 651: *R.* v. *Wilkes*, *ubi supra*: *R.* v. *Burdett*, 1 *St. Tr., N. S.* 1: *R.* v. *Waddington*, 1 *St. Tr., N. S.* 1339; 1 *B. & C.* 26: *R.* v. *Mary Ann Carlile*, 1 *St. Tr., N. S.* 1033); seditious riots not amounting to high treason; libels upon the King or his ministers, the judges, or other high officers, reflecting upon their conduct in the execution of their official duties (*R.* v. *Harvey*, 2 *St. Tr., N. S.* 1: *R.* v. *Hunt*, 31 *St. Tr.* 367, 408: *R.* v. *Lord George Gordon*, 22 *Id.* 177); libels on foreign sovereigns or ambassadors (*R.* v. *Peltier*, 28 *St. Tr.* 529: *R.* v. *Vint*, 27 *Id.* 627); obstructing public officers in the execution of their duties; obstructing the King's officers in the collection, etc., of the revenues; bribery at parliamentary elections (*R.* v. *Leatham*, 8 *Cox*, 425, 498: *R.* v. *Charlesworth*, 1 *B. & S.* 460); bribery, corrupt or oppressive conduct or neglect of duty by magistrates and public officials (*R.* v. *Pinney*, 3 *St. Tr., N. S.* 11); or against public officials for misconduct outside Great Britain. *See* 11 *& 12 W.* 3, *c.* 12; 42 *G.* 3, *c.* 85: *R.* v. *Shawe*, 5 *M. & Sel.* 403; 17 *R. R.* 370: *R.* v. *Turner* [1889] 24 *L. J. Newsp.* 466, 469, 479. In *R.* v. *Brown and others*, *Q. B. Feb.* 1858; 7 *Cox*, 442; *sub nom. R.* v. *Esdaile*, 1 *F. & F.* 213, informations *ex officio* were filed against directors of a banking company, for a conspiracy to defraud the shareholders by false reports of the pecuniary condition of the bank and otherwise. In *R.* v. *Parnell*, 14 *Cox*, 508, an *ex officio* information was laid in Ireland for conspiracy to commit an offence against the State. *Ex officio* informations are now rarely filed in England. The latest was *R.* v. *Cate & Tarry*, 9 July, 1887, for a libel imputing corruptibility to the Middlesex Justices.

Form.]—The form of an information *ex officio* is thus:

MIDDLESEX, *to wit:—Be it remembered that Sir R. B. F., knight, attorney-general of our present sovereign lord the King, who for our said lord the King in this behalf prosecutes in his own proper person, comes here into court, before the King himself, at the Royal Courts of Justice, London, on the —— day of ——, 190—. And for our said lord the King gives the court here to understand and be informed, that* [state offence and then proceed in the same manner as if it were an indictment.] Second Count.—*And the said attorney-general of our said lord the King, for our said lord the King, further gives the court here to understand and be informed that, etc.* To conclude:—*Whereupon the said attorney-general for our said lord the King prays the consideration of the court here in the premises, and that due process of law may be awarded against him, the said B. G., in this behalf to make him answer to our said lord the King touching and concerning the premises aforesaid.*

Filing.]—This information is filed in the crown office, without any leave previously obtained of the court for that purpose; and the court will not entertain a motion by the attorney-general for a criminal information at the suit of the crown; *R.* v. *Philipps*, 3 *Burr.* 1564: *R.* v. *Phillips*, 4 *Burr.* 2089; 1 *Deacon, Cr. Law*, 672 *n.*; *R.* v. *Magee, Rowe* (*Ir. K. B.*) 416; nor will the court, upon the application of the defendant, restrain the attorney-general from filing an *ex officio* information upon the ground that a criminal information has already been granted for the

same cause. *R.* v. *Alexander*, *MS.*, *E. T.* 1830. But in that case, after both informations had been filed, the court stayed the criminal information until further order. *See post*, p. 152.

Quashing.]—The court will not quash an *ex officio* information at the instance of the prosecutor, because the attorney-general may, if he will, enter a *nolle prosequi*; *R.* v. *Stratton*, 1 *Doug.* 239; and even upon the motion of the defendant, they will seldom quash it, but will generally put the defendant to demur, etc.; *see Com. Dig. Information* (*D.* 4); *R.* v. *Gregory*, 1 *Salk.* 372. After demurrer the information may be amended. *R.* v. *Holland*, 4 *T. R.* 457; 2 *R. R.* 439. The attorney-general is also entitled as of right to amend the information on paying costs. *Att.-Gen.* v. *Ray*, 11 *M. & W.* 464.

Procedure.]—When the information has been filed, the defendant, after appearance, upon application to the court, is entitled to a copy of it free of expense. 60 *G.* 3 & 1 *G.* 4, *c.* 4, *s.* 8. This provision applies also to indictments where prosecuted by the attorney-general or solicitor-general in the King's Bench Division. *Id.* If the attorney-general delay bringing the information to trial, the defendant cannot take it down by proviso; *R.* v. *M'Leod*, 2 *East*, 202; but if it is not brought to trial within twelve calendar months next after the plea of not guilty has been pleaded, the defendant may, after twenty days' notice to the attorney-general or solicitor-general, apply to the court, which may authorize the defendant to bring on the trial, and he may bring it on accordingly, unless a *nolle prosequi* be entered. 60 *G.* 3 & 1 *G.* 4, *c.* 4, *s.* 9. *See also Cr. Off. Rules*, 1886, *rr.* 44, 45, for securing the speedy trial of the defendant, and his being speedily brought up for judgment, when he is in custody. The attorney-general is entitled, if he please, to a trial at bar; *R.* v. *Johnson*, 1 *Str.* 644: *Paddock* v. *Forrester*, 4 *St. Tr., N. S.* 557; 1 *Man. & G.* 583: *R.* v. *Pinney*, 3 *St. Tr., N. S.* 17, *n.*; and to bring on the case out of its turn. *Short & Mellor, Cr. Off. Pract.* 278. As to the venue and procedure on a trial at bar, *see Dixon* v. *Farrer*, 18 *Q. B. D.* 43; *Cr. Off. Rules*, 1886, *rr.* 160-163. At the trial the attorney-general has the right of reply, even though the defendant call no witnesses. *R.* v. *Marsden*, *M. & M.* 439. The cases on this subject are collected in 2 *St. Tr., N. S.* 1019; and *see post*, p. 212.

Costs.]—On the trial of an information there is no jurisdiction to give costs for or against the crown, nor to direct their payment out of the local rate. As to the position of the crown with respect to costs, *see Hullock*, 557: *R.* v. *Beadle*, 26 *L. J.* (*M. C.*) 111: *Thomas* v. *Pritchard* [1903] 1 *K. B.* 209: *R.* v. *Archbishop of Canterbury* [1902] 2 *K. B.* 572.

Sect. 3.

Information by the Master of the Crown Office.

What and in what cases.]—An information by the master of the crown office is a formal written suggestion of an offence committed, filed in the King's Bench Division of the High Court of Justice at the instance of an individual, with the leave of the court, by the master of the crown office, without the intervention of a grand jury. The right of private prosecutors to file informations for trespass, battery, or other misdemeanors without

the leave of the court was taken away by 4 *Will. & Mar. c.* 18, *ss.* 1, 5. *See R. v. Robinson*, 1 *W. Bl.* 541.

This, as does the information *ex officio* (*see ante*, p. 142), lies for misdemeanor only (2 *Hale*, 151; 2 *Hawk. c.* 26, *ss.* 7–12), and not for treason, felony, or misprision of treason. The court has power to give leave to file a criminal information of this description for any misdemeanor whatever, but usually grants leave only in the case of gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not specially concerning the state; *Ex parte Crawshay*, 8 *Cox*, 356; nor peculiarly tending to disturb the government, for those are left to the care of the attorney-general (*R. v. Harvey*, 2 *St. Tr., N. S.* 1; 2 *B. & C.* 257; 3 *D. & R.* 464), but which, on account of their magnitude or pernicious example, deserve the most public animadversion. 4 *Bl. Com.* 309. In substance informations are granted only in cases which before the abolition of the Star Chamber went to that court as too serious for the ordinary courts, or because justice could not be obtained in them. *See R. v. Sedley*, 1 *Sid.* 168; 17 *St. Tr.* 155, *n.*; *Baildon, Star Chamber Reports.* In a few cases informations have been granted for non-repair of roads or bridges where the grand jury has ignored a bill of indictment. *R. v. Upton St. Leonards*, 10 *Q. B.* 827. The cases in which they have been granted fall under the following heads:—

Blasphemy.]—Informations have been granted for publishing a blasphemous libel; *R. v. Richard Carlile*, 4 *St. Tr., N. S.* 1423; 3 *B. & Ald.* 161; or an invective upon the established religion of the country. *R. v. Waddington*, 1 *St. Tr., N. S.* 1339: 1 *B. & C.* 26; 25 *R. R.* 288: *R. v. Curl*, 2 *Str.* 788; 17 *St. Tr.* 153.

Bribery and corruption.]—An attempt to bribe a privy councillor to obtain a patent of an office under government; *R. v. Vaughan*, 4 *Burr.* 2494; an attempt to bribe at an election for members to serve in parliament; *R. v. Robinson*, 1 *W. Bl.* 541: *R. v. Isherwood*, 2 *Ld. Ken.* 202: *R. v. Pitt*, 1 *W. Bl.* 380; 3 *Burr.* 1335; bribing persons, either by money or promises, to vote at elections of officers of corporations; *R. v. Plympton*, 2 *Ld. Raym.* 1377: *R. v. Mayor of Tiverton* [1723] 8 *Mod.* 186; bribery in the election of an alderman, who, by virtue of his office, is a justice of the peace; *R. v. Steward*, 2 *B. & Ad.* 12; attempting to bribe jurymen; *R. v. Young*, 2 *East*, 14, *cit.*; or clerks in public offices; *R. v. Beale*, 1 *East*, 183, *cit.*; endeavouring to procure the appointment of certain persons to be overseers of the poor, with a view to derive a private advantage to the party. *R. v. Jolliffe*, 1 *East*, 154, *n.*; 4 *T. R.* 285.

Immorality.]—Where a music-master, in consideration of a sum of money, assigned over his female apprentice to a gentleman under pretence of her receiving lessons from him in music, but really for the purposes of prostitution, the court upon application granted a criminal information against the gentleman, the music-master, and the attorney who drew up the assignment. *R. v. Delaval*, 3 *Burr.* 1434; 1 *W. Bl.* 410, 439; *and see R. v. Sedley*, 1 *Sid.* 168; 17 *St. Tr.* 155, *n.*

Libel.]—The court at one time used to grant criminal informations for libels reflecting on the conduct of private individuals, if attended with circumstances of aggravation. *R. v. Benfield*, 2 *Burr.* 980: *R. v. Miles*, 1 *Doug.* 284: *R. v. Haswell, Id.* 387: *R. v. Staples, Andr.* 228. With the repeal of the Acts *de scandalis magnatum* and change in opinion and circumstances the rule established by modern decisions is that a criminal

information for libel will not be granted at the suit of private persons, but only on the application of persons in a public office or position; *R.* v. *Labouchere*, 12 *Q. B. D.* 330; 53 *L. J.* (*Q. B.*) 362; for instance, for libels reflecting on the conduct of magistrates in the execution of their duties; *R.* v. *Waite*, 1 *Wils.* (*K. B.*) 22; of conduct of the mayor of a city during his term of office; *R.* v. *O'Brien, Cooke & Alcock* (*Ir. K. B.*) 128; of members of parliament in the execution of their duties in parliament; *R.* v. *Haswell*, 1 *Doug.* 387; of persons high in office under government in the execution of their several duties; of a public body; *R.* v. *Williams*, 5 *B. & Ald.* 595; 1 *St. Tr., N. S.* 1291; and the like. *See R.* v. *Jenour*, 7 *Mod.* 400; *R.* v. *Dennison, Lofft*, 148; *R.* v. *Kinnersley*, 1 *W. Bl.* 294, and *n.*

Offences against the administration of justice.]—Informations have been granted for prejudging a criminal case by representing in a theatrical exhibition a man in the act of committing the offence. *R.* v. *Williams*, 2 *L. J., O. S., K. B.* 30; 26 *R. R.* 624, and *cf. Monson* v. *Tussauds, Ltd.* [1894], 1 *Q. B.* 671. And in *R.* v. *Tibbits & Windust* [1902] 1 *K. B.* 77 it was held to be an indictable offence to attempt to pervert the course of justice by publishing articles affecting the conduct and character of persons about to be tried. The C. C. R., in coming to this decision, followed *R.* v. *Williams, ubi supra*, and *R.* v. *Fisher*, 2 *Camp.* 563. So, where a defendant in an information, immediately before the trial, distributed handbills in the assize town, vindicating his own conduct, and reflecting on that of the prosecutor, the court, considering the handbills to have been distributed by the defendant for the purpose of influencing the jury in his favour at the trial, granted a criminal information against him. *R.* v. *Jolliffe*, 4 *T. R.* 285; 2 *R. R.* 383. So, the court granted a criminal information against a person for publishing the proceedings before a coroner, with comments previously to the trial, although the statement was correct, and no malicious motive shown; for such publications have a tendency improperly to influence the public mind, and particularly the jury by whom the cause is afterwards to be tried. *R.* v. *Fleet*, 1 *B. & Ald.* 379; 19 *R. R.* 132. *See R.* v. *Wright*, 8 *T. R.* 293; 4 *R. R.* 649. It is now found more expeditious in such case to proceed for contempt of court where the proceeding affected is in one of the branches of the High Court: *R.* v. *Parke* [1903] 2 *K. B.* 432: *R.* v. *Freeman's Journal* [1902] 2 *Ir. Rep.* 82. But the existence of the summary remedy is no bar to proceedings by indictment or information: *R.* v. *Tibbits, ubi supra.* Informations have also been granted for procuring a grand jury to throw out bills: *Anon., Rowe* (*Ir. K. B.*) 644, 727; for attempting to suborn witnesses in a civil suit: *R.* v. *Phillips, Cas.* (*K. B.*), *temp. Hardw.* 241; and for attempting to induce witnesses to keep out of the way: *R.* v. *Lawley*, 2 *Str.* 904; and also for a conspiracy to obtain a false verdict: *R.* v. *Opie, Wms.* 1 *Saund.* 300 *K.*

And an information has been granted for publishing an invective against judges and juries, with a view to bring into suspicion and contempt the administration of justice. *R.* v. *White*, 1 *Camp.* 359; 30 *St. Tr.* 1131. And where an order was made by a corporation, and entered on their books, stating that J. S. (against whom a jury had given a verdict with large damages in an action for a malicious prosecution for perjury, which verdict had been confirmed in the court of Common Pleas) was actuated by motives of public justice, etc., in preferring the indictment, the court, deeming the order to be a libel reflecting upon the administration of justice, upon application granted a criminal information against the parties concerned in making it. *R.* v. *Watson*, 2]*T. R.* 199; 1 *R. R.* 461. *See also R.* v. *Gray* [1900] 2 *Q. B.* 36.

A criminal information will not be granted for *words* imputing misconduct to a justice of the peace in his office, unless tending to a breach of the peace, or spoken to the magistrate when sitting as such. *Ex parte Duke of Marlborough*, 5 *Q. B.* 955; *Ex parte Chapman*, 4 *A. & E.* 773.

Misconduct by judicial officers.]—There are no modern precedents of indictments or informations against judges of a superior court of record for oppression or extortions under colour of office. *See Anderson* v. *Gorrie* [1895] 1 *Q. B.* 668: *Mayne, Ind. Cr. L.* [1896] 342. For an early precedent, *see Y. B.* 14 & 15 *Edw.* 3 (ed. Pike), *Preface.* An information will lie against a judge of an inferior court of record for misconduct in office. A rule for a criminal information against a county court judge, for misconduct in his office, was discharged on the ground that the applicant had made the same misconduct the subject of a memorial to the Lord Chancellor, praying for inquiry, and so had elected his remedy. *R.* v. *Marshall*, 4 *E. & B.* 475; *L. J.* (*Q. B.*) 242; *see Anon.*, 4 *A. & E.* 576, *n.*

The court can grant a criminal information against a justice of the peace for any illegal act committed by him from fraudulent, corrupt or vindictive motives, or for manifest illegality and oppression, or gross abuse of power, or partiality and wilful abuse of discretion, or wilful disobedience of the orders of a superior court. *R.* v. *Wykes, Andr.* 238; *R.* v. *Soane, Id.* 272: *R.* v. *Cozens*, 2 *Doug.* 426: *R.* v. *Jones*, 1 *Wils.* (*K. B.*) 7; *cf. R.* v. *Newton*, 1 *Str.* 413: *R.* v. *Staffordshire JJ.*, 1 *Chit.* (*K. B.*) 217. The following cases illustrate the occasions on which the power has been exercised:—1. A justice acting where he had direct interest. *R.* v. *Davis, Lofft*, 62: *R.* v. *Whateley*, 4 *Man. & Ry.* 431: *R.* v. *Hoseason*, 14 *East*, 605, or failing without lawful excuse to return to the assizes examinations taken by him. *R.* v. *Going, Rowe* (*Ir. K. B.*) 563. 2. Grant or refusal of alehouse licences, from corrupt motives or resentment. *R.* v. *Young*, 1 *Burr.* 556, 560, 561: *R.* v. *Nottingham JJ., Say.* 216: *R.* v. *Holland*, 1 *T. R.* 692, 1 *R. R.* 362: *R.* v. *Davis, R.* v. *Williams*, 3 *Burr.* 1317: *R.* v. *Hann*, 3 *Burr.* 1716. In *Boulter* v. *Kent Justices* [1897] *App. Cas.* 556, it was held that justices sitting for the grant or renewal of liquor licences do not sit as a court: *cf. R.* v. *Howard* [1902] 2 *K. B.* 363 *C. A.*; so that it may be doubted whether the old cases as to information are now of authority. *But see R.* v. *Manchester JJ.* [1899] 1 *Q. B.* 571: *R.* v. *Nicholson* [1899] 2 *Q. B.* 455. 3. Illegal appointment of overseers from corrupt and improper motives. *R.* v. *Somersetshire JJ.*, 1 *D. & R.* 443: *cf. R.* v. *Jolliffe*, 1 *East*, 154, *cit.* 4. Corruptly making a false return to a *mandamus*. *R.* v. *Lancashire JJ.*, 1 *D. & R.* 485. 5. Abuse of authority by an obviously improper conviction; *R.* v. *Webster*, 3 *T. R.* 388: *R.* v. *Martin, Rowe* (*Ir. K. B.*) 726; or an obviously illegal sentence; *R.* v. *Mather*, 3 *Barnard.* 249; or by interfering with order of another justice; *R.* v. *Brooke*, 2 *T. R.* 190; or refusing bail from improper motives; *R.* v. *Badger*, 4 *Q. B.* 468; 4 *St. Tr., N. S.* 1387; destroying a house on not finding the men he was searching for; *Anon., Rowe* (*Ir. K. B.*) 645; or abusing the prosecutor in a case before him. *R.* v. *Manley* (*Id.*) 646. But to induce the court to act there must be *primâ facie* evidence that the justice acted from corrupt motives (*C. O. R.*, 1886, *r.* 48), and not from mistake or ignorance of law or in *bonâ fide* exercise of discretion. *R.* v. *Palmer*, 2 *Burr.* 1162: *R.* v. *Davie*, 2 *Doug.* 588: *R.* v. *Brooke*, 2 *T. R.* 190: *R.* v. *Jackson*, 1 *T. R.* 653; 1 *R. R.* 343: *R.* v. *Seton*, 7 *T. R.* 373: *R.* v. *Barker*, 1 *East*, 186: *R.* v. *Baylis*, 3 *Burr.* 1318: *R.* v. *Fielding*, 2 *Id.* 719: *R.* v. *Borron*, 3 *B. & Ald.* 432; 1 *St. Tr., N. S.* 1347; 22 *R. R.* 147: *Ex parte Fentiman*, 2 *A. & E.* 127. If the act complained of was

done at general or quarter sessions the evidence of deliberate misconduct or corruption must be very strong. *R.* v. *Seaford JJ.*, 1 *W. Bl.* 432: *R.* v. *Shrewsbury JJ.*, 2 *Barnard.* 272: *R.* v. *Phelps*, 2 *Ld. Kenyon*, 570: *R.* v. *Eyres*, 2 *Barnard*, 250.

Misconduct by ministerial officers.]—The court will grant an information against ministerial officers, for any act of oppression, or for any illegal act committed by them in the execution of their duties, from corrupt, vindictive, or other improper motives; but not where they act from ignorance or mistake merely. *R.* v. *Friar*, 1 *Chit. Rep.* (*K. B.*) 702. Informations have been granted against overseers for forcing a pauper to marry another pauper then pregnant with a bastard; *R.* v. *Tarrant*, 4 *Burr.* 2106; for a conspiracy by parish officers to marry persons settled in different parishes; *R.* v. *Compton*, *Cald.* 246: *R.* v. *Herbert*, 2 *Ld. Ken.* 466; and for procuring one to marry an idiot chargeable to the parish; *R.* v. *Watson*, 1 *Wils.* (*K. B.*) 41; but it has long been settled practice to refuse informations in such cases, and to leave the applicant to seek his remedy by indictment: *see Cald.* 447, *n.* (*a*); 2 *Nolan*, 262.

The court has granted a criminal information against a person for refusing to take upon himself the office of sheriff, because the vacancy of the office occasioned an interruption of public justice, and the year would be nearly expired before an indictment could be brought to trial. *R.* v. *Woodrow*, 2 *T. R.* 731. *See R.* v. *Grosvenor*, 2 *Str.* 1193; 1 *Wils.* (*K. B.*) 18: *R.* v. *Shacklington*, *Andr.* 201 *n.*

Discretion of the court.]—The grant of the information is in the discretion of the court, and is not of right nor *ex debito justitiae*, as the remedy is extraordinary and an alternative to proceedings by indictment. In the exercise of this discretion the court has refused to grant a criminal information for an illegal act committed by a person under a *bonâ fide* conviction that he was merely exercising a legal right; *R.* v. *Parkyns*, 3 *B. & Ald.* 668: 22 *R. R.* 519; and where the application was made against a poor man residing at a distance, to whom it would be very inconvenient, if not impossible, to show cause against the rule, or to appear afterwards to receive judgment if convicted. *See R.* v. *Compton*, *Cald.* 246; *cf. Lofft*, 155. They have refused it also against the members of a corporation, for a misapplication of the corporation funds, it being rather a subject for an application to the court of Chancery. *R.* v. *Watson*, 2 *T. R.* 199: 1 *R. R.* 461. They have also refused to grant it where the applicant himself was not free from imputation; *Lofft*, 314; or had already taken civil proceedings; *Anon.* 4 *A. & E.* 576, *n.*; or had, before applying for the rule, entered into a correspondence with the person sought to be made defendant. *Ex. parte Haviland*, 44 *J. P.* 789. So, where an application was made for a criminal information on a charge of raising great sums by subscription for trading purposes, as being one of those schemes denounced by 6 *G.* 1, *c.* 18, *s.* 18 (*rep.*), the court refused to grant it, as the statute had not been acted upon for a great length of time, and was now sought to be enforced by a private relator, who seemed not to have been deluded by the project, but to have subscribed with a view to an application to the court. *R.* v. *Dodd*, 9 *East*, 516. *See R.* v. *Webb*, 14 *East*, 406. Informations have been granted for sending a challenge to fight a duel. *R.* v. *Younghusband*, 4 *N. & M.* 850: *R.* v. *Holmes*, *Rowe* (*Ir. K. B.*) 239: *R.* v. *Rowe*, *Id.*, 288, 418: *R.* v. *Harman*, *Id.*, 441: *R.* v. *Staunton*, 1 *Ir. Law Rec.* (*O. S.*), 7: *R.* v. *Maunsell* [1839] 1 *Ir. Law Rec.*, 257: *Armstrong* v. *Kiernan*, 7 *Cox*, 6 (*Ir.*). But an information for a challenge has been refused, when it appeared that the party applying had previously written letters to the other, provoking him to fight; but the court said that, if both parties had applied for

informations, they would have granted them. *R.* v. *Hankey*, 1 *Burr.* 316. And an information has been refused, where the application was made by notorious gamesters against other gamesters, for a conspiracy to cheat them at a race. *R.* v. *Peach*, 1 *Burr.* 548. Even in cases which would warrant an information, if the court think it will be sufficient punishment for the defendant to pay the costs already incurred by the prosecutor, they will discharge the rule *nisi* upon these terms, if acceded to by the defendant. *R.* v. *Morgan*, 1 *Doug.* 314: *R.* v. *Cozens*, 2 *Doug.* 426.

When and how to be moved for, etc.]—"The application for a criminal information shall be made to a Divisional Court (of the King's Bench Division) by a motion for an order *nisi* within a reasonable time after the offence complained of." *Cr. Off. Rules*, 1886, *r.* 48, which adopts the practice as laid down in *R.* v. *Harries*, 13 *East*, 270; 12 *R. R.* 338: *R.* v. *Marshall*, 13 *East*, 322: 12 *R. R.* 340: *R.* v. *Smith*, 7 *T. R.* 80: *R.* v. *Bishop*, 5 *B. & Ald.* 612: 24 *R. R.* 494: *R.* v. *Saunders*, 10 *Q. B.* 484. The motion must be founded upon an affidavit disclosing all the material facts of the case. It is a strong, although not a conclusive, reason for rejecting an application for leave to file a criminal information that the applicant does not reside in this country. *R.* v. *Labouchere*, 12 *Q. B. D.* 320; 53 *L. J.* (*Q. B.*) 362. If the court grant the order *nisi*, it is afterwards, upon showing cause, discharged or made absolute, as in ordinary cases. But the court cannot compel the prosecutor to proceed to make it absolute. *R.* v. *Sherwood*, 2 *L. J.* (*O. S.*) *K. B.* 78: 26 *R. R.* 626.

Under the *Crown Office Rules*, 1886, *r.* 47, "No application shall be made for a criminal information against a justice of the peace for misconduct in his magisterial capacity unless a notice containing a distinct statement of the grievances, or acts of misconduct complained of, be served personally upon him, or left at his residence, with some member of his household, six days before the time named in it for making the application." This rule perpetuates what had been the established practice both in England and Ireland. *R.* v. *Heming*, 5 *B. & Ad.* 666; 3 *L. J.* (*M. C.*) 3: *R.* v. *Rae*, *Ir. Rep.* 8 *C. L.* 524.

"If the application be made against a justice of the peace for misconduct in his magisterial capacity, the applicant must depose on affidavit to his belief that the defendant was actuated by corrupt motives, and further, if for an unjust conviction, that the defendant is innocent of the charge." *Id. r.* 48. The rule embodies the practice as stated in *R.* v. *Saunders*, 2 *Cox*, 249.

The motion must be made by counsel, and is not entertained if made by a private individual. *R.* v. *Lancaster JJ.*, 1 *Chit. Rep.* (*K. B.*) 602. *Anon.* 2 *Ir. Law Rec.* (*O. S.*) 479. The words "innocent of the charge" continue the practice as laid down in *R.* v. *Athay*, 2 *Burr.* 653: *R.* v. *Webster*, 3 *T. R.* 388, as to the necessity of removing or quashing the conviction before a rule will be granted; *see R.* v. *Heber*, 2 *Str.* 915. The abolition of the division of the legal year into terms so far as relates to the administration of justice by *s.* 26 of the *Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), appears to render it unnecessary to refer (for the purposes of *rule* 48) to the old division into terms in computing the time within which an application may be made for a criminal information against a magistrate for anything done in execution of his office. On the construction of that section *see re College of Christ, Brecknock and Martin*, 3 *Q. B. D.* 16; 46 *L. J.* (*Q. B.*) 591.

The motion must in all cases be made upon affidavits disclosing all the material facts of the case; if a material fact be suppressed or misrepresented, the court will discharge the rule; *R.* v. *Wroughton*, 3 *Burr.* 1683,

very probably with costs against the applicant: *R.* v. *Wroughton* (*ubi supra*); or perhaps, in an extreme case, against his solicitor: *R.* v. *Anderson*, [1840] 2 *Ir. Law Rep.* 262: *R.* v. *Thomas*, 7 *A. & E.* 608. And, as the court is in a manner substituted for a grand jury, it will in general expect that the fact so disclosed shall amount to such evidence as would satisfy a grand jury, if an indictment was preferred for the offence. *R.* v. *Willett*, 6 *T. R.* 294: *R.* v. *Williamson*, 3 *B. & Ald.* 582. The affidavit must connect the person complained of with the offence by legal evidence. *R.* v. *Stanger*, *L. R.*, 6 *Q. B.* 352; 40 *L. J.* (*Q. B.*) 96. Therefore where a rule *nisi* had been granted calling upon S. to show cause why an information should not be exhibited against him publishing a libel in a newspaper, and the affidavit simply showed that copies of the newspaper had been purchased at the publishing office of the paper, that by a foot-note printed at the end of the copies S. was stated to be the printer and publisher of them, and that the deponent believed that S. was the printer and publisher, the court discharged the rule on the ground that the affidavit was insufficient. *Id.* The question was raised, but not decided, whether, under such circumstances, recourse can be had to the affidavits used by the defendant in showing cause, to supply the defect in those for the prosecution. *Id.* An information may be granted upon the uncontradicted affidavit of one who was *particeps criminis*. *R.* v. *Steward*, 2 *B. & Ad.* 12. If the subject of the application be a libel upon an individual charging him with a particular offence, the court always requires the prosecutor to deny the charge upon oath, before they will grant the information; *R.* v. *Miles*, 1 *Doug.* 284: *R.* v. *Haswell*, *Id.* 387. But it is otherwise if the charge be general or be against a public body of men; *R.* v. *Williams*, 5 *B. & Ald.* 595, 1 *D. & R.* 197; or if it relate to anything said, or supposed to have been said, by the prosecutor in parliament as a member: *R.* v. *Haswell*, 1 *Doug.* 387. As to the practice on such applications (before *R.* v. *Labouchere*, 12 *Q. B. D.* 320, *ante*, p. 146). *See R.* v. *The Werld*, 13 *Cox*, 305. Where a criminal information was applied for against a magistrate, for improperly convicting a person, the court refused to grant it, unless the party complaining would make an exculpatory affidavit denying the charge. *R.* v. *Webster*, 3 *T. R.* 388. The affidavit upon which the order *nisi* is moved for must not be intituled in any cause. *R.* v. *Harrison*, 6 *T. R.* 60: *R.* v. *Robinson*, *Id.* 642, *cit.* The affidavits, upon showing cause, are intituled *The King* v. the party complained of. *R.* v. *Jones*, 2 *Str.* 704: *see King* (*qui tam*) v. *Cole*, 6 *T. R.* 642. And all the affidavits used must now be entitled, "In the High Court of Justice, King's Bench Division."

If it be intended to file a joint information against several persons, the application should be joint against all in the first instance: for, where distinct rules were obtained against five persons severally, and one information thereupon filed against them jointly, the court, upon application, set aside the proceedings. *R.* v. *Heydon*, 3 *Burr.* 1270.

Proceedings for a criminal information once instituted cannot be withdrawn or compromised without the sanction of the court. *R.* v. *Newton*, 67 *J. P. Rep.* 453.

A rule for a criminal information was granted, and discharged upon an affidavit of the truth of the charge; subsequently it was discovered that the affidavit in answer to the rule was false, and the court granted another rule, which was made absolute. *R.* v. *Eve*, 5 *A. & E.* 780.

The *Law of Libel Amendment Act*, 1888 (51 *& 52 Vict. c.* 64, *s.* 8, which forbids prosecution by indictment of libels in registered newspapers without the leave of a judge of the High Court; *see ex parte Pulbrook* [1892], 1 *Q. B.* 86; does not prevent proceedings by way of criminal information.

That Act repealed s. 3 of the *Newspaper Libel and Registration Act*, 1881 (44 & 45 *Vict.* c. 60), which also did not affect proceedings by criminal information. *R.* v. *Yates*, 11 *Q. B. D.* 750; 52 *L. J.* (*Q. B.*) 778: *Yates* v. *R.*, 14 *Q. B. D.* 648; 54 *L. J.* (*Q. B.*) 258.

Form.]—The form of an information filed by the master of the crown office is as follows:—

MIDDLESEX, *to wit:—Be it remembered, that James Robert Mellor, esquire, coroner and attorney of our present sovereign lord the King, in the King's Bench Division of his Majesty's High Court of Justice, before the King himself, who for our said lord the King in this behalf prosecutes* [proceeding as in the form of an information *ex officio*, *ante*, p. 143, substituting the name and style of the King's coroner and attorney for those of the attorney-general].

Filing, etc.]—After the court has made the rule absolute, the information may be filed at the crown office, upon the prosecutor's entering into the usual recognizances for costs. "With the exception of *ex officio* informations filed by the attorney-general on behalf of the crown no criminal information . . . shall be exhibited, received, or filed at the Crown Office Department without express order of the King's Bench Division in open court, nor shall any process be issued upon any information other than an *ex officio* information, until the person procuring such information to be exhibited shall have filed at the Crown Office Department a recognizance in the penalty of 50*l.* effectually to prosecute such information and to abide and observe such orders as the court shall direct, such recognizance to be entered into before the King's coroner and attorney or the master of the Crown Office, or a justice of the peace of the county, borough, or place in which the same may have arisen." *Cr. Off. Rules*, 1886, *r.* 46. *See form of recognizance, App. to Cr. Off. Rules*, 1886, *Form* 27.

Costs.]—The defendant upon acquittal is not entitled to any costs beyond the extent of the recognizance. *R.* v. *Filewood*, 2 *T. R.* 145: *see R.* v. *Brooke*, 2 *Id.* 190. *See also R.* v. *Savile*, 18 *Q. B.* 703, *and Cr. Off. Rules*, 1886, *r.* 49, *infra*. In cases of informations for libel, however, a more extensive remedy for costs is given by the *Libel Act*, 1846 (6 & 7 *Vict.* c. 96, *s.* 8), which enacts, that in case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information; and upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the court before which the said indictment or information is tried. Under this section it has been held, that, on a criminal information for libel, the defendant, having recovered judgment, was entitled to costs, though the only plea on the record was not guilty, and though the judge had certified, under 4 *W.* & *M.* c. 18, *s.* 2 (*rep.*), that there was reasonable cause for exhibiting the information; *R.* v. *Latimer*, 15 *Q. B.* 1077; 20 *L. J.* (*Q. B.*) 129; and that where, on such an information, judgment is given for the defendant, he is entitled to costs incurred previously to the filing of the information, as well as to costs

incurred subsequently to the filing of the information. *R.* v. *Steel*, 1 *Q. B. D.* 482; 45 *L. J.* (*Q. B.*) 391. The provisions of *s.* 8 are embodied in *Cr. Off. Rules*, 1886, *r.* 50.

Appearance and pleading.]—When the information is filed, process issues to compel the appearance of the defendant, if an appearance be not already entered for him. He then either pleads to it, or applies to quash it; and on issue joined, the proceedings are brought on to trial. *See Short & Mellor, Cr. Off. Practice*, 272–278; *Cr. Off. Rules*, 1886, *rr.* 83–98, 128–133. "If the prosecutor on any information not *ex officio* does not proceed to trial within a year after issue joined, or if the prosecutor causes a *nolle prosequi* to be entered, or if the defendant be acquitted (unless the judge at the time of trial certifies that there was reasonable cause for the information), the court, on motion for the same, may award the defendant his costs to the amount of the recognizance entered into by the prosecutor on filing the information." *Cr. Off. Rules*, 1886, *r.* 49. *See also rr.* 44, 45, for securing the speedy trial of the defendant, and his being speedily brought up for judgment, when in custody.

In what cases quashed or stayed.]—The court will very seldom quash an information filed by the master of the crown office; indeed, in some of the books it is laid down that they will not quash it in any case. *See R.* v. *Nixon*, 1 *Str.* 185: *R.* v. *Fountain*, 1 *Sid.* 152. They have, however, interfered in this manner in a very few cases, under peculiar circumstances. *See R.* v. *Roper*, 2 *Str.* 1072: *R.* v. *Williams*, 1 *Burr.* 385. If quashed on the motion of the prosecutor, it must be upon payment by him of the defendant's costs, at least to the extent of the recognizance. (*See ante*, p. 121.) Where a criminal information had been granted, and the attorney-general afterwards, for the same cause, filed an information *ex officio*, the court stayed the former until further order. *R.* v. *Alexander*, *MS.*, *E. T.* 1830. It seems to have been laid down as a rule of practice of the court, that a person who applies for a criminal information must waive his right of action in that court for the same cause, unless the court should, on hearing the whole matter, be of opinion that it was a proper subject to be tried in a civil action, and should specifically give him leave to do so; and it was said that, if an information was granted, it was of course to stay the proceedings in an action for the same cause. *R.* v. *Sparrow*, 2 *T. R.* 198. And in *R.* v. *Mahon* (1836), 4 *A. & E.* 575, the court refused to pass sentence in a conviction for assault by the O'Gorman Mahon while a civil action was pending for the assault. *See Short & Mellor, Cr. Off. Practice*, 256. However, where a rule for a criminal information for a libel was discharged on cause shown, this was held not to preclude the applicant from bringing an action in another court for the publication of the same libel. *Wakley* v. *Cooke*, 16 *M. & W.* 822; 16 *L. J.* (*Ex.*) 225.

New trial.]—*See post, ch. viii. sect.* 4.

CHAPTER III.

CORONER'S INQUISITION.

CORONERS are ancient officers of the common law: so called because they deal principally with the pleas of *The Crown*, and were of old time the principal conservators of the peace within their county: 2 *Hawk. c.* 9, *s.* 1; *Stephen*, 1 *Hist. Cr. L.* 217: *Seld. Soc. Publ. vol.* 9.

Coroner's inquisition as a mode of criminal prosecution.]—The finding of a coroner's inquest is equivalent to the finding of a grand jury; and a defendant may be prosecuted for murder or manslaughter upon an *inquisition*, which is the record of the finding of a jury sworn to inquire concerning the death of the deceased, *super visum corporis*. Such an inquisition amounts to an indictment (*R.* v. *Ingham*, 5 *B. & S.* 257; 33 *L. J.* (*Q. B.*) 183), and by Lord *Coke*, and the older law-writers, is frequently designated by that name, and a defendant is arraigned upon it in the same way as upon an indictment, and may plead, or take exception to it precisely as if it had been found by a grand jury, and he may be tried and sentenced on such inquisition. *Re Ward*, 30 *L. J. Ch.* 775, 776, *per* Lord *Campbell*. It is the practice at assizes, where a prisoner stands charged with murder or manslaughter, in order to guard against any failure of justice, also to prefer a bill of indictment for the same offence before the grand jury. It is usual when a bill of indictment for the offence charged in the inquisition has been ignored, to offer no evidence on the coroner's inquisition, but it is occasionally found more convenient to try on the inquisition, and cases have occurred when this was done and the defendant was convicted of manslaughter. If a true bill is found the defendant is arraigned on both the indictment and the inquisition at the same time: 1 *East, P. C.* 371. If the bill is ignored the defendant must still be arraigned on the inquisition. But where a defendant against whom a verdict of guilty has been found on the coroner's inquest, and against whom also the grand jury have found a true bill, is arraigned and tried upon one only and acquitted, he must afterwards be arraigned upon the other; to which, however, he may effectually plead *autrefois acquit*. 2 *Hale*, 61; 4 *Bl. Com.* 301; 1 *Chitty, Cr. L.* 163; *R.* v. *Cole*, 3 *Camp.* 371; 2 *Leach*, 1095; *R.* v. *Maynard*, *R. & R.* 240.

Authority and duty of coroner in holding inquests in cases of murder and manslaughter.]—The duty of a coroner, in cases "where any be slain or suddenly dead," was pointed out with great particularity by the statute 4 *Edw.* 1 (*De Officio Coronatoris*), which is said to have been merely directory, and in affirmance of the common law. (*See Seld. Soc. Publ. vol.* 9, p. xiv. *et seq.*) That statute was repealed by *s.* 45 of the *Coroners Act*, 1887 (50 *&* 51 *Vict. c.* 71), a consolidating Act. *Sect.* 3 of the latter statute provides that "where a coroner is informed that the dead body of a person is lying within his jurisdiction, and there is reasonable cause to suspect that such person has died either a violent or an unnatural death,

or has died a sudden death of which the cause is unknown (*see re Hull*, 9 *Q. B. D.* 689), or that such person has died in prison (*R.* v. *Robinson*, 19 *Q. B. D.* 322), or in such place or under such circumstances as to require an inquest in pursuance of any Act, the coroner, whether the cause of death arose within his jurisdiction or not, shall, as soon as practicable, issue his warrant for summoning not less than twelve nor more than twenty-three good and lawful men to appear before him at a specified time and place, there to inquire as jurors, touching the death of such person as aforesaid (*sub-s.* 1).

Upon the statute 4 *Edw.* 1 (*De Officio Coronatoris*), it was held that a coroner was bound to take his inquest *upon view* of the dead body, and that an inquest otherwise taken is void; *R.* v. *Ferrand*, 3 *B. & Ald.*, 260; 22 *R. R.* 373; and it is still the law that the coroner and jury shall, at the first sitting of the inquest, view the body. 50 & 51 *Vict. c.* 71, *s.* 4, *sub-s.* 1 (*post*, p. 155). It was also held under the old statute that a coroner might inquire as well respecting accessories *before* the fact to a murder or manslaughter, or respecting a principal in the second degree, aiding and abetting a murder or manslaughter, as concerning the actual murderer or slayer; but that he had no power to inquire concerning accessories after the fact; and the same rule appears to continue under 50 & 51 *Vict. c.* 71, *s.* 4, *sub-s.* 3 of which enacts that the inquisition shall in cases of murder or manslaughter set forth "the persons, if any, whom the jury find to have been guilty of such murder or manslaughter, or of being accessories before the fact to such murder." It was held before the passing of the *Coroners Act*, 1887, that if the dead body, whereon an inquest ought to be held, be interred, or suffered to putrefy before the coroner viewed it, the township, or, if the death occurred in a prison, the gaoler should be amerced; and that it was a misdemeanor to burn or otherwise dispose of a dead body, upon which an inquest ought to be held, with intent to prevent the coroner from holding the inquest. *R.* v. *Price*, 12 *Q. B. D.* 247; 53 *L. J.* (*M. C.*) 51: *R.* v. *Stephenson*, 13 *Q. B. D.* 331; 53 *L. J.* (*M. C.*) 176; *Cremation Act*, 1902 (2 *Edw.* 7 *c.* 8), *s.* 10; or in any other way to obstruct the coroner or his jury in the view or inquiry—*Jervis on Coroners* (6th ed.), 6, 86—and the *ratio decidendi* of these cases will apply to similar cases arising since the passing of the Act. The coroner himself may be indicted for misdemeanor if guilty of corruption or wilful neglect of duty or of misbehaviour in abstaining from holding an inquest where it is his duty to do so. *See* 50 & 51 *Vict. c.* 71, *s.* 8, *sub-s.* 2. On the other hand, the holding of inquests *unnecessarily* was most strongly censured by Lord *Ellenborough*, C.J., in *R.* v. *Justices of Kent*, 11 *East*, 229: 10 *R. R.* 484. The coroner has not an absolute right to hold inquests in every case in which he chooses to do so. It would be intolerable if he had power to intrude without adequate cause upon the privacy of a family in distress, and to interfere with their arrangements for a funeral. Nothing can justify such interference except a reasonable suspicion that there may have been something peculiar in the death,—that it may have been due to other causes than common illness. In such cases the coroner not only may, but ought to hold an inquest. *R.* v. *Price*, 12 *Q. B. D.* 247, 248, *Stephen*, J. And a coroner is justified in holding an inquest if he honestly believes information which has been given to him to be true, which, if true, would make it his duty to hold such inquest. *R.* v. *Stephenson*, 13 *Q. B. D.* 331. A coroner, also, it has been resolved, may lawfully, within a reasonable time after the death, order a dead body to be disinterred in order to view it, not only for the purpose of taking an inquest where none has been held before, but of taking a good inquest where an insufficient one has been taken before. *Jervis on Coroners*

(6th ed.), 27. For, where the first inquest was not held *supra visum corporis*, or is afterwards quashed by the High Court (K. B. D.), the coroner may hold another. 2 *Hawk. c.* 9, *s.* 23; 2 *Hale*, 58; *Anon.* 1 *Str.* 533. But where an inquest has been held *supra visum corporis*, and a verdict recorded, the coroner cannot, *mero motu*, hold a second inquest. 2 *Hale*, 59; *R.* v. *White*, 3 *E. & E.* 137; 29 *L. J.* (*Q. B.*) 257. Where a coroner rejected evidence which he ought to have admitted and the jury returned an open verdict, the inquisition was quashed by the Q. B. D., and a *melius inquirendum* awarded before the same coroner and another jury. *R.* v. *Carter*, 13 *Cox*, 220. And now *s.* 6 of the *Coroners Act*, 1887 (50 *&* 51 *Vict. c.* 71), "where his Majesty's High Court of Justice, upon application made by or under the authority of the attorney-general, is satisfied either (*a*) that a coroner refuses or neglects to hold an inquest which ought to be held; or (*b*) where an inquest has been held by a coroner that by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, or otherwise, it is necessary or desirable, in the interests of justice, that another inquest should be held, the court may order an inquest to be held touching the said death . . . and where an inquest has been already held may quash the inquisition on that inquest." That section also makes provisions as to the costs of the application, the coroner before whom the inquest provided for by it is to be held, and the proceedings at such inquest. *See Jervis on Coroners* (6th ed.), 54. Having regard to the terms of this section, it seems doubtful whether if a coroner neglects to take an inquisition, it can now be taken by the justices of goal delivery, of oyer and terminer, or of the peace, as stated in *Bac. Abr. Coroner*; 2 *Hawk. c.* 9, *s.* 23 (5) *et seq.*

In view of the powers given to the secretary of state to license exhumation (20 *&* 21 *Vict. c.* 81, *s.* 25), and the terms of *s.* 6 of the *Coroners Act*, 1887, it has been doubted whether a coroner has now the power, *proprio motu*, to order exhumation. *See Baker on Burials* (8th ed.), 43. The form of order in *Jervis on Coroners* (6th ed.), 247, is not a statutory form.

Proceedings at the inquest.]—"When not less than twelve jurors are assembled they shall be sworn by or before the coroner diligently to inquire touching the death of the person on whose body the inquest is about to be held, and a true verdict to give according to the evidence." 50 *&* 51 *Vict. c.* 71, *s.* 3, *sub-s.* 3. Though the jury cannot consist of less than twelve persons, it may consist of any greater number not exceeding twenty-three. 50 *&* 51 *Vict. c.* 71, *s.* 3, *sub-s.* 1 (*ante*, p. 154). "The coroner and jury shall, at the first sitting of the inquest, view the body, and the coroner shall examine on oath touching the death all persons who tender their evidence respecting the facts, and all persons having knowledge of the facts whom he thinks it expedient to examine." 50 *&* 51 *Vict. c.* 71, *s.* 4, *sub-s.* 1. Without view the inquisition is void. *R.* v. *Ferrand* (*ante*, p. 154). The coroner has power to require and compel the attendance of such witnesses as he deems necessary for the investigation of the truth of each case, and may fine them for non-attendance or for refusing to answer questions. 50 *&* 51 *Vict. c.* 71, *s.* 19, *sub-s.* 2. The Act of 1887, *s.* 4, *sub-s.* 1 (*ubi supra*) requires that the evidence at the inquest shall be given upon oath. This leaves the law as it stood before 1887. *Wakley* v. *Cooke*, 4 *Ex.* 511; 19 *L. J.* (*Ex.*) 91: *Jervis on Coroners* (6th ed.). But the fact that evidence not upon oath was received by the coroner is no ground for a *certiorari* to bring up the inquisition. *R.* v. *Ingham*, 5 *B. & S.* 257: 9 *Cox*, 508. It might, however, furnish ground for an application to the High Court of Justice for an order for another inquest under 50 *&* 51 *Vict. c.* 71, *s.* 6, *supra*. "Where it appears to the

coroner that the deceased was attended at his death or during his last illness by any legally qualified medical practitioner, the coroner may summon such practitioner as a witness; but if it appears to the coroner that the deceased person was not attended at his death or during his last illness by any legally qualified medical practitioner, the coroner may summon any legally qualified medical practitioner who is at the time in actual practice in or near the place where the death happened, and any such medical witness as is summoned in pursuance of this section, may be asked to give evidence as to how, in his opinion, the deceased came to his death." 50 & 51 *Vict.* c. 71, *s.* 21, *sub-s.* 1. "The coroner may, either in his summons for the attendance of such medical witness or at any time between the issuing of that summons and the end of the inquest, direct such medical witness to make a *post-mortem* examination of the body of the deceased, with or without an analysis of the contents of the stomach or intestines. Provided that where a person states upon oath before the coroner, that in his belief the death of the deceased was caused partly or entirely by the improper or negligent treatment of a medical practitioner or other person, such medical practitioner or other person shall not be allowed to perform or assist at the *post-mortem* examination of the deceased." *Id. sub-s.* 2. "If a majority of the jury sitting at an inquest are of opinion that the cause of death has not been satisfactorily explained by the evidence of the medical practitioner or other witnesses brought before them, they may require the coroner in writing to summon as a witness some other legally qualified medical practitioner named by them, and further to direct a *post-mortem* examination of the deceased, with or without an analysis of the contents of the stomach or intestines, to be made by such last mentioned practitioner, and that whether such examination has been previously made or not, and the coroner shall comply with such requisition, and in default shall be guilty of a misdemeanor." *Id. sub-s.* 3.

"It shall be the duty of the coroner in a case of murder or manslaughter to put into writing the statement on oath of those who know the facts and circumstances of the case, or so much of such statement as is material, and any such deposition shall be signed by the witness and also by the coroner." 50 & 51 *Vict.* c. 71, *s.* 4, *sub-s.* 2. [As to the admissibility in evidence of depositions taken before coroners, *see post, Part II.*]

As to summing up by the coroner, *see Jervis on Coroners* (6th ed.), 40.

"After viewing the body and hearing the evidence the jury shall give their verdict, and certify it by an inquisition in writing, setting forth, so far as such particulars have been proved to them, who the deceased was, and how, when, and where the deceased came by his death, and, if he came by his death by murder or manslaughter, the persons, if any, whom the jury find to have been guilty of such murder or manslaughter, or of being accessories before the fact to such murder." 50 & 51 *Vict.* c. 71, *s.* 4, *sub-s.* 3. If twelve at least of the jury do not agree on a verdict, the coroner may adjourn the inquest to the next assizes for the county or place for which the inquest is held, and if after hearing the charge of the judge or commissioner of assize twelve of the jury fail to agree on a verdict they may be discharged without a verdict. 50 & 51 *Vict.* c. 71, *s.* 4, *sub-s.* 5: *Jervis on Coroners* (6th ed.), 44.

Requisites and form of inquisition in cases of murder and manslaughter.] —The form of an inquisition is contained in the second schedule of 50 & 51 *Vict.* c. 71, and by sect. 37 of that Act:—"the schedules to this Act shall be construed and have effect as part of this Act, and the forms given in any of those schedules, or such other forms as the Lord Chancellor

from time to time directs may be used in all matters to which they apply, and when so used shall be sufficient in law." "The inquisition shall be under the hands, *and in the case of murder or manslaughter also under the seals*, of the jurors who concur in the verdict, and of the coroner." 50 & 51 *Vict. c.* 71, *s.* 18, *sub-s.* 1. "An inquisition need not, *except in the case of murder or manslaughter, be on parchment*, and may be written or printed, or partly written and partly printed, and may be in the form contained in the second schedule to this Act, or to the like effect or in such other form as the Lord Chancellor from time to time prescribes, or to the like effect, and the statements therein may be made in concise and ordinary language." *Id. sub-s.* 2. An inquisition consists of three parts, the caption or *incipitur*, the verdict of the jury, and the attestation. It may be stated generally, that the same degree of certainty that is requisite in an indictment is requisite in a coroner's inquisition, and all the rules relating to the description of the offence in the case of the former so far as the same are applicable, govern inquisitions. [*See ante*, p. 35, *et seq.*]

Venue.]—The venue must be inserted in the margin, or in the body of the caption; 2 *Hale*, 163, 166; but it is usually inserted in both. The venue should be in the county or jurisdiction within which the inquisition is holden. Where the inquisition is taken by the coroner of the Admiralty (*see Jervis on Coroners* (6th ed.), 102), no county is inserted in the margin as venue, but instead of it, the words, "Admiralty of England." To avoid difficulty in cases where the cause of death arose within one county or jurisdiction, and the body was lying dead within another county or jurisdiction, the Act of 1887 provides that "the coroner only within whose jurisdiction the body of a person upon whose death an inquest ought to be holden is lying shall hold the inquest, and where a body is found dead in the sea, or any creek, river, or navigable canal within the flowing of the sea where there is no deputy coroner for the jurisdiction of the Admiralty of England, the inquest shall be held only by the coroner having jurisdiction in the place where the body is first brought to land;" *s.* 7, *sub-s.* 1; and "for the purpose of holding coroners' inquests, every detached part of a county shall be deemed to be within the county by which it is wholly surrounded, or, where it is partly surrounded by two or more counties within the county with which it has the longest common boundary." *Sect.* 40, *sub-s.* 1. No inquisition is rendered insufficient by want of a proper or perfect venue. 14 & 15 *Vict. c.* 100, *ss.* 24, 30 (*ante*, pp. 54, 55). It must appear on the face of the inquisition at what place the inquest was held; but it is not necessary that the inquest should be held at the place where the body lies; and it has been decided that an inquest may be well held at D. *upon view* of a body lying dead at L. 2 *Hawk. c.* 9, *s.* 25. The inquisition ought to specify the day upon which the inquest was held; if held upon a Sunday, it is said that it would be void. 2 *Saund.* 291: *Jervis on Coroners* (6th ed.), 10.

Verdict.]—By 14 & 15 *Vict. c.* 100, *ss.* 24, 30 (*ante*, pp. 54, 55), no inquisition can be held insufficient for omitting to state the time at which the offence was committed (where time is not of the essence of the offence), or for stating the time imperfectly, or for stating the offence to have been committed subsequently to the finding of the inquisition, or on an impossible day, or on a day that never happened. The inquisition must show of what place the party who took it was coroner, and that he had competent jurisdiction. 2 *Ld. Raym.* 1305. It is essential that the inquest shall be taken *upon view* of the body (2 *Hawk. c.* 9, *s.* 23), for the coroner can take an inquisition *super visum corporis* only (excepting where the inquest is

ordered by the High Court of Justice, *v. ante*, p. 155); the view being absolutely necessary to give jurisdiction to him. If the body of the deceased be identified, and his christian name and surname be known, or the name by which he was usually known be ascertained, they ought to be correctly stated; but if the name of the deceased be unknown, he may be described as a certain person whose name is to the jurors unknown. It is essential to every inquisition that it be found by twelve jurors at the least; 2 *Hale*, 161, *n.*; 50 & 51 *Vict. c.* 71, *s.* 4, *sub-s.* 5; that the inquisition is presented upon their oaths; but if any juror has made an affirmation instead of an oath, it is not necessary to state the fact. It must also appear that the jury are lawful persons from the county or jurisdiction within which the inquest is held. 2 *Hawk. c.* 9, *s.* 22.

Attestation.]—Their names ought to be inserted in the body of the inquisition, and the inquisition ought to be subscribed by them with their names. *R.* v. *Evett*, 6 *B. & C.* 247: 30 *R. R.* 319. It was held in the last-mentioned case that the jurors ought to subscribe their names in full. 50 & 51 *Vict. c.* 71, *s.* 18, *sub-s.* 1 (*ante*, p. 157), merely directs that the inquisition shall be under their hands, and in the case of murder or manslaughter also under their seals. *See* 2 *Co. Inst.* 388.

By 24 & 25 *Vict. c.* 100, *s.* 6, it is enacted that, "in any indictment" [which word comprehends inquisitions taken before coroners, *R.* v. *Ingham*, 5 *B. & S.* 257; 33 *L. J.* (*Q. B.*) 183] "for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but that it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought, kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased; and it shall be sufficient in any indictment against any accessory to any murder or manslaughter to charge the principal with the murder or manslaughter (as the case may be) in the manner hereinbefore specified, and then to charge the defendant as an accessory in the manner heretofore used and accustomed." This gets rid of the strictness of the old rules as to pleading murder or manslaughter: but the form of inquisition for murder or manslaughter given in the schedule to 50 & 51 *Vict. c.* 71, does set out the circumstances of the death. If particulars are set out professing to show the facts justifying the verdict, the inquisition can be quashed if they are insufficient in law to constitute the offence found. *R.* v. *Clerk of Assize of Oxford Circuit* [1897] 1 *Q. B.* 370: 18 *Cox*, 518. On the trial of an inquisition, the court has the same powers of amendment as in the case of the trial of an indictment. *See* 14 & 15 *Vict. c.* 100, *ss.* 1, 24, and 30 (*ante*, pp. 52, 54, 55). And by *s.* 20 of 50 & 51 *Vict. c.* 71,—"If in the opinion of the court having cognizance of the case an inquisition finds sufficiently the matters required to be found thereby, and where it charges a person with murder or manslaughter sufficiently designates that person and the offence charged, the inquisition shall not be quashed for any defects, and the court may order the proper officer of the court to amend any defect in the inquisition, and any variance occurring between the inquisition and the evidence offered in proof thereof, if the court are of opinion that such defect or variance is not material to the merits of the case, and that the defendant or person traversing the inquisition cannot be prejudiced by the amendment in his defence or traverse on the merits, and the court may order the amendment on such terms as to postponing the trial to be had before the same or another jury as to the court may seem reasonable,

and after the amendment the trial shall proceed in like manner, and the inquisition, verdict, and judgment, shall be of the same effect, and the record shall be drawn up in the same form, in all respects, as if the inquisition had originally been in the form in which it stands when so amended." The jurisdiction to amend belongs only to the court of trial, *R.* v. *Directors of G. W. R.*, 20 *Q. B. D.* 410; 16 *Cox*, 410. If the inquisition is defective it may be brought up with the depositions by *certiorari* to the King's Bench Division of the High Court and quashed; *R.* v. *Clerk of Assize of Oxford Circuit* [1897] *Q. B.* 370: 18 *Cox*, 518: *and cf. Six-mile Bridge Case*, 6 *Cox*, 122 (*Ir.*). Where the defects are on the face of the inquisition the application is usually made to the court to which it is returned, and before plea pleaded. *See Jervis on Coroners* (6th ed.), 54, 55.

The inquisition in the case of murder or manslaughter must be not only under the hands, but also under the seals, of the jurors and of the coroner; 50 & 51 *Vict. c.* 71, *s.* 18, *sub-s.* 1 (*ante*, p. 157); and on parchment; *Id. sub-s.* 2 (*ante*, p. 157). On a similar provision contained in 6 & 7 *Vict. c.* 83 (*rep.*), it was held that an inquisition for murder or manslaughter or *felo de se* which was on paper instead of parchment should be quashed. *R.* v. *Whalley*, 7 *Dowl. & L.* 317; 19 *L. J.* (*Q. B.*) 14. Where the inquisition is taken before a deputy coroner, the proper mode of signing the attestation is "R. D. (L.S.), coroner, by E. M. his deputy duly appointed," etc. *R.* v. *Perkins*, 7 *Q. B.* 165; 14 *L. J.* (*M. C.*) 87. As to the jurisdiction of deputy coroners, and the mode of proving it, *see* 55 & 56 *Vict. c.* 56, *s.* 1. When the inquest takes place in a county other than that in which the offence is charged by the inquisition, the inquisition should be returned to the court of assize for the county in which the offence is charged. *R.* v. *Wight*, 59 *J. P.* 746.

Process upon a coroner's inquisition.]—"Where a coroner's inquisition charges a person with the offence of murder or manslaughter, or of being accessory before the fact to a murder (which latter offence is in this Act included in the expression 'murder'), the coroner shall issue his warrant for arresting or detaining such person (if such warrant has not previously been issued) and shall bind by recognizance all such persons examined before him as know or declare anything material touching the said offence, to appear at the next court of oyer and terminer or gaol delivery at which the trial is to be, then and there to prosecute or give evidence against the person so charged." 50 & 51 *Vict. c.* 71, *s.* 5, *sub-s.* 1. For form of recognizances to prosecute and give evidence, *Id. Sched.* 2. "The coroner shall deliver the inquisition, depositions, and recognizances, with a certificate under his hand that the same have been taken before him, to the proper officer of the court in which the trial is to be, before or at the opening of the court." *Id. s.* 5, *sub-s.* 3. By Home Office circular of May, 1891, coroners are requested to see that the depositions are legibly written and accompanied by all exhibits. If the coroner does not take them properly, and return them to the proper court or person, he is liable to fine under 50 & 51 *Vict. c.* 71, *s.* 9. When an inquisition is returned to the justices of oyer and terminer, or of gaol delivery, if the person against whom the coroner's jury have found their verdict of guilty has been taken, he is tried before them; but if he cannot be taken, the inquisition is to be certified by them into the King's Bench Division, and process may then be awarded as upon an indictment. *See ante*, p. 103; 2 *Hale*, 64; 1 *Chitty, Cr. L.* 163; and for all the forms of proceeding upon inquests, *see Jervis on Coroners* (6th ed.), and *Sched.* 2 of 50 & 51 *Vict. c.* 71.

Person charged with murder or manslaughter entitled to copy of inquisition

and of depositions.]—"A person charged by an inquisition with murder or manslaughter shall be entitled to have from the person having for the time being the custody of the inquisition or of the depositions of the witnesses at the inquest, copies thereof on payment of a reasonable sum for the same, not exceeding the rate of three half-pence for every folio of ninety words." 50 & 51 *Vict.* c. 71, *s.* 18, *sub-s.* 5.

Where a prosecution for murder or manslaughter is undertaken by the Director of Public Prosecutions, the coroner must send the inquisition and depositions to that officer. 42 & 43 *Vict.* c. 21, *s.* 5. By the Regulations of Jan. 25, 1886, under the *Prosecution of Offences Acts*, 1879 & 1884 (*see Douglas, Summ. Jur. Proc.* (8th ed.) 485: *Stat. Rules & Orders Revised* (ed. 1904), *vol.* 4, *tit.* "*Criminal Procedure, England*," p. 7), it is the duty of the Director of Public Prosecutions to take up charges of murder, and it has been the practice, since the issue of a Home Office circular of September, 1884, for the coroner to send to that officer copies of depositions taken on inquisitions of murder or manslaughter. *See Jervis on Coroners* (6th ed.), 52.

Bail where the coroner has committed a party to prison.]—The provisions as to bail contained in the *Indictable Offences Act*, 1848 (11 & 12 *Vict.* c. 42), the *Summary Jurisdiction Act*, 1848 (11 & 12 *Vict.* c. 43), *and the Bail Act*, 1898 (61 & 62 *Vict.* c. 7), *ante*, p. 112, *et seq.*, do not apply to cases of commitment upon an inquisition by the warrant of a coroner; but by 50 & 51 *Vict.* c. 71, *s.* 5, *sub-s.* 2, "Where the offence is manslaughter, the coroner may, if he thinks fit, accept bail by recognizance with sufficient sureties for the appearance of the person charged at the next court of oyer and terminer, or gaol delivery at which the trial is to be, and thereupon such person if in the custody of an officer of the coroner's court or under a warrant of commitment issued by such coroner, shall be discharged therefrom." As to the form of such recognizances, and the notices to be given to the persons bound thereby, *see Id. s.* 18, *sub-s.* 4, and *Sched.* 2. Where the jury find a verdict of *murder*, or where the coroner refuses bail, the High Court (K. B. D.) can grant bail. The procedure is the same as in other cases of bail. It is now usual to proceed by summons for bail, and not by writ of *habeas corpus* and *certiorari*. *See ante*, p. 116.

CHAPTER IV.

PLEAS, REPLICATIONS, ETC.

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SECT. 1.

ORDER AND TIME OF PLEADING.

CRIMINAL proceedings have been specially excepted from statutes changing the system of pleading (*e.g.*, 4 & 5 *Anne, c.* 8; 4 *Anne, c.* 16, *Ruffhead*), and are still to a great extent subject to the common law rules of pleading: 1 *Chit. Cr. L.* 434. At common law no more than one plea can be pleaded to any indictment or criminal information for misdemeanor. *R.* v. *Charlesworth*, 1 *B. & S.* 460; 31 *L. J.* (*M. C.*) 26: *R.* v. *Strahan*, 7 *Cox*, 85. In felonies if the defendant plead in abatement, he must afterwards, if the plea be adjudged against him, plead over to the felony; if he plead specially in bar, he may (*R.* v. *Charlesworth*, *ubi supra*), and should in strictness, *at the same time*, plead over to the felony. *See post*, p. 174; *and R.* v. *Drury*, 3 *C. & K.* 196, 200; 18 *L. J.* (*M. C.*) 189.

When brought to the bar and arraigned (*see post*, p. 181), the prisoner either confesses the charge, stands mute (*see post*, p. 183), or does not answer directly to the charge, (*see* 7 & 8 *G.* 4, *c.* 28, *s.* 2); or pleads to the jurisdiction, or in abatement—or demurs—or pleads specially in bar—or pleads the general issue, *i.e.*, that he is "not guilty." Except under the express provisions of a statute, it is not permissible to plead double or to join any other plea with the general issue. *R.* v. *Strahan*, 7 *Cox*, 85. When the defendant has any special matter to plead in abatement or in bar, or if the indictment be demurrable, he should plead, or demur at the time of arraignment, before the plea of not guilty. *See R.* v. *Binkes*, 2 *Smith* (*K. B.*) 620.

Where a defendant prosecuted in the King's Bench Division of the High Court in England or Ireland, by information or indictment, for any misdemeanor there found or removed into that court, appears in court in term time in person to answer the indictment or information, he cannot "imparle" to a following term, but must plead or demur thereto within four days from the time of his appearance; and in default of

his pleading or demurring within four days, judgment may be entered against him for want of a plea. If he appear to the indictment by attorney, he cannot imparle to the following term, but may forthwith be ruled to plead; and a plea or demurrer may be enforced, or judgment by default entered thereupon, in the same manner as before the passing of the Act might have been done, had the defendant appeared by his attorney in the preceding term. 60 *G.* 3 *&* 1 *G.* 4, *c.* 4, *s.* 1. But the court or a judge may, on sufficient cause, allow further time to plead or demur. 60 *G.* 3 *&* 1 *G.* 4, *c.* 4, *s.* 2. These provisions do not apply to prosecutions for non-repair of a bridge or highway. 60 *G.* 3 *&* 1 *G.* 4. *c.* 4, *s.* 10.

Sect. 2.

Plea to the Jurisdiction.

When available.]—Where an indictment is taken before a court which has no cognizance of the offence, the defendant may plead to the jurisdiction, without answering at all to the crime alleged; 2 *Hale*, 268; 1 *Chit. Cr. L.* 437; as if a man were indicted for treason at the quarter sessions, or for a rape at the sheriff's tourn, or the like; *Id.*; or if another court have exclusive jurisdiction of the offence. 4 *Bl. Com.* 333.

But it is seldom necessary to have recourse to this plea. For it is bad unless it shows a court or jurisdiction in which the defendant could lawfully be tried. If the offence were committed out of the jurisdiction of the English courts, the defendant may take advantage of this matter under the general issue; *R.* v. *Johnson*, 6 *East*, 583; 8 *R. R.* 550; or if the defect of jurisdiction appears upon the face of the record, he may demur, or (it would seem) move in arrest of judgment, or bring a writ of error. *See R.* v. *Hewitt*, *R. & R.* 158. If, on the other hand, the offence were committed within the local jurisdiction of the court, but the court has not cognizance of it (which can occur only in the case of indictments in inferior courts, such as a court of quarter sessions), the defendant may have advantage of it upon general demurrer; *R.* v. *Fearnley*, 1 *T. R.* 316; 1 *Leach*, 425; or the High Court, upon the indictment being removed by *certiorari*, will quash it. *R.* v. *Bainton*, 2 *Str.* 1088. And the court before which the indictment is preferred will, in general, give the defendant advantage of the objection at the trial, under the general issue. In *R.* v. *Balfour*, *Q. B. D.*, *Oct.* 15*th*, 1895, *Bruce*, J., it was proposed to put in a plea to the jurisdiction on the ground that the indictment contained counts for offences in respect of which the defendant had not been extradited from the Argentine Republic; but the doubtful counts were withdrawn, and the plea was not in fact pleaded. In *R.* v. *Jameson* [1896] 2 *Q. B.* 425; 65 *L. J.* (*M. C.*) 218; objections on the ground of want of jurisdiction were taken (1) on motion to quash the indictment; and (2) when this failed, under the plea of not guilty.

Form.]—The form of a plea to the jurisdiction is as follows:—

"*And the said* J. S. *in his own proper person cometh into court here, and having heard the said indictment read, saith, that the court of our lord the King here ought not to take cognizance of the* [trespass and assault] *in the said indictment above specified; because protesting that he is not guilty of the same, nevertheless the said* J. S. *saith, that,*" [etc., so proceeding to state

the matter of the plea. See the precedents, 1 *Went.* 10, 18; 4 *Went.* 63. Conclude thus]: "*And this he the said* J. S. *is ready to verify; wherefore he prays judgment if the said court of our lord the King now here will or ought to take cognizance of the indictment aforesaid; and that by the court here he may be dismissed and discharged,*" etc. Then add *profert* of any letters patent which may have been set forth in the plea. The form is the same in the King's Bench Division, excepting that the court is described as "*The King's Bench Division of His Majesty's High Court of Justice before the King himself here,*" and in the case of informations, the words, "*having heard the said indictment read,*" are omitted. The plea must be verified by affidavit.

The form of the replication to this plea is:—*And hereupon* J. K. A. [the clerk of the court], *who prosecutes for our said lord the King in this behalf, says, that notwithstanding anything by the said* J. S. *above in pleading alleged, this court ought not to be precluded from taking cognizance of the indictment aforesaid; because he says that,*" [etc., stating the matter of the replication]. "*And this the said* J. N. *prays may be inquired of by the country,*" etc. Or, if it concludes with a verification, then thus:—"*And this he the said* H. K. A. *is ready to verify; wherefore he prays judgment, and that the said* J. S. *may answer to the said indictment.*" Where the plea is pleaded in the King's Bench Division, the replication is in the name of the master of the crown office, in the case of an indictment or of an information filed by him; or in the name of the attorney-general, in the case of informations *ex officio.* *See post*, p. 168.

If a plea to the jurisdiction is quashed on demurrer or otherwise fails the defendant may be ordered to plead over *instanter.* *R.* v. *Johnson*, *ubi supra.*

Sect. 3.

Plea in Abatement.

A plea in abatement must be pleaded before pleading the general issue. Without confessing or denying the fact charged, it sets up some fact which if proved defeats the indictment. It is, therefore, purely dilatory, must be pleaded exactly (*O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1, 787), and cannot be amended. *R.* v. *Cooke*, 2 *B. & C.* 871.

It had by 1826 fallen into disuse in England except as to misnomer or want of proper addition (1 *H.* 5, *c.* 5) (*see ante*, p. 56). The *Criminal Law Act*, 1826 (7 *G.* 4, *c.* 64), *s.* 19, has rendered pleas in abatement useless by enacting that "no indictment or information shall be abated by reason of any dilatory plea of misnomer or of want of addition, or of wrong addition of the party offering such plea, if the court shall be satisfied, by affidavit or otherwise, of the truth of such plea; but in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and call upon the party to plead thereto, and proceed as if no such dilatory plea had been pleaded." And they are virtually abolished by 14 & 15 *Vict. c.* 100, *s.* 24, which enacts that no indictment shall be held insufficient "for want of or imperfection in the addition of any defendant." *See ante*, p. 54. For form of plea in abatement *see R.* v. *Shakespeare*, 10 *East*, 83: *R.* v. *Sheares*, 27 *St. Tr.* 267; *R.* v. *Duffy*, 7 *St. Tr., N. S.* 795, 806.

In *R.* v. *Swan*, *Fost.* 105, a plea in abatement and demurrer thereto were allowed to be pleaded *ore tenus.*

In Ireland it has been used as a mode of objecting to the qualification

of grand jurors. *R.* v. *Sheares*, 27 *St. Tr.* 255, 267: *R.* v. *Sheridan*, 31 *St. Tr.* 543, 576; *R.* v. *Duffy*, 7 *St. Tr., N. S.* 795, 805. *See post*, p. 201.

It is not settled whether the statutes cited *ante*, p. 163, affect the right of a peer, when indicted as a commoner, to plead in abatement of an indictment for treason, misprision of treason, or felony. His title is not only part of his name, but gives him a different mode of trial, viz., by his peers, which apparently cannot be waived. *See Lord Graves' case*, 4 *St. Tr., N. S.* 609, *n.*: 310 *Hansard*, 246, *and post*, p. 182.

The judgment *against* the King on a plea in abatement at common law was that the indictment be quashed, and was no bar to a fresh indictment properly framed. Under 7 *G.* 4, *c.* 64, *s.* 19, the indictment may be amended, and the defendant called to plead thereto, as if no such dilatory plea had been pleaded. The judgment *for* the King upon a plea of abatement, in misdemeanors, is final; in treason and felony, that the defendant do answer over. *R.* v. *Gibson*, 8 *East*, 107.

Sect. 4.

Demurrer.

By a demurrer to an indictment or information the defendant refers it to the court to pronounce whether, admitting the matters of fact alleged against him to be true, they do, in point of law, constitute him guilty of an offence sufficiently charged against him. 1 *Starkie, Cr. Pl.* 315 (2nd ed.). Demurrers are of two kinds: 1. *Special*, usually called demurrers in abatement, based on some formal defect in the indictment. 2. *General*, founded on some substantial defect in the indictment or last preceding pleading. And if the party plead to the indictment, or reply to a plea in bar, it will then be too late to demur unless the court consents to withdrawal of the plea or replication.

Special demurrers.]—Special demurrers seem altogether obsolete. Many omissions in an indictment, which formerly rendered it the subject of special demurrer, have become altogether immaterial since the passing of 14 & 15 *Vict. c.* 100, *s.* 24, which enacts that "no indictment," "information," "inquisition," "presentment," "plea," "replication," or other pleading, or any *nisi prius* record (14 & 15 *Vict. c.* 100, *s.* 30), "for *any offence* shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute,' instead of 'against the forms of the statutes,' or *vice versâ*, nor for that any person mentioned in the indictment is designated by a name of office, or other descriptive appellation, instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil in any case where the value or price, or the amount of damage, injury, or spoil, is not of the essence of the offence."

It is therefore useless to demur in respect of the defects specified in that section, and in respect of other formal defects in an indictment, the utility of a special demurrer as a weapon of defence appears to be entirely taken away by *s.* 25 of 14 *&* 15 *Vict. c.* 100, which enacts that "every objection to any indictment for any formal defect apparent on the face thereof shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared." *See R.* v. *O'Callaghan*, 14 *Cox*, 499: *R.* v. *Titley*, *Id.* 502.

General demurrers.]—Where, however, there is a defect in substance apparent on the face of the indictment, the defendant may still take advantage of it by general demurrer, and if he pleads over, instead of demurring or moving to quash the indictment (as to which *see ante*, p. 120) the defect will in numerous cases be cured by verdict. Thus, by 7 *G.* 4, *c.* 64, *s.* 21, "where the offence charged has been created by any statute or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute." And, independently of that enactment, it is a general rule of pleading at common law—in criminal as in civil cases—that, where an averment which is necessary for the support of the pleading is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court after verdict that the verdict could not have been found on this issue without proof of this averment, then, after verdict, the defective averment, which might have been bad on demurrer, is cured by the verdict. *Heymann* v. *R.*, *L. R.*, 8 *Q. B.* 102, 105: *R.* v. *Goldsmith*, *L. R.*, 2 *C. C. R.* 74; 42 *L. J.* (*M. C.*) 94: *Taylor* v. *R.* [1895] 1 *Q. B.* 25; 64 *L. J.* (*M. C.*) 11 *ante*, p. 85. In the cases of defects in substance apparent on the face of the indictment which do not fall within one of the classes mentioned either in 7 *G.* 4, *c.* 64, *s.* 21, or in *Heymann* v. *R.* (*ubi supra*), and are therefore not cured by verdict, the defendant may, instead of demurring, plead "not guilty;" and then if convicted, move in arrest of judgment, thus giving himself the same advantage which he could have had upon demurrer, after having had a chance of an acquittal on his plea of not guilty. The frequent adoption of this course in practice appears to be one of the main causes of the infrequency of demurrers in criminal practice. *Archb. Cr. Pl.* 126 (17th ed.); 1 *Starkie Cr. Pl.* 315 (2nd ed.). An additional reason for its adoption lies in the fact that the point of law raised on his motion can be reserved for the Court for Crown Cases Reserved. *R.* v. *Martin*, 1 *Den.* 398; 18 *L. J.* (*M. C.*) 137; and probably since the cases of *Heymann* v. *R.* (*ubi supra*) and *R.* v. *Goldsmith* (*ubi supra*) have called attention to the state of the law on this subject, demurrers and motions to quash indictments (as to which see *ante*, p. 120) may become somewhat more usual than they had hitherto been. But, inasmuch as the practice last stated is of value only in the case of *defects not cured by verdict*, there remain a few cases in which it may be expedient to resort to a general demurrer. The objections to the latter course are: (1) that points of law raised on demurrer cannot be reserved for the consideration of the Court for Crown Cases Reserved, *R.* v. *Fadermann*, 1 *Den.* 565; 19 *L. J.* (*M. C.*) 147, and that the judgment on demurrer can be reviewed only by writ of error (*Id.*); (2) that a

judgment for the Crown on a general demurrer to an indictment for felony is final: *R.* v. *Fadermann*, 1 *Den.* 569; 3 *C. & K.* 353: *Mulcahy* v. *R.*, *L. B.*, 3 *H. L.* 303, 326, *n.*; and final also in misdemeanor unless leave is given to plead over. *R.* v. *Birmingham & Gloucester Rail. Co.*, 3 *Q. B.* 224; 10 *L. J.* (*M. C.*) 136.

Time.]—The proper time for the defendant to demur is when arraigned and called upon to plead. But the court has a discretion to allow a plea to be withdrawn in order that the defendant may demur. Thus, in *R.* v. *Purchase*, *C. & Mar.* 617, where a man indicted for felony had in the absence of his counsel pleaded to a demurrable indictment, the judge, on the counsel's application, allowed him to demur, before the evidence was gone into. But this would not be permitted in order to take advantage of a merely verbal objection. *R.* v. *Odgers*, 2 *M. & Rob.* 479, and *see R.* v. *Brown*, 1 *Den.* 291, 293, *n.* It was in some cases held that a defendant might demur and plead to the indictment at the same time. *R.* v. *Phelps*, *C. & Mar.* 180: *R.* v. *Adams*, *Id.* 299. But this was denied to be law by *Cresswell*, J., in *R.* v. *Odgers* (*ubi supra*), and *see R.* v. *Duffy*, 7 *St. Tr.*, *N. S.* 795, 853; 2 *Cox*, 45: *Bullen & Leake Pleading* (3rd ed.), 692.

Form.]—A demurrer in the High Court must be written or printed on paper and filed at the Crown Office, and a copy delivered to the opposite party, and, if settled by counsel, must be signed by him. *Cr. Off. Rules*, 1886, *rr.* 128, 130. A demurrer in other courts must also be in writing. As to demurring *ore tenus*, *see R.* v. *Swan*, *Fost.* 105; 1 *Chit. Cr. L.* 440. In the Central Criminal Court, and apparently in other criminal courts, the demurrer must be written on parchment and filed. The following are forms of demurrers and joinders:—

Demurrer to an Indictment.

"*And the said* J. S. *in his own proper person cometh into court here, and, having heard the said indictment read, saith, that the said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he the said* J. S. *is not bound by the law of the land to answer the same; and this he is ready to verify: wherefore, for want of a sufficient indictment in this behalf, the said* J. S. *prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment specified.*"

Joinder.

"*And* H. K. A., *who prosecutes for our said lord the King in this behalf, saith, that the said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said* J. S. *to answer the same; and the said* H. K. A., *who prosecutes as aforesaid, is ready to verify and prove the same, as the court here shall direct and award: wherefore, inasmuch as the said* J. S. *hath not answered to the said indictment, nor hitherto in any manner denied the same, the said* H. K. A., *for our said lord the King, prays judgment, and that the said* J. S. *may be convicted of the premises in the said indictment specified.*"

Demurrer to a Plea in Bar.

"*And* H. K. A., *who prosecutes for our said lord the King in this behalf, as to the said plea of the said* J. S. *by him above pleaded, saith, that the same, and the matters therein contained, in manner and form as the same are above*

pleaded and set forth, are not sufficient in law to bar or preclude our said lord the King from prosecuting the said indictment against him the said J. S.; *and that our said lord the King is not bound by the law of the land to answer the same; and this he the said* H. K. A., *who prosecutes as aforesaid, is ready to verify: wherefore, for want of a sufficient plea in this behalf, he the said* H. K. A., *for our said lord the King, prays judgment, and that the said* J. S. *may be convicted of the premises in the said indictment specified.*" A demurrer to a plea in abatement is in the same form, except that it concludes with praying "*judgment, and that the said indictment may be adjudged good, and that the said* J. S. *may further answer thereto,*" etc.

Joinder.

"*And the said* J. S. *saith, that his said plea by him above pleaded and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude our said lord the King from prosecuting the said indictment against him the said* J. S.; *and the said* J. S. *is ready to verify and prove the same, as the said court here shall direct and award: wherefore, inasmuch as the said* H. K. A., *for our said lord the King, hath not answered the said plea, nor hitherto in any manner denied the same, the said* J. S. *prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified.*" The joinder is the same, if the demurrer be to a plea in abatement, except that it concludes with praying "*judgment, and that the said indictment may be quashed,*" etc.

For forms of demurrers and joinders in demurrer in the case of informations and of indictments in the King's Bench Division, *see App. to Cr. Off. Rules*, 1886, *Forms* 80, 84, 85 *and* 86.

Effect.]—A demurrer, on the part either of the crown or of the defendant, has the effect of laying open to the court not only the pleading demurred to, but the entire record, for their judgment upon it as to the matter of law; *Hob.* 56; 1 *Saund.* 284, *n.* 5; and if two or more of the pleadings be bad in substance the court will give judgment against the party who committed the first fault. Thus, for instance, if the indictment be bad, there shall be judgment for the defendant, although the bar be also insufficient; *Piggot's case*, 5 *Co. Rep.* 29 *a*; or even if it appear upon the face of the record that the court have no jurisdiction of the offence charged in the indictment, the defendant may take advantage of this matter upon the demurrer. *R.* v. *Fearnley*, 1 *T. R.* 316; 1 *Leach*, 425.

Judgment.]—The judgment for the defendant upon demurrer is, that he be dismissed and discharged from the premises. The judgment against the defendant in misdemeanors is the same as on demurrer in civil cases; *R.* v. *Taylor*, 3 *B. & C.* 502; 5 *D. & R.* 422; and the court has the same power of permitting the defendant afterwards to plead over. *R.* v. *Birmingham and Gloucester Railway Co.*, 3 *Q. B.* 224; 10 *L. J.* (*M. C.*) 136; *R.* v. *Mitchel*, 6 *St. Tr., N. S.* 545: *R.* v. *Taylor*, 3 *B. & C.* 502, *Abbott*, C.J. But demurrers in felonies have hitherto been of such rare occurrence, that it has been doubted what judgment ought to be pronounced against the defendant. The older authorities went to show it to be final: 2 *Hawk. c.* 31, *s.* 5; but by some this was questioned, and it was said that, *in favorem vitæ*, the defendant should plead over to the felony. *Id. s.* 6; 2 *Hale*, 255, 257; 4 *Bl. Com.* 334: *R.* v. *Taylor*, 5 *D. & R.* 422; 3 *B. & C.* 502: *R.* v. *Gibson*, 8 *East*, 107: *see R.* v. *Purchase, C. & Mar.* 617: *R.* v. *Bowen*, 1 *C. & K.*, 501, 504. In *R.* v. *Duffy*, 7 *St. Tr., N. S.* 795; 4 *Cox*,

24, which was an indictment for a felony not capital, the judges sitting on the commission of oyer and terminer in Dublin, agreed that the defendant was entitled to plead over to the felony, after judgment against him on demurrer to the indictment.

Respondeas ouster is a judgment in respect of dilatory pleas such as pleas in abatement, and not in respect of pleas in bar. *R.* v. *Taylor*, 3 *B. & C.* 502, 512.

The judgment for the crown on a demurrer to a plea in bar is generally against the defendant. But in *R.* v. *Fadermann*, 1 *Den.* 569; 3 *C. & K.* 353, the English law has been settled to be, that on *general* demurrer to an indictment for felony, the judgment for the Crown is final; though in the case of a special demurrer (usually called a demurrer in abatement), it might be otherwise; and *see Mulcahy* v. *R.*, *L. R.* 3 *H. L.* 306, 323, *n.*

Amendment.]—An information may be amended after demurrer: *R.* v. *Holland*, 4 *T. R.* 457; 2 *R. R.* 439; *R.* v. *Wilkes*, 4 *Burr.* 2527, 2568.

Until 1851 (14 & 15 *Vict. c.* 100, *s.* 1, *ante*, p. 52) an indictment, which is a finding upon the oaths of the grand jury, could only be amended with their consent before they were discharged. 2 *Hawk. c.* 25, *ss.* 97, 98, and *ante*, p. 93.

Appeal.]—The judgment given against a prisoner on demurrer to an indictment cannot be reviewed by the court for the consideration of Crown Cases Reserved (*post*, *c. viii. sect.* 1); *R.* v. *Fadermann*, 1 *Den.* 565; 19 *L. J.* (*M. C.*) 147, but only by writ of error, *q. v.*, *post*, *ch. viii. sect.* 2, p. 278.

Sect. 5.

SPECIAL PLEAS IN BAR.

When used.]—As all matters of excuse and justification may be given in evidence under the general issue, a special plea in bar seldom occurs in practice. In fact, the only instance (with the exception of the pleas of *autrefois acquit*, etc., *post*, p. 169 *et seq.*) in which a special plea in bar seems requisite in criminal cases is, where a parish or county is indicted for not repairing a road or bridge, etc., and wishes to throw the *onus* of repairing upon some person or persons not bound of common right to repair it; in which case they must plead specially the liability of the party to repair, and the reason of his liability, so as to take the case out of the common law rule, that every highway shall be repaired by the parish, and every bridge by the county in which it is situate. *See precedents of such pleas, post, Book II., Part II., Chap. VI., Sect.* 2, *nuisance.*

Form.]—The following are the forms of special pleas in bar, replications, and rejoinders:—

Special Plea.

"*And the said* J. S., *in his own proper person, cometh into court here, and, having heard the said indictment read, saith, that our said lord the King ought not further to prosecute the said indictment against him the said* J. S.; *because he saith, that*" [etc., so proceed to state the matter of the plea; and concluding thus]: "*And this he the said* J. S. *is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified.*"

Replication.

"*And hereupon* H. K. A. [the clerk of the court], *who prosecutes for our said Lord the King in this behalf, says, that, by reason of anything in the*

said plea of the said J. S. *above pleaded in bar alleged, our said lord the King ought not to be precluded from prosecuting the said indictment against the said* J. S.; *because he says, that* [etc., so proceeding to state the matter of the replication, and concluding thus]: "*And this the said* H. K. A. *prays may be inquired of by the country.*" [Or, if it conclude with a verification, then thus]; "*And this he the said* H. K. A. *is ready to verify; wherefore he prays judgment, and that the said* J. S. *may be convicted of the premises in the said indictment above specified.*"

When the plea is to an indictment in the King's Bench Division, the replication commences thus: "*And hereupon James Robert Mellor, esquire, coroner and attorney of our said lord the King, in the King's Bench Division of His Majesty's High Court of Justice, before the King himself, who for our said lord the King in this behalf prosecutes, says, that, by reason of,*" etc.: and the conclusion thus: "*And this he the said James Robert Mellor prays,*" etc., as above. Where the plea is pleaded to an information, the replication is thus: "*And the said attorney-general* [or *coroner and attorney*] *of our said lord the King, who prosecutes as aforesaid, says, that by reason of,*" etc. "*And this the said attorney-general* [or *coroner and attorney*] *of our said lord the King, prays,*" etc., as above.

If the replication conclude to the country, in making up the record add what is known as the *similiter*: "*And the said* J. S. *doth the like. Therefore, let a jury come.*" *See Stephen, Pleading* (5th ed.), 271. No judgment after verdict upon any indictment can be stayed or reversed for want of a *similiter*. 7 *G.* 4, *c.* 64, *s.* 21.

But if the replication conclude with a verification, the defendant must then rejoin.

Rejoinder.

"*And the said* J. S., *as to the said replication of the said* H. K. A. *to the said plea by him the said* J. S., *saith, that our lord the King, by reason of anything by the said* H. K. A. *in that replication alleged, ought not further to prosecute the said indictment against him the said* J. S.; *because he saith, that,*" [etc., so proceeding to state the matter of the rejoinder, and concluding thus]: "*And of this he the said* J. S. *puts himself upon the country.*" Or, if it be necessary to conclude with a verification, the conclusion may be in the same form as in a plea.

Having thus given the forms of special pleas, etc., generally, we shall now proceed to treat of those which usually occur in practice, in this order:—

1. *Autrefois acquit*, p. 169.
2. *Autrefois convict*, p. 174.
3. *Autrefois attaint*, p. 177.
4. *Pardon*, p. 178.

1. *Autrefois acquit.*

"It is an established rule of the common law that a man may not be put twice in peril for the same offence." 2 *Hawk. c.* 35.

The principle on which the right to plead *autrefois acquit* or *autrefois convict* depends, is that a man should not be put twice in jeopardy for the same matter, and not on any doctrine of estoppel. But it seems always to have been held that a previous acquittal can only be pleaded in bar to a subsequent indictment (1) where the acquittal is for the exact offence charged in the subsequent indictment; or (2) where the subsequent indictment is based on the same acts and omissions in respect whereof the previous acquittal was made, and some statute directs that the defendant shall not be tried

or punished twice in respect of the same acts or omissions. The statutory provisions on the subject are as follows: The *Piracy Act*, 1744 (18 *G.* 2, *c.* 30), directs that persons tried and acquitted or convicted for piracy, felony, and robbery under the Act shall not be liable to be tried again "for the same fact" as high treason. The *Incitement to Mutiny Act*, 1797 (37 *G.* 3, *c.* 70), contains a similar provision (*s.* 2), as do the *Unlawful Oaths Acts*, 1797 (37 *G.* 3, *c.* 123, *s.* 7), and 1812 (52 *G.* 3, *c.* 104, *s.* 8), and the *Treason Felony Act*, 1848 (11 *&* 12 *Vict. c.* 12, *s.* 7). The *Criminal Law Act*, 1851 (14 *&* 15 *Vict. c.* 100), provides (*s.* 12) that a person tried for misdemeanor shall not be entitled to acquittal because the evidence proves a felony, and shall not be tried again on the same facts for felony unless the court so directs. Similar provisions are made as to trials for false pretences where the evidence proves larceny, 24 *&* 25 *Vict. c.* 96, *s.* 88: and 14 *&* 15 *Vict. c.* 100, *s.* 9, while permitting conviction of an attempt on a charge for the full offence, forbids a second trial for the attempt: and by *s.* 33 of the *Interpretation Act*, 1889 (52 *&* 53 *Vict. c.* 63), it is provided that "where an act or omission constitutes an offence under two or more Acts or under an Act and at common law (whether any such Act was passed before or after the commencement of this Act (January 1, 1890) the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence."

Perhaps this enactment would have been clearer if for the word "offence" at the end had been substituted the words "act or omission." But it does no more than extend to statutory offences the common-law rule as laid down in *R.* v. *Miles*, 24 *Q. B. D.* 423.

One result of the rule is that when a man is tried for an offence and acquitted, he cannot afterwards be indicted for the same offence, if the first were such that he could have been lawfully convicted; and if he be prosecuted a second time, he may plead *autrefois acquit*, and it will be a good bar to the indictment. It is immaterial whether the first acquittal were in a summary proceeding or on indictment: *Wemyss* v. *Hopkins*, *L. R.* 10 *Q. B.* 378; 44 *L. J.* (*M. C.*) 101. The true test by which the question, whether such a plea is a sufficient bar in any particular case, may be tried is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. *R.* v. *Clark*, 1 *B. & B.* 473. If the crimes were so distinct that the evidence of one will not support the other, it is inconsistent with reason to say that they were so far the same that an acquittal of one shall be a bar to a prosecution for the other. Neither do the legal authorities support such a proposition. *R.* v. *Vandercomb*, 2 *East, P. C.* 519, 520; 2 *Leach*, 708. *See also R.* v. *Bird*, 2 *Den.* 94; 20 *L. J.* (*M. C.*) 70 (*C. C. R.*): *R.* v. *Emden*, 9 *East*, 437; *R.* v. *Sheen*, 2 *C. & P.* 634: *R.* v. *Drury*, 3 *C. & K.* 193; 18 *L. J.* (*M. C.*) 189; *R.* v. *Miles*, 24 *Q. B. D.* 423; 59 *L. J.* (*M. C.*) 56: and 1 *Russ. Cr.* (6th ed.) 49, *n.*

Thus, an acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for larceny of the same goods: because, upon the former indictment the defendant might have been convicted of the larceny. But if the first indictment were for a burglary, with intent to commit a larceny, and did not charge an actual larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny; 2 *Hale*, 246: *R.* v. *Vandercomb*, *ubi supra*; because the defendant could not have been convicted of the larceny on the first indictment. But in *R.* v. *O'Brien*, 15 *Cox*, 29 (*C. C. R.*), an acquittal for larceny at common law and feloniously receiving the goods so stolen was

held no bar to a subsequent indictment for stealing a fixture, framed on 24 & 25 *Vict. c.* 96, *s.* 31. An acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter; 2 *Hale*, 246; because the defendant might have been convicted of the manslaughter on the first indictment. So, an acquittal upon an indictment for manslaughter is, it seems, a bar to an indictment for murder. *Holtcroft's case*, 2 *Hale*, 246; 3 *Co. Rep.* 46 *b*, *cit.*: *R.* v. *Tancock*, 13 *Cox*, 217. A series of charges may not be preferred, and whether a person accused of a minor offence is acquitted or convicted he may not be charged again on the same facts in a more aggravated form. *R.* v. *Elrington*, 1 *B.* & *S.* 688; 31 *L. J.* (*M. C.*) 14, *Cockburn*, C.J.: *R.* v. *Miles*, 24 *Q. B. D.* 423. But this rule does not apply when the subsequent charge is of murder or manslaughter. *R.* v. *Morris*, 10 *Cox*, 480: *R.* v. *Salvi*, *Ib.* 481, *n.* A person cannot, after being acquitted on an indictment for felony, be indicted for an attempt to commit it, for he might have been convicted for the attempt on the previous indictment for the felony. 14 & 15 *Vict. c.* 100, *s.* 9. So, also, a person indicted and acquitted on an indictment for robbery, cannot afterwards be indicted for an assault with intent to commit it; 24 & 25 *Vict. c.* 96, *s.* 41; a person indicted and acquitted for a misdemeanor, which upon the trial appears to be a felony, cannot afterwards be indicted for the felony: 14 & 15 *Vict. c.* 100, *s.* 12; a person indicted and acquitted for embezzlement cannot afterwards be indicted as for larceny; or if tried and acquitted for larceny, cannot afterwards be indicted as for embezzlement, upon the same facts; 24 & 25 *Vict. c.* 96, *s.* 72: *R.* v. *Gorbutt*, *Dears.* & *B.* 166; 26 *L. J.* (*M. C.*) 47; and if a man be indicted in any manner for receiving stolen goods, he cannot afterwards be prosecuted again for the same offence. 24 & 25 *Vict. c.* 96, *s.* 91: *see ss.* 92, 93, 94. This rule is equally applicable, though the first indictment be against the defendant jointly with others, and the second against him alone; for upon the second indictment he may be convicted of an offence committed by him separately or jointly with others; and the plea avers the identity of the offence charged in both the indictments. *R.* v. *Dann*, 1 *Mood. C. C.* 424. An acquittal by a competent jurisdiction abroad is a bar to an indictment for the same offence before any other tribunal. *R.* v. *Roche*, 1 *Leach*, 134: *R.* v. *Hutchinson*, 3 *Keb.* 785; 1 *Leach*, 135, *cit.*; *Bull.* (*N. P.*) 245. But in this case the defendant should produce an exemplification of the record of his acquittal under the public seal of that state or kingdom where he has been tried and acquitted. *See Beak* v. *Thyrwhit*, 3 *Mod.* 194; *S. C. sub nom. Beake* v. *Tyrrell*, 1 *Show.* 6; *Bull.* (*N. P.*) 245: *R.* v. *Roche*, 1 *Leach*, 134. Even an erroneous acquittal, standing unreversed, is a sufficient foundation for this plea: *Y. B.* 9 *H.* 5, *fo.* 2, *pl.* 7; 2 *Co. Inst.* 318, 319; 2 *Hale*, 247: *R.* v. *Drury*, 18 *L. J.* (*M. C.*) 189; 3 *C.* & *K.* 193. An acquittal on an indictment for non-repair of a highway binds no right. *R.* v. *Burbon* [1816] 1 *Man.* & *G.* 392: *R.* v. *Hutchings*, 6 *Q. B. D.* 300, 306; *and see R.* v. *Ollis* [1900] 2 *Q. B.* 758 (*C. C. R.*).

But an acquittal upon an indictment in a wrong county cannot be pleaded to a subsequent indictment for the offence in another county. *Com. Dig.*, *Indictment* (*L.*); 2 *Hale*, 245: *R.* v. *Welsh*, 1 *Mood. C. C.* 175. An acquittal on an indictment for murder is no bar to an indictment for arson arising on the same facts. *R.* v. *Serné*, 107 *Cent. Crim. Ct. Sess. Pap.* 418, *Charles*, J. It was held in *R.* v. *Henderson*, *C.* & *Mar.* 328; 2 *Mood. C. C.* 192, that an acquittal on an indictment for larceny is no bar to an indictment for the same offence charged as "obtaining by false pretences," notwithstanding the proviso in 7 & 8 *G.* 4, *c.* 29, *s.* 53 (*rep.*), which is now included in 24 & 25 *Vict. c.* 96, *s.* 88. But in *R.* v. *King* [1897]

1 *Q. B.* 214; 66 *L. J.* (*Q. B.*) 81 (*C. C. R.*), it was held that a conviction for obtaining credit under false pretences and by fraud was a bar to a subsequent indictment based on the same facts for stealing the same goods. An acquittal on an indictment under 24 & 25 *Vict. c.* 97, *s.* 35, for the felony of unlawfully and maliciously putting across any railway anything with intent to obstruct any engine using such railway, is no bar to a subsequent indictment upon the same facts, under 24 & 25 *Vict. c.* 97, *s.* 36, for the misdemeanor of unlawfully obstructing an engine using a railway. *R.* v. *Gilmore*, 15 *Cox*, 85, *Huddleston*, B.

The acquittal of a man as principal is no bar to a subsequent prosecution against him (*a*) as accessory *after the fact*; 2 *Hawk. c.* 35, *s.* 11; nor (*b*) according to the ancient law, as accessory *before the fact*. Sir M. Hale lays down that such an acquittal is a bar to a subsequent prosecution against him as an accessory *before the fact*. 1 *Hale*, 625; 2 *Hale*, 244: *Kel.* (J.) 35. This, however, is not the view of either *Foster* or *Hawkins*: *Fost.* 361; 2 *Hawk. c.* 35, *s.* 11; and in *R.* v. *Birchenough*, 1 *Mood. C. C.* 477; 7 *C. & P.* 575, where, to an indictment charging the defendant as an accessory before the fact to child murder, he pleaded *autrefois acquit* upon an indictment charging him with having been present, aiding and abetting in the said murder, the judges held that the plea was no bar, and had been properly overruled at the trial.

But by 24 & 25 *Vict. c.* 94, *s.* 1, an accessory before the fact may be indicted as a principal felon (*ante*, p. 18). So an acquittal (or judgment for the defendant on demurrer, *R.* v. *Richmond*, 1 *C. & K.* 240) upon insufficient indictment, is no bar to another indictment for the same offence. *Vaux's case*, 4 *Co. Rep.* 44*b*, 45*a*; and *see R.* v. *Coogan*, 1 *Leach*, 448: *R.* v. *Taylor*, 3 *B. & C.* 502. An insolvent debtor, who had been indicted for omitting goods from his schedule and acquitted, afterwards pleaded *autrefois acquit* to another indictment for omitting other goods from the same schedule; and *Patteson*, J., held that the plea was no bar to the second indictment, but said that such a course ought not to be adopted except under very peculiar circumstances. *R.* v. *Champneys*, 2 *M. & Rob.* 26. And generally it may be laid down, that whenever, by reason of some defect in the record, either in the indictment, the place of trial, the process, or the like, the defendant was not lawfully liable to suffer judgment for the offences charged against him in the first indictment as it stood at the time of its finding, he has not been *in jeopardy*, in the sense which entitles him to plead the former acquittal (or conviction) in bar of a subsequent indictment. *R.* v. *Drury*, 3 *C. & K.* 193; 18 *L. J.* (*M. C.*) 189: *R.* v. *Green*, *Dears. & B.* 113; 26 *L. J.* (*M. C.*) 17; 7 *Cox*, 186.

Form.]—"In any plea of *autrefois convict* or *autrefois acquit*, it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted, as the case may be, of the offence charged in the indictment. 14 & 15 *Vict. c.* 100, *s.* 28.

The following is the form of the plea of *autrefois acquit*:—

"*And the said* J. S., *in his own proper person cometh into court here, and having heard the said indictment read, saith that our said lord the King ought not further to prosecute the said indictment against the said* J. S.; *because he saith, that heretofore, to wit, at the general quarter sessions of the peace holden at* ——, *in and for the county of* ——, *he the said* J. S., *was lawfully acquitted of the said offence charged in the said indictment. And this he the said* J. S., *is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified.*" *See also post*, p. 176, and *R.*

v. *Connell*, 6 *Cox*, 178. The plea may be made *ore tenus*; 1 *Russ. Cr.* (6th ed.) 49, *n.*; but should be on parchment, and be signed by counsel. The court, however, will not reject the plea because it is informal, but will assign counsel to prepare it in a proper form for the defendant. *R.* v. *Chamberlain*, 6 *C. & P.* 93.

If the indictment be for treason or felony, the defendant, besides this plea of *autrefois acquit*, should also plead over to the treason or felony. *R.* v. *Vandercomb*, 2 *Leach*, 708, 712: *R.* v. *Drury*, *ante*, p. 172. In such a case, therefore, continue the plea thus: "*And as to the felony and larceny of which the said* J. S. *now stands indicted, he the said* J. S. *saith, that he is not guilty thereof; and of this he the said* J. S. *puts himself upon the country.*" If, however, the defendant pleads *auterfois acquit*, without pleading over to the felony, after his special plea is found against him, he may still plead over to the felony. 2 *Hawk. c.* 23, *s.* 128: *R.* v. *Sheen*, 2 *C. & P.* 634: *R.* v. *Welsh*, *MS.* (1828); *Carr. Supp.* 56.

In the case of a plea of *autrefois acquit*, a jury are sworn *instanter* to try the issue: *R.* v. *Scott*, 1 *Leach*, 401; and therefore there is no replication actually pleaded on the part of the crown. *But see R.* v. *Sheen*, *ubi supra*: 1 *Russ. Cr.* (6th ed.) 50, *n.* But a replication and *similiter* must be entered upon the record, when it is made up. The form may be as follows:—

"*And hereupon* H. K. A. [the clerk of the court], *who prosecutes for our said lord the King in this behalf, says that, by reason of anything in the said plea of the said* J. S. *above pleaded in bar alleged, our said lord the King ought not to be precluded from prosecuting the said indictment against the said* J. S.; *because he says that the said* J. S. *was not lawfully acquitted of the said offence charged in the said indictment, in manner and form as the said* J. S. *hath above in his said plea alleged; and this he the said* H. K. A. *prays may be inquired of by the country. And the said* J. S. *doth the like. Therefore let a jury come.*"

The proof of the issue lies on the defendant. To prove it, it used to be necessary to make up the record of the former acquittal, and to give in evidence the record itself, or an examined copy of it; *R.* v. *Bowman*, 6 *C. & P.* 101, 337; except where the second indictment was preferred at the same assizes, in which case the original indictment and minutes of the verdict were and are receivable in evidence in support of the plea, without a record being drawn up. *R.* v. *Parry*, 7 *C. & P.* 836. But by the *Evidence Act*, 1851 (14 *& 15 Vict. c.* 99), *s.* 13, "whenever in any proceeding whatever" [whether civil or criminal, *Richardson* v. *Willis*, *L. R.*, 8 *Ex.* 69; 42 *L. J.* (*Ex.*) 15], "it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof; but it shall be sufficient that it be certified, or purport to be certified under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof." And by 34 *& 35 Vict. c.* 112, *s.* 18 (*post*, *Book II. Part V.*), provision is made for proving previous convictions by certificate.

If there be a variance between the former record and the present indictment, in the description of the offence, it may be made good by evidence showing in substance that the evidence necessary to support the present indictment would have been sufficient to convict the prisoner upon the former.

If the former trial was at quarter sessions, the King's Bench Division can, if necessary, grant a *mandamus* to the justices to make up the record. *R.* v. *Justices of Middlesex*, 5 *B. & Ad.* 1113; 3 *L. J.* (*M. C.*) 32.

The judgment against the defendant on this plea, in felonies, is *respondeas ouster* (*see ante*, p. 168); or rather, as the defendant generally pleads over to the felony at the same time with the issue in the plea of *autrefois acquit*, the jury are charged again to inquire of the second issue, and the trial proceeds as if no special plea in bar had been pleaded. *R.* v. *Vandercomb*, 2 *Leach*, 708; *R.* v. *Coogan*, 1 *Leach*, 448: *R.* v. *Sheen*, 2 *C. & P.* 634. In misdemeanors the judgment is final. *R.* v. *Goddard*, 2 *Ld. Raym.* 920; 3 *Salk.* 171. When the plea is allowed, the judgment is "that the defendant shall go without day," and he is altogether discharged from the prosecution. 2 *Hale*, 391, and *see* 1 *Deacon, Cr. Law*, 90. The verdict for the defendant, upon the issue on the plea of *autrefois acquit*, cannot, it seems, be set aside, and a new trial had, although it be given without evidence and against the opinion of the judge. *R.* v. *Lea*, 2 *Mood. C. C.* 9.

As to the effect of dismissal of a charge tried summarily on a subsequent prosecution on indictment, *see post*, p. 175.

2. *Autrefois convict.*

By 52 & 53 *Vict. c.* 63 (*Interpretation Act*, 1889), *s.* 33, "where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether such Act was passed before or after the commencement of this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts and at common law, but shall not be liable to be punished twice for the same offence. This enactment is substantially the same as the common law rule, that a man must not be put twice in peril for the same offence. 2 *Hawk. c.* 35.

The defence *autrefois convict*, applies whether the previous conviction was on indictment or summary provided that it was before a court of competent jurisdiction after a hearing on the merits. *Wemyss* v. *Hopkins*, *L. R.* 10 *Q. B.* 378: 44 *L. J.* (*M. C.*) 101.

The only cases in which a previous conviction can be effectually pleaded in bar to a subsequent indictment are:

(1) Where the conviction was for the exact offence charged in the subsequent indictment, and was sufficient in law: 1 *Chit. Cr. L.* 461: 4 *Bl. Com.* 336: 2 *Hale* 251: 2 *Hawk. c.* 36, *s.* 10: *Vaux' case*, 4 *Co. Rep.* 44*b*, 45*a*. A plea of *autrefois convict*, which shows that the judgment on the former indictment has been reversed for error in the judgment is not a good bar to another indictment for the same offence. *R.* v. *Drury*, 3 *C. & K.* 193; 18 *L. J.* (*M. C.*) 189; 2 *Cox*, 144.

(2) Where the subsequent indictment is based on the same acts or omissions as those in respect whereof the previous conviction was made, and some statute directs that a person shall not be punished twice in respect of the same acts or omissions. *Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63) *s.* 33 (*supra*); 14 & 15 *Vict. c.* 100, *s.* 12. A conviction for obtaining credit or goods under false pretences is a bar to a subsequent indictment for larceny on the same facts. *R.* v. *King* [1897] 1 *Q. B.* 214, 218: 18 *Cox*, 447, *Hawkins*, J.

A person who has been convicted by a court of summary jurisdiction under 24 & 25 *Vict. c.* 100, *s.* 42, of a common assault, but has been discharged under *s.* 16, *sub-s.* 2 of 42 & 43 *Vict. c.* 49, without any sentence of fine or imprisonment, on giving security to be of good behaviour, cannot, at common law and independently of the defence given by 24 & 25 *Vict. c.*

100, *s.* 45 (*infra*), afterwards be convicted on indictment for the same assault, although the indictment charges him with unlawful wounding or other circumstances of aggravation. *R.* v. *Miles*, 24 *Q. B. D.* 423; 59 *L. J.* (*M. C.*) 56.

The *Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), which empowers a petty sessional court under certain circumstances to try summarily persons charged with certain indictable offences, enacts in *s.* 27, *sub-s.* 3, that "the conviction for any such offence shall be of the same effect as a conviction for the offence on indictment," and in *sub-s.* 4, that "where the court have assumed the power to deal with the case summarily, and dismiss the information, they shall, if required, deliver to the person charged a copy certified under their hands of the order of such dismissal, and such dismissal shall be of the same effect as an acquittal on a trial on indictment for the offence."

The same rules apply generally to this plea as to the plea of *autrefois acquit*.

Where on an indictment containing counts for inflicting grievous bodily harm, unlawful wounding, assault occasioning actual bodily harm, and common assault, the jury convicted of common assault, but disagreed on the other counts, it was held, on a retrial on the other counts, that the conviction for common assault would support a plea of *autrefois convict*. *R.* v. *Grimwood*, 60 *J. P.* 809, *Pollock*, B., *and see R.* v. *Elrington*, 1 *B. & S.* 688: 31 *L. J.* (*M. C.*) 14.

24 & 25 *Vict. c.* 100, *s.* 44, enacts, that if the justices on the hearing of any such case of assault or battery upon the merits, where the complaint was preferred by or on behalf of the party aggrieved, under either of the last two preceding sections (*ss.* 42, 43), shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall *forthwith* make out a certificate under their hands, stating the fact of such dismissal, and shall deliver the certificate to the party against whom the complaint was preferred." "Forthwith" means so soon as it is applied for by the defendant, who has a right to it *ex debito justitiæ*; *Hancock* v. *Somes*, 1 *E. & E.* 795; 21 *L. J.* (*M. C.*) 196; *Costar* v. *Hetherington*, 1 *E. & E.* 802; 28 *L. J.* (*M. C.*) 198; overruling *R.* v. *Robinson*, 12 *A. & E.* 672; 10 *L. J.* (*M. C.*) 9, where it was held that the certificate must be given before the justices separated. Such certificate of dismissal can only be granted when there has been a full hearing "upon the merits." If the certificate be granted on the withdrawal of the charge, before hearing, it will be no bar to subsequent proceedings in respect of the same assault. *Reed* v. *Nutt*, 24 *Q. B. D.* 669. By *s.* 45, "if any person against whom any such complaint, as in either of the last three preceding sections mentioned, shall have been preferred by or on behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment, or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, *for the same cause*." But by *s.* 46, the justices are prohibited from adjudicating on any assault or battery which they shall find to have been "accompanied by any attempt to commit felony," or which they shall think, "from any other circumstance, a fit subject for prosecution by indictment," or "in which any question shall arise as to the title to any lands, tenements or hereditaments or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice."

The form of the plea of *autrefois convict* in such cases may be as follows:—

"*And the said* J. S. *in his own proper person cometh into court here, and having heard the said indictment read, saith, that our said lord the King ought not to further prosecute the said indictment against him the said* J. S. *in respect of the offence in the said indictment mentioned, because he saith that heretofore, to wit, on the —— day of ——, in the year of our Lord ——, at the parish of —— in the county of ——, he the said* J. S. *was, upon the complaint of the said* J. N., *etc.* [reciting the information before the magistrates in the past tense], *convicted before the said* A. B., *clerk, and the said* C. D. *esquire, two of his Majesty's justices of the peace in and for the said county, for that he the said* J. S. *did, on, etc., at, etc., unlawfully assault and beat the said* J. N., *in the peace of our said lord the King then and there being contrary to the statute in that case made and provided; and the said justices did then and there adjudge the said* J. S. *for his said offence to forfeit and pay the sum of* 5*l. of lawful money of Great Britain; and, in default of immediate payment of the said sum of* 5*l. by the said* J. S. *as aforesaid, they the said justices did adjudge the said* J. S. *to be imprisoned in the house of correction for the said county for the space of two calendar months, unless the said sum of* 5*l. should be sooner paid; and the said justices did direct that the said sum of* 5*l. should be paid to* E. F., *one of the overseers of the poor of the parish of —— aforesaid, in which parish the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided; as by the record of the said conviction more fully and at large appears; which said judgment and conviction still remains in full force and effect, and not in the least reversed or made void. And the said* J. S. *further saith, that the assault and battery of the said* J. N., *of which he the said* J. S. *was so convicted as aforesaid, and the wounding of the said* J. N. *in the said indictment mentioned, are one and the same assault and battery, and not other and different. And he the said* J. S. *further saith, that he the said* J. S. *hath duly paid the whole amount of the said sum of* 5*l. so adjudged by the said justices to be paid under the said conviction as aforesaid to the said* E. F., *etc., being such overseer of the said parish of —— as aforesaid. And this he the said* J. S. *is ready to verify; wherefore he prays judgment if our said lord the King ought further to prosecute the said indictment against him the said* J. S. *in respect of the said offence in the said indictment mentioned, and that he the said* J. S. *may be dismissed and discharged from the same. And as to the felony aforesaid in the said indictment mentioned, the said* J. S. *saith that he is not guilty thereof, and thereof he puts himself upon the country,*" etc. [If the complaint was dismissed by the justices, a plea of *autrefois acquit* can be framed accordingly.]

Where to an action for an assault the defendant pleaded that he had been summoned by the plaintiff before a metropolitan police magistrate, who convicted him in the costs of the complaint and hearing, which the defendant had paid; and at the trial the magistrate's clerk produced his note-book by which it appeared that the magistrate had merely ordered the defendant to enter into his recognizances, and pay the expense thereof, and the clerk also said that in such cases no conviction was ever drawn up: it was held that the plea was bad, and disclosed no defence under 24 & 25 *Vict. c.* 100, *s.* 45; that it was not proved, and that, even if there were a conviction, the proper proof was not adduced. *Hartley* v. *Hindmarsh*, *L. R.* 1 *C. P.* 553; 35 *L. J.* (*M. C.*) 255. The judgment of the court in that case proceeded upon the grounds that there was no record of any conviction, and further that the magistrate did not adjudicate upon the case, but, as a conservator of the peace, ordered the defendant

to enter into recognizances. *Per Pollock*, B., in *R.* v. *Miles*, 24 *Q. B. D.* 423; 59 *L. J.* (*M. C.*) 56, *ante*, p. 175.

The replication may be as follows:—"*And hereupon* H. K. A. [the clerk of the court] *who prosecutes for our said lord the King in this behalf, says, that by reason of anything in the said plea of the said* J. S. *above pleaded in bar alleged, our said lord the King ought not to be precluded from prosecuting the said indictment against the said* J. S.; *because he says that there is not any record of the said supposed conviction, in manner and form as the said* J. S. *hath above in his said plea alleged; and this he the said* H. K. A. *prays may be inquired of by the country,*" etc. In the case of a dismissal of the complaint by the justices, the replication should traverse the fact of the granting of the certificate. *See R.* v. *Robinson*, 12 *A. & E.* 672; 4 *Per. & D.* 391: 10 *L. J.* (*M. C.*) 9.

The plea and any demurrer to it should be put on parchment. *R.* v. *Walker*, 8 *C. & P.* 446, *Parke*, B. A plea of a conviction or acquittal under 9 *G.* 4, *c.* 31, *ss.* 27, 28 (*rep.*), of which 24 *&* 25 *Vict. c.* 100, *ss.* 44, 45, are in substance a re-enactment, is a bar to an indictment for a felonious stabbing, etc., in the same transaction; *R.* v. *Walker*, *ubi supra*; for the justices are to determine whether the assault was accompanied by any felonious transaction, and their decision on that point is final. *R.* v. *Stanton*, 5 *Cox*, 324, *Erle*, J. And a plea of a dismissal of the complaint by the justices under 2 *G.* 4, *c.* 31, *ss.* 27, 28 (*rep.*), was held to be a bar to an indictment for unlawfully wounding, and for an assault occasioning actual bodily harm, arising out of the same circumstances; *R.* v. *Elrington*, 1 *B. & S.* 688; 31 *L. J.* (*M. C.*) 14; 9 *Cox*, 86, where the two cases last cited were approved; but a summary *conviction* for assault under 24 *&* 25 *Vict. c.* 100, *s.* 42, is not a bar to a subsequent indictment for manslaughter upon the death of the man assaulted, consequent upon the same assault. *R.* v. *Morris*, *L. R.* 1 *C. C. R.* 90; 36 *L. J.* (*M. C.*) 84: *R.* v. *Friel*, 17 *Cox*, 325: *Stephen Dig. Cr. Proc.* 325. This rule is not affected by 42 *&* 43 *Vict. c.* 49 (*The Summary Jurisdiction Act*, 1879), *s.* 27 (3); *R.* v. *Friel*, *ubi supra*. The production of the certificate is of itself sufficient evidence of the dismissal by the justices, without proof of their signature or official character; 8 *&* 9 *Vict. c.* 113, *s.* 1: and if the defendant appeared before the justices, the recital in the certificate of the fact of a complaint having been made, and of a summons having been issued, is sufficient evidence of those facts, without producing the complaint or summons. *R.* v. *Westley*, 11 *Cox*, 139. Where the first count of an indictment charged the defendant with assaulting the prosecutor and inflicting upon him grievous bodily harm, and the second charged him with an assault upon the prosecutor occasioning actual bodily harm, and the defendant pleaded one plea only (instead of a plea to each count), setting up a dismissal of the charge by the justice, and it appeared upon the trial that there had only been in fact one assault on the day named in the indictment, and that that assault and the one named in the plea took place on the same day, it was held that the plea was a good answer to the whole indictment. *R.* v. *Westley*, *ubi supra*.

3. *Autrefois attaint.* (*a*)

At common law if a man were attainted of treason or felony, whilst the attainder remained in force he could not, with certain exceptions, be

(*a*) In *R.* v. *Jemmy Governor* [1900] 21 *N. S. W. Rep.* (*Law*) 279, on an indictment for murder an attempt was made to plead *autrefois attaint* on a colonial outlawry, but failed on the ground that the common law of England as to outlawry did not apply to New South Wales, and that outlawry under the colonial statutes was not equivalent to a conviction.

indicted for another felony, whether such other felony were committed before or after his attainder; because, being already attainted, and therefore dead in contemplation of law, and his property forfeited, a prosecution for any other offence was considered useless. 2 *Hale*, 251; 2 *Hawk. c.* 36, *s.* 10; 1 *Chit. Cr. L.* 724. But in 1827 it was enacted by 7 & 8 *G.* 4, *c.* 28, *s.* 4, that an attainder is no bar, unless it be for the same offence as that charged in the indictment, and this enactment practically abrogated the plea. 4 *Bl. Com.* 337, *n.* Attainder for treason and felony was abolished in 1870, except in cases of outlawry (33 & 34 *Vict. c.* 23, *s.* 1), and in effect the plea of *autrefois attaint* is obsolete.

The same rules apply to this plea as to the plea of *autrefois acquit*, with respect to the pleading and production of the record, the averments of identity, and the proceedings on the plea at the trial.

4. *Pardon.*

A pardon may be pleaded in bar to the indictment; or, after verdict, in arrest of judgment; or, after judgment, in bar of execution. 2 *Hawk. c.* 37. A pardon under statute need not be pleaded, *Staundf.* 103*a*: 3 *Co. Inst.* 234: *Plowd.* 83, 84: 2 *Hawk. c.* 37, *s.* 59: unless there be exceptions out of it; *Id.*: *Fost.* 43: 2 *Hale*, 252: 3 *Co. Inst.* 334; nor can the defendant lose the benefit of it by his own laches or negligence.

The King's pardon should be pleaded at the first opportunity which the defendant may have of so doing; if, for instance, he have obtained a pardon before arraignment, and, instead of pleading it in bar, he plead the general issue, he is deemed to have waived the benefit of it, and cannot afterwards avail himself of it in arrest of judgment. 2 *Hawk. c.* 37, *s.* 59.

Form of plea.]—In pleading a pardon under the great seal the letters patent were set out with *profert*, and the plea concluded thus—"*By reason of which said letters patent, the said* J. S. *prays that by the court here he may be dismissed and discharged from the said premises in the said indictment specified.*"

Formerly only a pardon under the great seal could be pleaded. *Lord Warwick's case*, 13 *St. Tr.* 939, 1015: *R.* v. *Gully*, 1 *Leach*, 98: *Bull* v. *Tilt*, 1 *B. & P.* 199: *R.* v. *Miller*, 2 *W. Bl.* 799.

But 7 & 8 *G.* 4, *c.* 28, *s.* 13, provides for the grant of free or conditional pardon for felony under the King's sign manual countersigned by a secretary of state and that the discharge of the offender from custody in the former case, or the performance of the condition in the latter, has the effect of a pardon under the great seal as to the felony for which the pardon is granted, but will not prevent or mitigate the punishment in any subsequent conviction for any felony committed after the grant of any such pardon. *See R.* v. *Harrod*, 2 *C. & K.* 294: 2 *Cox*, 242.

This enactment seems to have given statutory effect to the practice of circuit pardons referred to in *R.* v. *Beaton*, 1 *W. Bl.* 479: *R.* v. *Beacall*, 1 *C. & P.* 454, 456: *Bullock* v. *Dodds* 2 *B. & Ald.* 258; 20 *R. R.* 420. In pleading under this enactment the stricter course would be to set out the pardon under the sign manual and to aver compliance with the conditions, if any; but in *R.* v. *Harrod*, *ubi supra*, the Court seem not to have required a plea, but to have taken a certificate of discharge by the governor of a prison as evidence of the grant of a free pardon.

Any variance in the description of the offence or party between the pardon and the indictment, could be made good in the plea, by averments of identity, in the same manner as in the plea given *ante*, p. 176.

A free pardon places the person in the same position as to status as he was in before his conviction. *Hay* v. *Tower Division Justices*, 24 *Q. B. D.* 561; 59 *L. J. (M. C.)* 79. The endurance of the punishment awarded by the court for a non-capital felony, or of that substituted by the crown, has the effect of a pardon under the great seal. 9 *G.* 4, *c.* 32, *s.* 3. *See post*, p. 245.

Sect. 6.

GENERAL ISSUE.

The general issue is pleaded by the prisoner *ore tenus* at the bar, in these words "*not guilty*;" by which plea, without further form, every person not having privilege of peerage, upon being arraigned upon any indictment for treason, felony, or piracy, is "deemed to have put himself upon the country for trial." 7 & 8 *G.* 4, *c.* 28, *s.* 1. And "if any person being arraigned upon, or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information," the court may "order the proper officer to enter a plea of 'not guilty' on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same." 7 & 8 *G.* 4, *c.* 28, *s.* 2. If the defendant says that he declines to plead, a plea of not guilty is entered. *R.* v. *Bernard*, 8 *St. Tr., N. S.* 887, 899. This course of refusing to plead is adopted after a demurrer or motion to quash, or where it is contended that the court has no jurisdiction, in the belief that it preserves the right to challenge by writ of error defects which otherwise might be cured by verdict. Where a prisoner who had been previously tried and convicted, but whose trial was deemed a nullity on account of some informality in swearing the witnesses, was again arraigned upon an indictment for the same offence, and refused to plead, alleging that he had been already tried; *Littledale*, J., and *Vaughan*, B., ordered a plea of not guilty to be entered for him under this section. *R.* v. *Bitton*, 6 *C. & P.* 92. As to the mode of determining whether a defendant is mute of malice, *see post*, p. 183. As to withdrawal of pleas during the trial, *see post*, p. 186.

When the record is made up, the general issue appears upon it thus:—"*And he the said* J. S., *forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, saith, that he is not guilty thereof, and thereupon the said* J. S. *puts himself upon the country.*" And the *similiter* is then added thus: "*And* H. K. A. [the clerk of the court] *who prosecutes for our said lord the King in this behalf, doth the like. Therefore let a jury come.*"

In informations, and in indictments for not repairing roads and bridges, etc., where the defendant is allowed to appear by attorney, the general issue is regularly engrossed, and filed with the proper officer. It is in form thus:—"*And the said* J. S., *by* A. B. *his solicitor, cometh into court here, and, having heard the same indictment* [or *information*] *read, saith, that he is not guilty of the said premises in the said indictment* [or *information*] *above specified and charged upon him; and of this the said* J. S. *puts himself upon the country.*" Afterwards, in making up the record, the *similiter* (*ante*, p. 169) is added thus: "*And* J. N., *who prosecutes for our said lord the King in this behalf, doth the like,*" if it be pleaded to an indictment at the assizes, or sessions; but if to an indictment in the King's Bench

Division, then thus: "*And James Robert Mellor, esquire, coroner and attorney of our said lord the King, in the King's Bench Division of His Majesty's High Court of Justice, before the King himself, who prosecutes for our said lord the King in this behalf doth the like;*" or if to an information, then thus: "*And the said attorney-general* [or *coroner and attorney*] *of our said lord the King who prosecutes as aforesaid for our said lord the King, doth the like.*"

Where the general issue is pleaded it is incumbent upon the prosecutor to prove every fact and circumstance constituting the offence as stated in the indictment or information. And under this plea the defendant may give in evidence, not only everything which negatives the allegations in the indictment, but also all matters of excuse and justification. *See post, Part II., Evidence. See* 1 *Chit. Cr. L.* 470.

CHAPTER V.

TRIAL, JUDGMENT, AND PUNISHMENT.

SECT. 1. *Arraignment*, p. 181.
2. *Summoning, impanelling, swearing, and charging the jury*, p. 191.
3. *Proceedings at trial*, p. 207.
4. *Verdict*, p. 214.
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6. *Judgment and punishments*, p. 229.

SECT. 1.

ARRAIGNMENT.

THE *arraignment* of prisoners, against whom true bills for indictable offences have been found by the grand jury, consists of three parts, first, calling the prisoner to the bar by name; secondly, reading the indictment to him; thirdly, asking him whether he be guilty or not of the offence charged. It was formerly the practice to require the prisoner to hold up his hand, the more completely to identify him as the person named in the indictment, but the ceremony, which was never essentially necessary (*R.* v. *Radcliffe*, 1 *W. Bl.* 3), is now in most courts disused; and the ancient form of asking him how he will be tried is also obsolete. As to the necessity of the presence of the accused, *see post*, p. 186. The prisoner is to be brought to the bar without irons, shackles, or other restraint, unless there be danger of escape; and "ought to be used with all the humanity and gentleness which is consistent with the nature of the thing, and under no other terror or uneasiness than what proceeds from a sense of his guilt and the misfortune of his present circumstances." 2 *Hawk. c.* 28, *s.* 1; *Kel.* (*J.*) 10. In *R.* v. *Layer*, 16 *St. Tr.* 93, 96, a distinction was taken between the time of arraignment and the time of trial, and the prisoner was obliged to stand at the bar in irons during the arraignment; but the ruling in that case is at variance with the authority of all the expositors of the common law. *Britton*, *c.* 5, *fo.* 14, says, "If felons come in judgment to answer, etc., they shall be out of irons and all manner of bonds, so that their pain shall not take away any manner of reason, nor constrain them to answer but at their free will." The *Mirror*, *bk.* 5, *Ch.* 1, 54 (*Seld. Soc. Publ.*, *vol. vii.* p. 160) says, "It is an abuse that a prisoner should be loaded with irons or put in pain before he is attainted for felony." But it is possible that this passage relates to *peine forte et dure*. *See also* 3 *Co. Inst.* 34, where *Coke* cites *Bracton*, *l.* 3, *f.* 137; *Staundf.* 78; and a decision of the judges, 8 *Edw.* 2; *also Hale's Sum.* 212. But where there is reason to believe that the prisoner will make an attempt to escape, or will be guilty of violence, the gaoler may, by order of the judge, bring up the prisoner for arraignment in irons, and he may be kept ironed during the trial, and even when giving evidence on his own

behalf. *R.* v. *Brazier, Hants Summer Assizes* [1899] *Wright*, J. The prisoner is entitled to a copy of his indictment in the case of treason (*see* 1 *St. Tr., N. S.* 673, *and post, tit.* "*Treason*"), but not in treason felony, *R.* v. *Mitchel*, 6 *St. Tr., N. S.* 599, 616, nor in any other felony. 1 *Chit. Cr. L.* 414: *R.* v. *Holland*, 4 *T. R.* 691, 693: *R.* v. *Dowling*, 7 *St. Tr., N. S.* 381; 3 *Cox*, 509. In *R.* v. *Martin*, 6 *St. Tr., N. S.* 925, 958, a copy of an indictment for treason felony was granted *ex gratiâ*. The prisoner is in strictness entitled to have the indictment read over slowly once before arraignment, and it is the practice after arraignment to let his counsel see the indictment and the names of the witnesses indorsed on it, or to have a copy. 1 *Chit. Cr. L.* 414. The same practice applies to misdemeanors (*R.* v. *Mitchel*, 1 *St. Tr., N. S.* at 616: *R.* v. *Newton*, 1 *C. & K.* 469), except (1) cases within 60 *G.* 3 & 1 *G.* 4, *c.* 4, *ss.* 8, 10, and the *Cr. Off. Rules*, 1886, *r.* 138. *See O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1, 24, 28, and (2) prosecutions for offences against the excise, 7 & 8 *G.* 4, *c.* 53, *s.* 42, in which cases the defendant is entitled to a copy of his indictment. If the prisoner be charged upon an indictment and also upon an inquisition for the same offence, he may be arraigned at the same time upon both; 1 *East, P. C.* 371; and where several defendants are charged in the same indictment, they ought all to be arraigned at the same time although their trials may be several. *Kel. (J.)* 9. As soon as the indictment has been read to the prisoner, or its substance stated to him (which is now the usual practice), the officer of the court demands of him—*How say you, are you guilty or not guilty?* The course of proceeding where the prisoner pleads to the jurisdiction, demurs, or raises the pleas in abatement, and the pleas of *autrefois convict*, or *acquit*, and *attaint* and of *pardon* have already been dealt with (*ante*, pp. 169–178). On the prisoner pleading not guilty under the old practice, he was asked how he would be tried, and made the answer "By God and my country." This form is now rarely, if ever, used. If the prisoner pleads guilty, and it appears to the satisfaction of the judge that he rightly comprehends the effect of his plea, his confession is recorded, and sentence is forthwith passed, or he is removed from the bar to be again brought up for judgment. 1 *Chit. Cr. L.* 415.

Arraignment of peers.]—A person entitled to the privilege of peerage if indicted for misdemeanor is tried in the same manner as a commoner. 3 *Co. Inst.* 30; 2 *Hawk. c.* 44, *s.* 13. But persons entitled to such privilege cannot be tried in pairs for treason, felony, or misprision of either offence, and it would seem that there is no power to waive the privilege. *Lord Graves' case*, 4 *St. Tr., N. S.* 609, *n.*; 310 *Hansard*, 246. When on arraignment the privilege is claimed or its existence is established, the indictment is removed by *certiorari* to the House of Lords, and if parliament be sitting is tried before that House as the court of the King in parliament; *R.* v. *Earl of Cardigan*, 4 *St. Tr., N. S.* 601; and if parliament be not sitting is tried in the court of the Lord High Steward, which is constituted by special commission. *R.* v. *Earl Russell* [1902] *App. Cas.* 446; *and see* 4 *St. Tr., N. S.* 666. At such trial the pleading and punishment are the same as in the case of any other accused person. 4 & 5 *Vict. c.* 22. The trial of peers for offences committed in Scotland is regulated by 6 *G.* 4, *c.* 66.

The privilege of peerage belongs to every peer except an Irish peer who is a member of the House of Commons, and to peeresses in their own right, to the wives of peers, and to the widows of peers who are not married to commoners; 20 *Hen.* 6, *c.* 9; 7 & 8 *W.* 3, *c.* 3, *s.* 10; but does not belong to archbishops or other bishops, who are lords of parliament but not peers. *Standing orders, H. L.*

Prisoner standing mute.]—If the prisoner, when called upon, stands mute of malice, or will not answer directly, the court may order the proper officer to enter a plea of not guilty; 7 & 8 *G.* 4, *c.* 28, *s.* 2: *see ante*, p. 179. At common law the consequences of standing obstinately mute in cases of felony, were forfeiture of goods, and *peine forte et dure*; *Hale's Sum.* 227; and by 12 *G.* 3, *c.* 20, judgment as on a plea of guilty. *See R.* v. *Steel*, 1 *Leach*, 451. Where the defendant stands mute it would seem that the court cannot determine whether in fact he is mute of malice or by the visitation of God, *R.* v. *Israel*, 2 *Cox*, 263: *R.* v. *Schleter*, 10 *Cox*, 403; but must direct a jury to be forthwith impanelled and sworn, to try whether the prisoner be mute of malice or *ex visitatione Dei*, and such jury may consist of any twelve men who may happen to be present. Counsel may call witnesses for the defendant on the trial of the issue and may address the jury. *R.* v. *Roberts*, *Carr.* C. L. 57. The form of the oath to the jury in such a case may be as follows:—"*You shall well and truly try whether* A. B., *the prisoner at the bar, who stands charged with felony, is mute of malice or by the visitation of God, and a true verdict give according to the evidence; so help you God.*" *See Cro. Circ. Comp.* 542 (9th ed.).

A person is mute by the visitation of God who is deaf and dumb; *R.* v. *Jones*, 1 *Leach*, 102: *R.* v. *Pritchard*, 7 *C.* & *P.* 303; or so deaf that he cannot hear the indictment when read. *R.* v. *Halton*, *Ry.* & *M.* 78: *and see* 1 *Russ. Cr.* (6th ed.), 119. The fact of being mute of visitation of God is no bar to an arraignment or trial if the mute is sane and intelligence can be conveyed to him by signs or symbols. But before proceeding with the trial it is necessary to ascertain whether he can plead to the indictment or understand the proceedings. *R.* v. *Jones*, *ubi supra.*

Prisoner unfit to plead or take his trial.]—*The Criminal Lunatics Act*, 1884 (47 & 48 *Vict. c.* 64), empowers a secretary of state to remove to a lunatic asylum all prisoners committed for trial who are certified in manner provided by the Act to be insane, and to order their detention as criminal lunatics until their remittal to prison or discharge. This power gets rid of the difficulty found in *R.* v. *Dwerryhouse*, 2 *Cox*, 446, where a prisoner was obviously unfit to be arraigned. If the secretary of state acts under the statute the hand of the court is stayed: *ex parte Collins* [1899] 34 *L. J. Newsp.* 132. *The Criminal Lunatics Act*, 1800 (39 & 40 *G.* 3, *c.* 94, passed in consequence of *Hadfield's Case*, 27 *St. Tr.* 1281, provides (*s.* 2) that "if any person indicted for *any* offence (*R.* v. *Little*, *R.* & *R.* 430), shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose," that is, by a jury returned by the sheriff *instanter* in the nature of an inquest of office "so that such person cannot be tried upon such indictment, it shall be lawful for the court before whom any such person shall be brought to be arraigned as aforesaid, to direct such finding to be *recorded*, and thereupon to order such person to be kept in strict custody until his Majesty's pleasure shall be known." Similar provisions are made by the same section as to persons brought up to be discharged for want of prosecution who appear to be insane. The enactment does not apply to grand juries. *R.* v. *Hodges*, 8 *C.* & *P.*, 195. Persons detained after verdict under the section are dealt with as criminal lunatics. The form of oath to be administered to the jury impanelled to try whether a prisoner be *non compos* or not, is as follows:—"*You shall diligently inquire and true presentment make, for and on behalf of our sovereign lord the King, whether* A. B., *the defendant who stands indicted for a misdemeanor, be insane or not, and a true verdict give accordingly to the best of your understanding;*

so help you God." The proper time to raise the question of the prisoner's fitness to be tried is before he pleads. *R.* v. *Southey*, 4 *F. & F.* 864. The issue to be tried is the state of the prisoner's mind at the date of arraignment, not at any prior time. *R.* v. *Keary*, 14 *Cox*, 143: 4 *Bl. Com.* 24. As to the onus of proof on the trial of the issue, *see R.* v. *Davies*, 6 *Cox*, 326: 3 *C. & K.* 328; *R.* v. *Turton*, 6 *Cox*, 385. In *R.* v. *Goode*, 7 *A. & E.* 536, where the prisoner was tried at bar in the Queen's Bench for using seditious language against Queen Victoria in her presence, it was held that the jury might form their own opinion as to the state of the prisoner's mind when arraigned, from his demeanor during the inquest, without any evidence being given on the subject: but under ordinary circumstances it is usual for the judges to require some evidence as to the prisoner's state of mind. And in *R.* v. *Pritchard*, 7 *C. & P.* 303, where a prisoner arraigned on an indictment for felony, appeared to be deaf, dumb, and also of non-sane mind, *Alderson*, B., put three distinct issues to the jury, directing the jury to be sworn separately on each: 1. Whether the prisoner was mute of malice or by the visitation of God; 2. Whether he was able to plead; 3. Whether he was sane or not: and on the last issue they were directed to inquire whether the prisoner was of sufficient intellect to comprehend the course of the proceedings of the trial, so as to make a proper defence, to challenge a juror he might wish to object to, and to understand the details of the evidence (*supra*, p. 183). *See also R.* v. *Whitfield*, 3 *C. & K.* 121. The directions in *R.* v. *Pritchard* were approved in *R.* v. *Berry*, 1 *Q. B. D.* 447; 45 *L. J.* (*M. C.*) 123; 13 *Cox*, 189. In that case a deaf mute being arraigned for felony, the jury who had been impanelled to try the case were sworn to try whether the prisoner stood mute of malice or by the visitation of God. The jury found that he was mute by the visitation of God. The judge then ordered that a plea of not guilty should be entered, and the trial proceeded. The better course in such cases would seem to be to proceed as in *R.* v. *Pritchard*, *ubi supra*, and not to enter a verdict of not guilty at once. The jury found the prisoner guilty of the felony charged against him, but also found that he was incapable of understanding, and did not understand, the proceedings at the trial. Upon this finding it was held that the prisoner could not be convicted, but must be detained as a non-sane person during the Queen's pleasure. In *R.* v. *Wheeler*, Central Criminal Court, May 12, 1852, where the prisoner was indicted for the murder of his mother, and on his arraignment said he was "not guilty," *Platt*, B., on the motion of the prisoner's counsel, directed the jury to be sworn to inquire whether the prisoner was in a fit state of mind to plead to the indictment, and it appearing from the evidence that the prisoner seemed to understand the nature of the crime for which he was indicted, but that he seemed unable to understand the distinction between a plea of "guilty" and of "not guilty," the jury, at the suggestion of the learned judge, returned a verdict that the prisoner was of unsound mind and incompetent to plead. In *R.* v. *Harris*, 61 *J. P.* 792, the prisoner was unable to read or write, and owing to an unhealed wound in his throat could not speak. A jury was impanelled to try whether he was sane and able to plead, who found that he was both, but that at present he was unable to give instructions for his defence, and that his condition was due to his own act, attempted suicide. He was then called on to plead; pleaded not guilty, and his trial was adjourned. *Cf. R.* v. *Whitfield*, 3 *C. & K.* 121. As to feigned madness, *see R.* v. *Davies*, 6 *Cox*, 326, *Williams*, J.; *R.* v. *Berry* [1897] 104 *L. T. Jan.* 110, *Wills*, J. Where the jury are sworn in the nature of an inquest of office, to inquire whether or not a prisoner is sufficiently sane to plead to the indictment, the court

directs the finding to be recorded; and the following is the form of the record of the finding:—

MIDDLESEX:—*The King against J. G.—The defendant being brought here into court, in the custody of the keeper of his Majesty's prison of* ——, *by virtue of a writ of* habeas corpus, *it is ordered that the said writ and the return made thereto be filed; and the said defendant is now here in court arraigned upon the indictment found against him in this court for certain misdemeanors, in speaking and publishing certain scandalous and seditious words of and concerning our sovereign lord the King, and is asked by the court here whether he be guilty of the premises charged upon him by the said indictment or not. Whereupon the said defendant doth refuse to answer to the said indictment; and it appearing to this court that the said defendant may be insane, so that he cannot be tried upon the said indictment: therefore, on the prayer of Sir Robert Finlay, knight, his Majesty's attorney-general, it is ordered that a jury in this behalf do immediately come here into court, to try and inquire for and on behalf of our sovereign lord the King, whether the said defendant be insane or not. And immediately thereupon, a jury being impanelled and returned for that purpose by the sheriff of the said county of Middlesex, come here into court, and being elected, tried, and sworn to speak the truth touching and concerning the premises aforesaid, say upon their oath that the said defendant is insane. And the said attorney-general, for and on behalf of our said sovereign lord the King, prays the said court here that the finding of the said jury may be recorded. It is thereupon ordered by the said court here, that the said finding of the said jury be recorded, and that the said defendant be kept in strict custody in the said gaol until his Majesty's pleasure in the premises shall be known. And the said defendant is now here in court re-committed to the custody of the keeper of the said gaol, to be by him kept in strict custody until his Majesty's pleasure shall be known. On the motion of the attorney-general: By the court.*

As to the proceedings on the trial of a person alleged to have been insane when the offence charged was committed, *see post*, p. 221.

Arraignment for subsequent offence.]—The mode of arraigning prisoners, on an indictment containing a charge, under 7 & 8 *G.* 4, *c.* 28, *s.* 11, of a previous conviction for felony, was first to arraign the prisoner *on the whole indictment*, and afterwards to give him in charge to the jury on the subsequent felony only. *R.* v. *Key*, 2 *Den.* 347; 21 *L. J.* (*M. C.*) 35; *R.* v. *Shuttleworth*, 2 *Den.* 351; 21 *L. J.* (*M. C.*) 36. This procedure was not altered by 14 & 15 *Vict. c.* 19, *s.* 9 (*rep.*). *S.* 116 of the *Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), provides that the mode of arraigning a defendant on an indictment for an offence punishable under that Act committed after a previous conviction is, in the first instance, to arraign him *upon so much only of the indictment as charges the subsequent offence*, and, if he pleads not guilty or the court orders a plea of not guilty to be entered, to charge the jury in the first instance to inquire only concerning the subsequent offence. A similar course is to be pursued where the prisoner is indicted for an offence against the *Coinage Offences Act*, 1861 (24 & 25 *Vict. c.* 99), after a previous conviction (*s.* 37). [*See post, Bk. II., Part V.*] And *s.* 9 of the *Prevention of Crimes Act*, 1871 (34 & 35 *Vict. c.* 112), alters the practice adopted under 7 & 8 *G.* 4, *c.* 28, *s.* 11, and provides that the rules contained in *s.* 116 of 24 & 25 *Vict. c.* 96, in relation to the form of *and the proceedings upon* an indictment for any offence punishable under that act committed after previous conviction, shall, with the necessary variations, apply to any indictment for committing a "crime" as defined by *s.* 20 of 34 & 35 *Vict. c.* 112 (viz., any felony, or the offence of uttering

false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanor under 24 & 25 *Vict.* c. 96, *s.* 58), after previous conviction for a crime, whether the crime charged in such indictment or the crime to which such previous conviction relates be or be not punishable under 24 & 25 *Vict.* c. 96.

The arraignment is not complete till the prisoner has pleaded. *R.* v. *Duffy*, 7 *St. Tr., N. S.* 795, 799. If the defendant pleads "not guilty," his plea is recorded by the officer of the court; either by writing on the indictment the words "*po. se*," an abbreviation of the words *ponit se super patriam*, or, as at the Central Criminal Court, the word "puts," and by an entry in the minute book of the court. *See R.* v. *Newman*, 2 *Den.* 390; 21 *L. J.* (*M. C.*) 74, 76. A plea of not guilty may by leave of the judge be withdrawn during the trial, and a plea of guilty substituted. *R.* v. *Brown*, 17 *L. J.* (*M. C.*) 145. There is a case to the contrary as to a trial on a *nisi prius* record. *R.* v. *Barrett*, 2 *Lewin*, 264; but it is inconsistent with old precedent and modern practice. *R.* v. *Turner*, 24 *L. J. Newsp.* 469. A plea of "guilty" may be withdrawn before sentence: *R.* v. *Plummer* [1902] 2 *K. B.* 339: but not after sentence. *R.* v. *Sell*, 9 *C. & P.* 346: *R.* v. *Clouter*, 8 *Cox*, 237. It is no bar to the right of the court to reserve a special case. *See post, ch. viii. s.* 1. Persons indicted and arraigned together may in the discretion of the court be separately tried, even in cases of conspiracy; *see R.* v. *Ahearne*, 2 *Ir. Com. Law Rep.* 381; 6 *Cox*, 7 (*C. C. R., Ir.*); or treason, *Kel.* (J.), 8, 9.

No trial for felony can be had except in the presence of the defendant, and he must, it is said, stand in the dock to be tried. *R.* v. *St. George*, 9 *C. & P.* 483; *R.* v. *Douglas, C. & Mar.* 193; *R.* v. *Zulueta*, 1 *C. & K.* 215; 1 *Cox*, 20. The reason of this may be that the defendant is given in charge to the jury. If he creates a disturbance it is said that the trial may go on without his presence. *Steph. Dig. Cr. Proc. art.* 302: *R.* v. *Berry* [1897] 104 *L. T. Journ.* 110, *Wills*, J. The prisoner may be punished for contempt of court for the disturbance created. *R.* v. *Giles* [1895] *Wilts Assizes, Wills*, J. A charge of misdemeanor may be tried, although the accused be not present, if he has previously pleaded; 8 *Rep. Crim. L.* 143; and it is not necessary for the defendant to be in the dock; *R.* v. *Lovett*, 9 *C. & P.* 462; 3 *St. Tr., N. S.* 1177; or even in the court. Where a defendant, tried at bar for perjury, was taken ill in the course of the trial, he was allowed to absent himself from the court until his recovery, and the trial proceeded in his absence. *R.* v. *Orton*, alias *Castro, Queen's Bench, July*, 1873, *MS.*

The absence of one of several persons accused together does not affect the validity of the conviction of those who appear. *See ex parte O'Brien Dalton*, 28 *L. R. Ir.* 36.

The *Fugitive Offenders Act*, 1881 (44 & 45 *Vict.* c. 69), which regulates the arrest in one part of the British Empire of fugitives from the justice of another part of the empire and their reconveyance for trial contains no provisions precluding an offender returned under that Act from being tried for offences other than those for which he was returned. It superseded the *Colonial Arrest Act* (6 & 7 *Vict.* c. 34), under which the same rule applied: *see R.* v. *Philips*, 1 *F. & F.* 105. The Act of 1881 has been extended to certain places subject to the *Foreign Jurisdiction Act*, 1890 (53 & 54 *Vict.* c. 37), by Orders in Council printed in the *Statutory Rules and Orders Revised* (ed. 1904) *vol.* 5, *tit.* "*Foreign Jurisdiction.*"

Under the *Extradition Acts*, 1870 to 1895, a fugitive criminal surrendered by a foreign state for an extradition crime in pursuance of a treaty can be tried only for offences "proved by the facts on which the

surrender is granted" (33 & 34 *Vict.* c. 52, *s.* 19); *i.e.*, by the extradition documents submitted to the authorities of the foreign state for the purpose of securing the surrender. As to the mode of raising the question, *see ante*, p. 162. The burden of proof that he was surrendered under the treaty and that the offences charged were not included in the order for surrender seems to rest upon him and not on the crown. *R.* v. *Butler*, 18 *New South Wales Rep.* (*Law*) 146. Where he has been arrested or surrendered irrespective of treaty he can be tried for any offence. *Ex parte Scott*, 9 *B.* & *C.* 446; 32 *R. R.* 237; *Lord Advocate* v. *Sinclair*, 17 *Rettie, Justiciary Cases*, 38.

Defence by counsel.]—In trials for treason and misprision of treason the prisoner is entitled to defence by counsel by 7 & 8 *W.* 3, *c.* 3, *s.* 1. And the court on his request will assign him not more than two counsel. *R.* v. *Lynch*, *K. B. D.*, Dec. 19, 1902: *R.* v. *Frost*, 4 *St. Tr., N. S.* 85, 106; 9 *C.* & *P.* 129, 135, *and n.* Since 1836 (6 & 7 *W.* 4, *c.* 114, *s.* 1) all persons tried for felony are entitled, "after the close of the prosecution, to make full answer and defence by counsel learned in the law, or by solicitor in courts where solicitors practise as counsel," *e.g.* at courts of quarter sessions where less than four counsel attend. *Archbold*, *Q. S.* (5th ed.) 126. In trials for misdemeanors the accused has always been entitled to be defended by counsel. King's counsel cannot appear for the defence except by licence from the crown, now granted through the Home Office without fee. *See R.* v. *Bartlett*, 2 *C.* & *K.* 321: *R.* v. *Jones*, 9 *C.* & *P.* 401.

Defence at request of judge.]—Quite apart from statute and the practice of the superior courts, where the prisoner is not defended by counsel, the court may properly request some member of the bar present to give his honorary services to the prisoner, if the prisoner is willing to accept them. *R.* v. *Fogarty*, 5 *Cox*, 161 (*Ir.*): *R.* v. *Yscuado*, 6 *Cox*, 386. This course has hitherto been adopted only in the case of murder or other grave crime, or where the circumstances of the case are special.

Provision of legal aid for poor prisoners.]—Statutory provision has since Jan. 1, 1904, been made for payment in certain events out of public funds in England and Wales of the costs of the defence of poor prisoners tried on indictment for any offence. *The Poor Prisoners Defence Act*, 1903 (3 *Edw.* 7, *c.* 38) enacts as follows:—

Sect. 1.—"(1) Where it appears, having regard to the nature of the defence set up by any poor prisoner, as disclosed in the evidence given or statement made by him before the committing justices, that it is desirable in the interests of justice that he should have legal aid in the preparation and conduct of his defence, and that his means are insufficient to enable him to obtain such aid—

"(*a*) the committing justices, upon the committal of the prisoner for trial; or

"(*b*) the judge of a court of assize or chairman of a court of quarter sessions, at any time after reading the depositions,

may certify that the prisoner ought to have such legal aid, and thereupon the prisoner shall be entitled to have solicitor and counsel assigned to him, subject to the provisions of this Act."

The best guide at present available in the application of this sub-section is contained in the following Home Office circular to justices' clerks:—

"*Home Office, Whitehall, Aug.* 31, 1904.

"SIR,—*I am directed by the Secretary of State to inform you that he has received a number of communications respecting the* Poor Prisoners Defence

Act, 1903, *from which it would appear that magistrates have in many instances found some difficulty in determining what action they should take to give effect to the intention of the Act. He thinks, therefore, that the remarks made by the Lord Chief Justice when charging the grand jury at the recent Warwick Summer Assizes may afford magistrates valuable assistance in the proper administration of the Act, and he will be glad if you will bring them to the notice of the magistrates of your bench. The following is the report which appeared in* The Times *of July* 26, 1904, *corrected by the Lord Chief Justice himself:—*

"'*At Warwick, on Saturday, Lord Alverstone, in charging the grand jury, referred to the working of the* Poor Prisoners Defence Act. *He said that during the six months since the Act had come into force there had been some difference of practice among magistrates as to its scope and the principle upon which it should be applied, and the Home Office had received many communications on the subject. This made it desirable that he should explain the guiding principles of the Act. The Act was not intended to give a prisoner legal assistance in order to find out if he had got a defence. He was not to have solicitor or counsel assigned to him for such a purpose. The governing principle of the Act was that people who had a defence should have every inducement to tell the truth about it at the earliest opportunity. Assistance under the Act could only be given where both* (1) *the nature of the defence as disclosed was such that in the interests of justice the prisoner should have legal aid to make his defence clear; and* (2) *where also his means were insufficient for that end. Magistrates would have little difficulty in deciding the second point, upon which they could inform themselves by the ordinary means of information. As regards the first point, they should bear in mind that by a defence disclosed was meant not only a defence stated by the prisoner at the end of the hearing, but a defence disclosed on cross-examination, or by questions the prisoner might ask, or by remarks he interposed, or even in some cases such as might appear on the face of the evidence called for the prosecution. All they had to be sure of was that a defence requiring legal consideration was disclosed at the time by a prisoner devoid of pecuniary means. The Act was passed in the interest of innocent persons; and such would be advised in future not to 'reserve their defence,' but to disclose it at once, so that it could be investigated. The prisoner would thus prevent the suggestion that he had kept back his defence so as to give the prosecution no opportunity of investigating it.*'

"*I am, Sir, your obedient servant,*
"M. D. CHALMERS"

"(2) The expenses of the defence, including the cost of a copy of the depositions, the fees of solicitor and counsel, and the expenses of any witnesses shall be allowed and paid in the same manner as the expenses of a prosecution in cases of indictment for felony, subject, nevertheless, to any rules under this Act and to any regulations as to rates or scales of payment which may be made by one of His Majesty's Principal Secretaries of State." (*See post*, p. 255).

Sect. 2. *Rules.*]—"Rules for carrying this Act into effect may be made in the same manner and subject to the same conditions as rules under the *Prosecution of Offences Act*, 1879" (42 & 43 *Vict. c.* 22). (*See post*, p. 189).

Sect. 3. *Definitions.*]—"In this Act—

"'Prisoner' includes a person committed for trial on bail.

"'Committing justices' includes a magistrate of the police courts of the metropolis and a stipendiary magistrate.

"'Chairman' includes recorder or deputy-recorder or deputy-chairman."

The Act does not extend to Scotland or Ireland (*s.* 4), and appears not to apply to trials in the King's Bench Division (*see post*, p. 190). But the term "court of assize" includes the Central Criminal Court (52 & 53 *Vict. c.* 63, *s.* 13 (4)).

The following rules were made by the Attorney-General, dated May 13, 1904, with the approval of the Lord Chancellor and the Secretary of State for the Home Department, in pursuance of s. 2 of the *Poor Prisoners' Defence Act*, 1903 (*Stat. Rules & Orders*, 1904, No. 1056, *Legal Series*, No. 8):—

1. "Every clerk of assize and clerk of the peace shall keep a list of solicitors who are willing to undertake the defence of poor prisoners, and shall insert in such list the names of all solicitors who are willing so to act. The name of any solicitor shall be removed from the list, either on the application of the solicitor himself or by direction of any judge of assize or chairman of quarter sessions. A copy of such list shall be sent to every clerk to justices in the county of quarter sessions district."

2. "Every clerk of assize and clerk of the peace shall keep a list of the members of the bar attending the circuit or sessions who are willing to act as counsel for poor prisoners, and shall insert in such list the names of all such members of the bar who are willing so to act."

3. "Any certificate given by the justices in pursuance of *s.* 1 of the *Poor Prisoners' Defence Act*, 1903, shall be in Form A in the Schedule hereto. It shall as soon as it has been given be sent by the clerk to the justices to the clerk of assize or clerk of the peace, together with the name of the solicitor assigned.

"The certificate given by a judge of assize or chairman of quarter sessions shall be in Form B in the schedule hereto."

4. "Any justices, judge of assize, or chairman of quarter sessions, who give such a certificate shall at the same time assign to the prisoner from the list kept under Rule 1 a solicitor to whose services the prisoner shall be entitled.

"A copy of the depositions shall be furnished to the solicitor so assigned by the justices' clerk, clerk of assize, or clerk of the peace, as the case may be."

5. "Any member of the bar whose name appears upon the list kept under Rule 2 may be instructed on behalf of the prisoner by the solicitor so assigned."

Schedule.

FORM A.—CERTIFICATE OF COMMITTING JUSTICES.

We [or *I*] *the committing justice*[s] *in the case of* ——, *having regard to the nature of the defence set up by him, as disclosed in the evidence given before us* [or *me*] [or *in the statement made by him before us*] [or *in the evidence given and statement made by him before us*], *are* [or *am*] *satisfied that it is desirable in the interests of justice that he should have legal aid in the preparation and conduct of his defence, and that his means are insufficient to obtain such aid, and we* [or *I*] *therefore certify that the said* —— *ought to have such legal aid.*

A.B.,
C.D.,
Justice[s] of the Peace.

Note.—*The prisoner has been committed to* —— *Prison* [or *has been released on bail and may be communicated with at* ——].

FORM B.—CERTIFICATE OF JUDGE OR CHAIRMAN.

I, A.B. ——, *having regard to the nature of the defence set up by* ——, *as disclosed in the evidence given* [or *in the statement made by him*] [or *in the evidence given and statement made by him*] *before the Committing Justices, am satisfied that it is desirable in the interests of justice that he should have legal aid in the conduct of his defence, and that his means are insufficient to enable him to obtain such aid, and I therefore certify that the said* —— *ought to have such legal aid.*

A.B.

Judge of Assize *or*
Chairman of Quarter Sessions *or*
Recorder of .

Law Officers' Department,
May 13, 1904.

R. B. FINLAY, Attorney-General.

Approved, { HALSBURY, C.
{ A. AKERS DOUGLAS.

Defence in formâ pauperis in superior courts.]—11 *H.* 7 *c.* 12, provided that every poor person having cause of action or suit, should have a writ original or *subpœnâ*, without paying for sealing or writing the same, and that the chancellor should assign clerks to write, and counsel the attorney for the same, without taking reward; and that so should the justices of the King's Bench and Common Bench, the barons of the exchequer, and all other justices in courts of record where such suit should be. This enactment applied only to civil cases, *R.* v. *Wright*, 2 *Str.* 1041; but even at the date of that decision the course of the court allowed defence *in formâ pauperis* in criminal cases. *Id.* Where, therefore, it appeared that a poor person is not worth five pounds after all his debts are paid, except the necessary implements of his trade, bed and bedding, and necessary wearing apparel, he is allowed to appear and defend himself in the King's Bench Division against an indictment *in formâ pauperis*, without paying the usual fees to the officers of the court. *Id.* So a woman indicted by her husband for a misdemeanor has been admitted to defend *in formâ pauperis*; *Com. Dig. Formâ Pauperis*; and a person convicted of perjury and outlawed for forgery has been admitted to plead the King's pardon as a pauper. *R.* v. *Morgan*, 2 *Str.* 1214. A prisoner against whom a bill of indictment was found for perjury, which was removed into the King's Bench by *certiorari*, was allowed to appear and defend there *in formâ pauperis*; *R.* v. *Page*, 1 *Dowl.* 507: *and see R.* v. *Sims*, *Tidd* (*N. P.*) 64, *cit.*; and this course has been allowed even where the indictment had been removed by *certiorari* at the instance of the defendant himself. *R.* v. *Nicholson*, 8 *Dowl.* 489. In the case of *R.* v. *Stokes*, 3 *C. & K.* 185, 189, where the prisoner was convicted at the assizes, an application was made, on petition and affidavit, to *Parke*, B., at chambers, for leave to sue out a writ of error *in formâ pauperis*; that learned judge intimated that he had never known a writ of error under such circumstances, though he was by no means prepared to say that it could not be granted; ultimately the case was argued as a crown case reserved. It seems, however, that the court may admit persons to sue or defend *in formâ pauperis at any time. Com. Dig. Formâ Pauperis.* A prosecutor may be allowed to sue *in formâ pauperis* on making an affidavit as above, and obtaining a certificate of counsel that he has good cause to prosecute. *R.* v. *Wilkins*, 1 *Dowl.* 536. The petition to be admitted to defend an indictment as a pauper may be in the following form:—

"*To the Right Hon. Richard Everard, Baron Alverstone, Lord Chief Justice of England, and the rest of the Honourable Justices of the King's Bench Division of His Majesty's High Court of Justice: The humble petition of* A. B., *etc., showeth, That at a session of oyer and terminer and gaol delivery, holden for the jurisdiction of the Central Criminal Court, in the month of December,* 19—, *an indictment for perjury was preferred against your petitioner, which indictment was by the grand jury then and there found to be a true bill; and that in Hilary term last the said indictment was removed by writ of* certiorari *into the said King's Bench Division; but your petitioner being very poor, is utterly unable to defend himself against the said indictment, without an order from this honourable court to enable him to defend the same* in formâ pauperis, *your petitioner not being worth five pounds in the world besides the necessary implements of his trade, bed and bedding, and necessary wearing apparel, and all his just debts being paid. Your petitioner therefore humbly prays your lordships will be pleased to admit him a pauper, to defend the said indictment: And your petitioner will ever pray,*" etc.

The affidavit to verify the foregoing petition may be as follows:—

"*In the High Court of Justice, King's Bench Division.—The King on the prosecutoin of* A. B. *against* C. D.—*I,* C. D:, *the above-named defendant, make oath and say, that I am not worth five pounds in the world, save and except the necessary implements of my trade, bed and bedding, and necessary wearing apparel. Sworn, etc.* C. D."

This petition is usually presented to a judge at chambers, but it may be presented in court; and on the prayer of the petition being granted, an order is drawn up at the Crown Office without any fee, which must be produced when the pauper requires anything to be done without payment of fees. *R.* v. *Dugdale, Short & Mellor, Cr. Off. Pr.* 250.

The court would in some cases allow poor persons to *prosecute in formâ pauperis*, but they would not do so on the common affidavit of poverty; such an application could only be granted on special grounds, upon the certificate of counsel, in addition to the foregoing petition and affidavit. *Com. Dig. Formâ Pauperis: R.* v. *Wilkins*, 1 *Dowl.* 536.

The repeal of 11 *H.* 7, *c.* 12, by 46 *&* 47 *Vict. c.* 49, *s.* 3, appears not to have affected the privilege of suing and defending *in formâ pauperis*, in criminal cases. Neither the Rules of the Supreme Court nor the Crown Office Rules deal with proceedings *in formâ pauperis* in criminal cases. *See* 38 *&* 39 *Vict. c.* 77, *s.* 19; 46 *&* 47 *Vict. c.* 49, *s.* 5 (*b*).

Sect. 2.

Summons, Impanelling, Challenge and Swearing of the Petty Jury.

Calling.]—The prisoner having put himself upon the country, the next proceeding is to call the petty jurors, which an officer of the court does in the following or like terms:—

"*You good men, who are returned and impanelled to try the issue joined between our sovereign lord the King and the prisoner at the bar, answer to your names and save your fines,*" [then calling the jurors by name]. It is not necessary in point of law that the names should be called over in the order in which they stand on the panel, although it is generally proper to do so: it is not, therefore, ground of error that the names are not so

called over. *Mansell* v. *R.*, 8 *St. Tr., N. S.* 831; 8 *E. & B.* 54; *Dears. & B.* 375.

Qualification.]—By *s.* 1 of the *Juries Act*, 1825 (6 *G.* 4, *c.* 50), "every man, except as hereinafter excepted [*see infra*], between the ages of twenty-one years and sixty years, residing in any county in England, who shall have in his own name or in trust for him, within the same county, 10*l.* by the year above reprizes, in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of any such lands or tenements, or in such lands, tenements, and rents taken together, in fee simple, fee tail, or for the life of himself or some other person; or who shall have within the same county 20*l.* by the year above reprizes, in lands or tenements held by lease or leases for the absolute term of twenty-one years, or some longer term, or for any term of years determinable on any life or lives: or who, being a householder, shall be rated or assessed to the poor rate or to the inhabited house duty in the county of Middlesex, on a value of not less than 30*l.*, or in any other county on a value of not less than 20*l.*; or who shall occupy a house containing not less than fifteen windows, shall be qualified and shall be liable to serve on juries for the trial of all issues joined in any of the king's courts of record at Westminster, and in the superior courts, both civil and criminal, of the three counties palatine, and in all courts of assize, nisi prius, oyer and terminer, and gaol delivery, such issues being respectively triable in the county in which every man so qualified respectively shall reside, and shall also be qualified and liable to serve on grand juries in courts of sessions of the peace, and on petty juries, for the trial of all issues joined in such courts of sessions of the peace, and triable in the county, riding, or division, in which every man so qualified respectively shall reside," including the new county of London, 51 *& 52 Vict. c.* 41, *s.* 89. The qualifications, it will be seen, do not apply to grand jurors except for general or quarter sessions (as to the qualifications of grand jurors *see ante*, p. 101), nor to common jurors in the city of London; *see* 6 *G.* 4, *c.* 50, *s.* 50, and 51 *& 52 Vict. c.* 41, *s.* 88 (2). The qualifications for jurors summoned for a coroner's inquest are not regulated by the Act of 1825 (*see s.* 52), but by *s.* 8 of the *Coroners Act*, 1887: *see in re Dutton* [1892] 1 *Q. B.* 486; *R.* v. *Waldo*, 67 *J. P. Rep.* 103, and *ante*, p. 154. The *Juries Act*, 1870 (33 *& 34 Vict. c.* 77, *s.* 7), enacts, that "the qualification of persons as jurors in Wales shall be the same as the qualification of persons as jurors in England," and repeals the prior provision to the contrary.

Under the *Municipal Corporations Act*, 1882 (45 *& 46 Vict. c.* 50, *s.* 186, *sub-s.* 1), "every burgess of a borough having a separate court of quarter sessions or a borough civil court shall, unless by law exempt, or disqualified, be qualified and liable to serve on grand juries in the borough, and on juries for the trial of issues joined in either of those courts." By 23 *H.* 8, *c.* 13, burgesses worth £40 in personalty are qualified as jurors to try felonies.

By *s.* 8 of the *Juries Act*, 1870 (33 *& 34 Vict. c.* 77), "*aliens* having been domiciled in England or Wales for ten years or upwards, if in other respects duly qualified, shall be qualified and shall be liable to serve on juries or inquests in England and Wales as if they had been natural-born subjects of the King; but, save as aforesaid, no man not being a natural-born subject of the King shall be qualified to serve on juries or inquests in any court or on any occasion whatsoever."

Disqualifications.]—By *s.* 10 of the same Act "no man who has been or shall be *attainted* (*see ante*, p. 177) of any treason or felony, or convicted of

any crime that is infamous, unless he shall have obtained a free pardon, nor any man who is under outlawry, is or shall be qualified to serve on juries or inquests in any court or on any occasion whatsoever." Persons over sixty are exempt but not disqualified. *Mulcahy* v. *R.*, *L. R.* 3 *H. L.* 306.

Exemptions.]—The privilege of exemption from serving on juries depends mainly upon *s.* 9 of the *Juries Act*, 1870 (33 *& 34 Vict. c.* 77), which enacts that "The persons described in the schedule hereto shall be severally exempt (as therein specified) from being returned to serve, and from serving upon any juries or inquests whatsoever, and their names shall not be inserted in the lists of the persons qualified and liable to serve on the same, but, save as aforesaid, no man otherwise qualified to serve on such juries or inquests shall be exempt from serving thereon, any enactment, prescription, charter, grant, or writ to the contrary notwithstanding." The *exemptions* extend to coroners' juries: *In re Dutton* [1892] 1 *Q. B.* 486. A particular exemption given by the section to jurors of the city of Westminster was abolished by 51 *& 52 Vict. c.* 41, *s.* 89 (2), and such jurors are now liable to serve on any jury in the new counties of London and Middlesex, except at quarter sessions for Middlesex. Below is given the schedule with the addition in italics of other exemptions added by the other statutes specified:—"Persons exempt from serving on juries. Peers; members of parliament; judges; clergymen; Roman Catholic priests; ministers of any congregation of Protestant Dissenters, and of Jews, whose place of meeting is duly registered, provided they follow no secular occupation except that of a schoolmaster; . . . barristers-at-law, certificated conveyancers and special pleaders, if actually practising; members of the society of doctors at law, and advocates of the civil law, if actually practising; . . . solicitors, . . . if actually practising and having taken out their annual certificates and their managing clerks, and notaries public in actual practice; officers of the courts of law and equity, and of the Admiralty and Ecclesiastical courts, including therein the courts of Probate and Divorce, and the clerks of the peace or their deputies, if actually exercising the duties of their respective offices; coroners; gaolers and keepers of houses of correction, and all subordinate officers of the same; keepers in public lunatic asylums; members and licentiates of the Royal College of Physicians in London, if actually practising as physicians; members of the Royal Colleges of Surgeons in London, Edinburgh and Dublin, if actually practising as surgeons; apothecaries certificated by the Court of Examiners of the Apothecaries Company, and all registered medical practitioners (*a*) and registered pharmaceutical chemists if actually practising as apothecaries, medical practitioners, or pharmaceutical chemists respectively (*see also* 21 *& 22 Vict. c.* 90, *s.* 35); *and registered dentists if they so desire* (41 *& 42 Vict. c.* 33, *s.* 30); officers of the navy, army, militia, and yeomanry, while on full pay; *all soldiers in his majesty's regular forces* (44 *& 45 Vict. c.* 58, *s.* 147); the members of the Mersey Docks and Harbour Board; the master, wardens, and brethren of the Corporation of Trinity House of Deptford Strond; pilots licensed by the Trinity House of Deptford Strond, Kingston-upon-Hull, or Newcastle-upon-Tyne, and all masters of vessels in the buoy and light service employed by either of those corporations, and all pilots licensed under any Act of Parliament or charter for the regulation of pilots (*see* 57 *& 58 Vict. c.* 60, *part x.*); the household servants of his majesty, his heirs and successors; officers of the Post Office, commissioners of customs, and

(*a*) It has been held in Ireland that duly qualified veterinary surgeons are exempt as medical practitioners. *See Re Allen* [1904] 2 *Ir. Rep.* 565. *Sed quaere* whether they can be so held under the English Jury Acts.

officers, clerks, or other persons acting in the management, *service* [39 & 40 *Vict.* c. 36, s. 9], or collection of the customs commissioners *and collectors* of inland revenue, and officers or persons appointed by the commissioners of inland revenue or employed by them or under their authority or direction in any way relating to the duties of inland revenue (53 & 54 *Vict.* c. 21, s. 8); *general or additional commissioners of income tax, as to the counties in which they dwell so long as they hold a certificate under* 5 & 6 *Vict.* c. 35 (43 & 44 *Vict.* c. 19, s. 40); sheriffs' officers; officers of the rural and metropolitan police [*see also* 2 & 3 *Vict.* c. 93, s. 10], magistrates of the metropolitan police courts, their clerks, ushers, doorkeepers, and messengers; *members of the London County Council as to juries within the administrative county of London* [53 & 54 *Vict.* c. cxlii. s. 26] *members of the council of a county of a city or town corporate so far as relates to service on the trial of indictments removed into the adjoining county at large* (38 *G.* 3, c. 52, s. 11); members of the council of the municipal corporation of any borough, and every justice of the peace assigned to keep the peace therein, and the town clerk and treasurer for the time being of every such borough, so far as relates to any jury summoned to serve in the county where such borough is situate; burgesses of every borough in and for which a separate court of quarter sessions shall be holden so far as relates to any jury summoned for the trial of issues joined in any court of general or quarter sessions of the peace in the county wherein such borough is situate; justices of the peace so far as relates to any jury summoned to serve at any sessions of the peace for the jurisdiction of which he is a justice; officers of the Houses of Lords and Commons," *and registrars of births, deaths, and marriages*; 7 *W.* 4 & 1 *Vict.* c. 22, s. 18. "No person whose name shall be in the jury book as a juror shall be entitled to be excused from attendance on the ground of any disqualification or exemption other than illness not claimed by him at or before the revision of the list by the justices of the peace, and a notice to that effect shall be printed at the bottom of every jury list." 33 & 34 *Vict.* c. 77, s. 12. That section does not apply to customs officials exempted by 39 & 40 *Vict.* c. 36, s. 9, *supra*.

Jury lists.]—The mode of preparing jury lists, returning the names of persons qualified as jurors, making up the jury book, and summoning the juries in counties, is prescribed by the *Juries Act*, 1825 (6 *G.* 4, c. 50), ss. 8–10, 12, 14, 20, 22, 25; the *Juries Act*, 1862 (25 & 26 *Vict.* c. 107), ss. 4–6, 8–14, and the *Juries Act*, 1870 (33 & 34 *Vict.* c. 77), ss. 11, 13, 14, 15, 19, 20, as modified by the *Local Government Act*, 1888, and the *London Government Act*, 1899 (62 & 63 *Vict.* c. 14).

Summoning jurors.]—The clerk of the county council in every administrative county in England and Wales is required on or before the 20th July in every year to issue his precept, according to the form given in the schedule to 25 & 26 *Vict.* c. 107, to the [churchwardens and] overseers of the poor of the several parishes and townships within the administrative county for which he acts, requiring them to make out, before the 1st September then next ensuing, a true list of all men residing within their respective parishes and townships qualified and liable to serve on juries according to 6 *G.* 4, c. 50, and also to perform and comply with all other the requisitions in the said precepts contained (25 & 26 *Vict.* c. 107, s. 4, as modified by 51 & 52 *Vict.* c. 41, s. 83 (6)). The [churchwardens and] overseers then make out their lists, and fix a copy on the principal door of every public place of religious worship within their parish or township on the three first Sundays in September; 6 *G.* 4, c. 50, ss. 8, 9; 25 & 26 *Vict.* c. 107, s. 6; and at a special petty sessions, held in the last week in

September (or at such adjournment thereof as is mentioned in 25 & 26 *Vict. c.* 107, *s.* 8), these lists are produced, and the justices then strike out the names of any persons not qualified, or not able to serve by reason of any infirmity, and insert the names of any qualified persons omitted; 6 *G.* 4, *c.* 50, *s.* 10. The lists duly corrected and allowed by the justices present at such petty sessions are transmitted by their clerk to the clerk of the county council. 25 & 26 *Vict. c.* 107, *s.* 9; 51 & 52 *Vict. c.* 41, *s.* 83 (6). The lists are then copied into *The Jurors' Book* by the clerk of the county council, which book is delivered by him to the sheriff, to be used from the 1st of January, for one year. 6 *G.* 4, *c.* 50, *s.* 12; 25 & 26 *Vict. c.* 107, *s.* 10; 51 & 52 *Vict. c.* 41, *s.* 83 (6).

In the county of London the duty of making out the lists now devolves on the town clerk of each metropolitan borough in substitution for the overseers, etc., of the parishes comprised therein. 62 & 63 *Vict. c.* 14, *ss.* 11 (1), 25. In rural parishes the churchwardens are no longer concerned with jury lists. 54 & 55 *Vict. c.* 73, *s.* 5 (2).

6 *G.* 4, *c.* 50, provides (*s.* 20) that "the court of King's Bench, and all courts of oyer and terminer or gaol delivery [and] the courts of sessions of the peace in England . . . and Wales, shall respectively have and exercise the same power and authority as they have heretofore had and exercised, in issuing any *writ* or *precept*, or in making any *award* or *order*, orally or otherwise, for the return of a jury for the trial of any issue before any of such courts respectively, or for the amending or enlarging the panel of jurors returned for the trial of any such issue; and the return to every such writ, precept, award or order, shall be made in the manner heretofore used and accustomed in such courts respectively, save and except that the jurors shall be returned from the body of the county, and not from any hundred, or any particular venue within the county, and shall be qualified according to this Act." (*a*)

High Court.]—The summoning of jurors for trial at the Royal Courts of Justice is now regulated by the following rule of January 15, 1903, made under *s.* 89 (3) of the *Local Government Act*, 1888:—

"The sheriffs of the county of London and of the county of Middlesex respectively shall execute and obey all precepts and process which the judges or proper officers of the High Court of Justice shall award, issue, and direct unto them respectively, and shall whenever required and commanded summon and return from the said county of London and the said county of Middlesex a competent number of persons qualified according to law to inquire of present and try all offences, issues and other matters cognizable by the justices of the High Court of Justice within the boundaries of the county of the county of London and the county of Middlesex, and the persons returned from the said county of London and the said county of Middlesex whether taken wholly from the said county of London or from the said county of Middlesex or taken indiscriminately from the said county of London and the said county of Middlesex shall have authority to inquire of, present, hear, try and determine all such offences and other matters and all issues and all matters of fact arising out of such trials or relating thereto as if the said county of London and the said county of Middlesex were one county."

Assizes.]—Before the justices of assize go their circuits, (*b*) they issue

(*a*) The court appears to have inherent authority to summon one or more grand juries. *See Chit. Cr. L.*, 309, 310; *R.* v. *McGuire* [1898] 34 *New Bruns.*, 430.

(*b*) The circuits are now regulated by a series of Orders in Council printed in *Statutory Rules and Orders Revised* (ed. 1904), *vol.* 12, *tit.* "*Supreme Court E.*," and the commission

their precept, signed and sealed to the sheriff, to cause all persons bound to attend at the assizes to appear before them on an appointed day, and requiring him (among other things) to return a competent number of good and lawful men of the body of the county, qualified as jurors according to law: and the judges are empowered by the *Jurors Act*, 1825 (6 *G.* 4, *c.* 50), *s.* 22, if they think fit, to direct the sheriff to "summon and impanel such number of jurors, not exceeding one hundred and forty-four, as such judges shall think fit to direct, to *serve indiscriminately on the criminal and civil side*," dividing them into two sets, the first to serve at the beginning of the assizes, for such time as the judge may direct, and the second to serve for the residue of such assizes. (*For forms of judges' precepts to the sheriff, see* 4 *Chit. Cr. L.* 171, 174.) "The precept issued by the justices of assize to the sheriff to summon jurors for the assizes shall direct that the jurors be summoned for the trial of all issues, whether civil or criminal, which may come on for trial at the assizes." 15 & 16 *Vict. c.* 76, *s.* 105. It is the duty of the sheriff, upon the receipt of the precept for the return of jurors, to return the names of men contained in the jurors' book for the current year and no others. 6 *G.* 4, *c.* 50, *s.* 14. "No juror shall be liable to any penalty for non-attendance on any jury, unless the summons requiring him to attend be duly *served* six days at least before the day on which he is required to attend; but no longer period than such six days shall in any case be required between the service and such last mentioned day." 33 & 34 *Vict. c.* 77, *s.* 20. Jurors *may* be summoned by post, provided that when any summons shall be served by post, two additional days shall be allowed for the transmission of such summons by post, over and above the number of days required by law for the service of a summons, before the day on which the juror is required to attend. 25 & 26 *Vict. c.* 107, *s.* 11. The writs of *venire facias juratores*, and *distringas juratores*, which constituted what was formerly known as the jury process, were abolished in 1852 (15 & 16 *Vict. c.* 76, *s.* 104, *rep.*). And under the present practice "writs of *venire facias*, or other writs for the summoning of juries, shall no longer be used, but the jury, whether special or common, shall be taken from the list of persons summoned for the sittings or assizes, and a panel shall be annexed to the record as in civil cases." (*Cr. Off. Rules*, 1886, *r.* 158).

The sheriff must for 1*s.* deliver a copy of the jury panel to any party requiring the same. 15 & 16 *Vict. c.* 76, *s.* 106.

The juries summoned under the substituted procedure are made as effectual for all purposes as those summoned under the old writs. 15 & 16 *Vict. c.* 76, *s.* 115.

Special jury.]—A special jury cannot be given in felony. *R.* v. *Mayne*, 32 *W. R.* 95. In important cases of misdemeanor, when the record is in the King's Bench Division, a special jury may be obtained on the motion of either prosecutor or defendant. By *s.* 30 of the *Juries Act*, 1825 (6 *G.* 4, *c.* 50), the High Court (K. B. D.) may, upon the motion of any *prosecutor*, relator, plaintiff, or demandant, or of any *defendant* in any case whatsoever, whether civil or *criminal*, or on any penal statute, *excepting only indictments for treason or felony*, depending in the said court, order and appoint a special jury to be struck before the proper officer of each respective court, for the trial of any issue joined in any of

days by orders in Council issued before each circuit and printed in the *Statutory Rules and Orders* of the year of issue. Certain of these orders contain directions as to the precepts for summoning jurors. They are made under 8 & 4 *W.* 4, *c.* 71, 38 & 39 *Vict. c.* 77, *s.* 23; and as to spring and winter assizes under 39 & 40 *Vict. c.* 57, 40 & 41 *Vict. c.* 46, and 42 & 43 *Vict. c.* 1.

the said cases, and triable by a jury, in such manner as the said courts respectively have usually ordered the same, and every jury so struck shall be the jury returned for the trial of such issue. As to the usual mode of striking a special jury, *see Short & Mellor, Cr. Off. Pr.* 213. As to the old practice, *see* 1 *Chit. Cr. L.* 522. As to the cost of such jury, *see* 6 *G.* 4, c. 50, *s.* 34: *R.* v. *Moate*, 3 *B. & Ad.* 237: 1 *L. J. N. S., K. B.* 78: 37 *R. R.* 421. By the *Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 108, as modified by 61 & 62 *Vict. c.* 6, *s.* 1 (1), the precept issued by the judges of assize for the sheriff to summon jurors for the assizes directs the sheriff to summon a sufficient number of special jurymen, to be mentioned therein, to try the special jury causes at the assizes; and the persons summoned in pursuance of such precept shall be the jury for trying the special jury causes at the assizes, subject to such right of challenge as the parties are now by law entitled to; and a printed panel of the special jurors so summoned shall be made, kept, delivered and annexed to the *nisi prius* record, in like time and manner, and upon the same terms as hereinbefore provided with reference to the panel of common jurors; and upon the trial the special jury shall be balloted for, and called in the order in which they shall be drawn from the box, in the same manner as common jurors: Provided that the court or a judge, in such case as they or he may think fit, may order that a special jury be struck according to the present practice, and such order shall be a sufficient warrant for striking such special jury, and making a panel thereof for the trial of the particular cause. And *see ss.* 112, 113, as to the course to be pursued in cases where a special jury is desired.

As to special juries in London and Middlesex, *see* 33 & 34 *Vict. c.* 77, *ss.* 15–18; 51 & 52 *Vict. c.* 41, *s.* 89. The nomination and reduction of the jurors in London and Middlesex is regulated by 15 & 16 *Vict. c.* 76, *s.* 110, and 51 & 52 *Vict. c.* 41, *s.* 89. The rule committee of the Supreme Court has, under the *Special Juries Act*, 1898 (61 & 62 *Vict. c.* 6, *s.* 1), power to make rules as to special juries, and thereby to repeal or alter rules made under any previous Act as to special juries. This enactment is aimed at what remains of the *Regulae Generales* of Hilary Term, 1853 (*see Statutory Rules and Orders Revised* (ed. 1904), *vol.* 12, *tit.* "*Supreme Court E.*")

In the King's Bench Division, "Either the prosecutor or the defendant may, except in case of felony, obtain a special jury upon giving the like notice as is required in civil cases, and the court or a judge may, at the instance of either party, order that a special jury be struck as provided for by the *Juries Act*, 1870 (*see s.* 17). And when the jury has been reduced either party may draw up an order at the Crown Office directing the sheriff to summon that particular jury at such time and place as may be required." *Cr. Off. Rules*, 1886, *r.* 158. The jury thus reduced may be challenged for cause. *Barrett* v. *Long*, 8 *St. Tr., N. S.* 1076; 3 *H. L. C.* 395. As to the Irish practice, *see R.* v. *Parnell*, 14 *Cox*, 505; and *Hubard, Grand Jury, etc., in Ireland.* As to the qualification of special jurors, *see* 33 & 34 *Vict. c.* 77, *s.* 6. "The person or party who shall apply for a special jury shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same upon taxation of costs, than such person or party would be entitled to in case the cause had been tried by a common jury, unless the judge before whom the case is tried shall immediately after the verdict certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury." 6 *G.* 4, *c.* 50, *s.* 34. This enactment applies to criminal cases: *R.* v. *Pembridge*, 3 *Q. B.* 901; 12 *L. J.* (*Q. B.*) 47; *and R.* v. *Rowlands*, 2 *Den.* 364, 371 (*n*).

If sufficient special jurors are not in attendance, a *tales* for deficiency

or default of jurors may be awarded, by warrant of the attorney-general, for a *tales de circumstantibus*. *See Att.-Gen.* v. *Parsons*, 2 *M. & W.* 23: *R.* v. *Dolby*, 2 *B. & C.* 104; 24 *R. R.* 647: 2 *St. Tr., N. S.* 939: 1 *C. & K.* 238; *R.* v. *Edmonds*, 1 *St. Tr., N. S.* 785, *post*, p. 206. [For the form of this warrant and the mode of obtaining, *see Short & Mellor, Cr. Off. Pr.* 217.] If a rule is made for a special jury, and the parties proceed to trial before a common jury, it would seem that the verdict cannot be afterwards impeached. *R.* v. *Perry*, 5 *T. R.* 453.

Jury de medietate linguæ.]—S. 5 of the *Naturalization Act*, 1870 (33 & 34 *Vict. c.* 14) took away the right which aliens previously had to be tried by a jury *de medietate linguæ*, when indicted of any felony or misdemeanor, but not when indicted of high treason. *See Arch. Cr. Pl.* 143 (16th ed.): *R.* v. *Manning*, 1 *Den.* 467: *Levinger* v. *R., L. R.*, 3 *P. C.* 282. Under that Act (*s.* 5) an alien is now "triable in the same manner as if he were a natural-born subject."

Panel.]—On a trial for high treason the accused has a right to a copy of the jury panel. 7 & 8 *W.* 3, *c.* 3, *s.* 7: 7 *Anne, c.* 21, *s.* 14. But he has no such right in cases of felony or misdemeanor. *R.* v. *Dowling*, 7 *St. Tr., N. S.* 381; 3 *Cox*, 509: *R.* v. *Nicholson*, 8 *Dowl.* 422: *R.* v. *Mitchel*, 6 *St. Tr., N. S.* 599; 3 *Cox*, 1.

Challenge of jurors.]—When a sufficient number of persons charged with felony have pleaded, and put themselves upon the country, the clerk of the court addresses the prisoners thus: "*Prisoners, these good men that you shall now hear called are the jurors who are to pass between our sovereign lord the King and you upon your respective trials* [or *who are to try you*]; [*or* in a capital case, *upon your life and death*;] *if therefore you or any of you will challenge* [or *object to*] *them or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard.*" The officer then proceeds to call twelve jurors from the panel, calling each juror by name and address. When a full jury has appeared (*R.* v. *Edmonds*, 1 *St. Tr., N. S.* 785, 916; 4 *B. & Ald.* 471), and before any juror is sworn (*R.* v. *Frost*, 4 *St. Tr., N. S.* 85, 122; 9 *C. & P.* 129, 137: *R.* v. *Key*, 2 *Den.* 347: 3 *C. & K.* 371: 21 *L. J.* (*M. C.*) 35: *R.* v. *Giorgetti*, 4 *F. & F.* 546), the proper time comes for the exercise of the right of *challenge*, or exception to the jurors returned to pass upon the trial (*a*). The party intending to challenge the array may pray a *tales* to complete the number, and then object to the panel. *Bull.* (*N. P.*) 307. If the defendant is not allowed his full right of challenge the proceedings may be quashed on writ of error, and a *venire de novo* awarded. *Gray* v. *R.*, 6 *St. Tr., N. S.* 117: 11 *Cl. & F.* 427 (*Eng. Rep.*). *See post, chap. viii., sect.* 2.

Challenges are of two kinds: 1. To the *array*, when exception is taken to the whole number impanelled, and 2. To the *polls*, when individual jurymen are excepted against. They are also divided into challenges *peremptory*, made to the polls without reason assigned, and challenges *for cause*, which may be to the array or the polls for some definite reason assigned and proved. Both are comparatively rare in England, and the

(*a*) It has been held in two Colonial cases that a challenge for cause is not too late if made before the juror has done any act showing assent to take the oath, even if he is touching the book. *R.* v. *Freeman*, 5, *id.* 281, *Griffith*, C.J.: *R.* v. *Longland*, 6 *Queensland L. J.* 56. In *R.* v. *Longland* the juror with the book in his hand said that he was opposed to capital punishment, and a challenge for cause was allowed to be made.

leading modern cases on the subject have occurred in Ireland. *See Hubard, Grand Jury in Ireland*, 611.

Peremptory challenge.]—Jurors empanelled to try collateral issues may not be challenged peremptorily. *R.* v. *Radcliffe*, 1 *W. Bl.* 3. At common law, the crown might, it seems, have challenged peremptorily any number of jurors, without alleging any other reason than "*quod non boni sunt pro rege.*" 2 *Hawk. c.* 43, *ss.* 2, 3; 2 *Rolle Abr.* 645; *Co. Litt.* 156 *b*; *Bac. Abr., Juries* (*E.*) 10. But this power was taken away by 33 *Edw.* 1, *c.* 4, and the present law is that in all inquests to be taken before the High Court (K. B. D.), and all courts of oyer and terminer, or gaol delivery, and courts of sessions of the peace in England and Wales (*see* 6 *G.* 4, *c.* 50, *s.* 20), "wherein the King is a party, howsoever it be, notwithstanding it be alleged by them that sue for the King, that the jurors of those inquests, or some of them, be not indifferent for the King, yet such inquests shall not remain untaken for that cause; but if they that sue for the King will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court; and it shall be proceeded to the taking of the same inquisitions as it shall be found, if the challenges be true or not, after the discretion of the court." 6 *G.* 4, *c.* 50, *s.* 29. The crown, however, is entitled to ask that a juror should "stand by," *i.e.*, to postpone consideration of the cause of challenge until the panel has been "gone through" and it appears that there will not be jurors enough to try the defendant, if the peremptory challenges are allowed to prevail. *R.* v. *Parry*, 7 *C. & P.* 836; *R.* v. *Geach*, 9 *C. & P.* 499; and *see* 2 *Hale*, 271; 2 *Hawk. c.* 43, *s.* 3; *Staundf.* 162. By "*going through*" or "*perusing*" the panel is meant ascertaining according to the usual practice of the court, and what may reasonably be expected, that there are no more jurors in the panel whose attendance can be procured, and that unless the crown be put to show its cause of challenge, "the inquest would remain untaken." *Mansell* v. *R.*, 8 *St. Tr., N. S.* 831; 8 *E. & B.* 54; *Dears. & B.* 375; 27 *L. J.* (*M. C.*) 4. In that case the panel contained fifty-four names: eighteen, when called, were peremptorily challenged by the prisoner; fifteen were, on the prayer of the counsel for the crown, the prisoner's counsel objecting, and praying that cause of challenge should be shown, ordered to "stand by;" and nine were elected and tried to be sworn. This left twelve other persons only on the panel, and those twelve were at that time absent, deliberating upon their verdict in another case. The name of W. J. (the first person who upon the prayer of the counsel for the crown had been ordered to stand by) was then again called, and the counsel for the crown again prayed that he might be ordered to stand by, upon which the counsel for the prisoner prayed that cause of challenge should be shown forthwith. At that moment, and before any judgment was given, the twelve persons who sat as a jury in the other case came into court and gave their verdict; and the counsel for the crown then prayed that W. J. should be ordered to stand by until those twelve persons had been called; but the counsel for the prisoner demanded that W. J. should be sworn, unless cause of challenge to him were shown. The court ordered that W. J. should stand by; and three persons, the number required to complete the jury, were taken from the said twelve jurors, and elected and tried to be sworn (*sic*), although the prisoner's counsel objected that such persons ought to be called in their proper order with other persons in the panel, and that J. J., the person whose name stood in the panel immediately after that of W. J., ought to be next called. Upon a writ of error, the record stating all these facts,

it was held that, under the circumstances, the panel was not gone through, so as to put the crown to assign cause of challenge, until the twelve persons who came into court before the complete formation of the jury had been called; that W. J. was properly ordered to stand by the second time; and that the three persons required to complete the jury were properly called and taken from the said twelve, without again calling the whole panel through in its order. *Id.*

The defendant is bound to show all his causes of objection before the prosecutor can be called upon to show the grounds of his challenges. 2 *Hawk. c.* 43, *s.* 3; *Bac. Abr. Juries* (*E.*) 10; 4 *Bl. Com.* 353; and see hereon *R.* v. *Bourke* [1900], 19 *N. Z. L. R.* 335: *R.* v. *Wardell*, 9 *Queensland L. J.* 49.

Peremptory challenges are allowed to the defence in cases of treason and felony, but not in cases of misdemeanor. *Co. Litt.* 56; 4 *Bl. Com.* 352; 3 *Co. Inst.* 27; *Com. Dig. Challenge* (*C.*): *Gray* v. *R.*, 6 *St. Tr., N. S.* 117, 134; 11 *Cl. & F.* 427; and *see Levinger* v. *R.*, L. *R.* 3 *P. C.* 282. The number of peremptory challenges allowed in cases of high treason is thirty-five (7 & 8 *W.* 3, *c.* 3, *s.* 2) except where the treason charged is the compassing of the King's death, and an overt act alleged in the indictment is the assassination of the King, or any direct attempt against his life, or against his person, whereby his life may be endangered, or his person may suffer bodily harm (39 & 40 *G.* 3, *c.* 93); or attempts against the person of the King; 5 & 6 *Vict. c.* 51, *ss.* 1, 2. In the last-mentioned cases of high treason, and in murder and all other felonies, the number is twenty. 6 *G.* 4, *c.* 50, *s*, 29: and *see* 2 *Hawk. c.* 43, *ss.* 7, 8; 2 *Hale*, 268; *Bac. Abr., Challenge*, 70, 74, 75, 217; *Fost.* 106; *Co. Litt.* 156; *Bac. Abr., Juries* (*E.*) 9, 10. "If any person indicted for any treason, felony, or piracy, shall challenge peremptorily a greater number of the men returned to be of the jury than such person is entitled by law so to challenge in any of the said cases, every peremptory challenge beyond the number allowed by law in any of the said cases shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made." 7 & 8 *G.* 4, *c.* 28, *s.* 3. And when he has exhausted his challenges he cannot withdraw one objection in order to challenge a fresh juror. *R.* v. *Parry*, 7 *C. & P.* 836. In Ireland only twenty peremptory challenges are allowed even in high treason. 9 *G.* 4, *c.* 54, *s.* 9; *Smith O'Brien* v. *R.*, 2 *H. L. C.* 465 (*Eng. Rep.*); 7 *St. Tr., N. S.* 1, 43, 359. In misprision of treason, it seems to be doubtful whether peremptory challenge is allowed. *See* 2 *Hawk. c.* 43, *s.* 5; 3 *Co. Inst.* 27 *a.* In cases of misdemeanor, though no right of peremptory challenge exists at all, it is usual for the officer, on application to him, to abstain from calling any reasonable number of names objected to either by the prosecutor or by the defendant, taking care that enough are left to form a jury; and this practice has often been sanctioned by the court. *See Dick. Q. S.* 485, 486 (6th ed.): *R.* v. *McGowan*, 11 *Ir. C. L. Rep.* 207, *cit.*; 3 *Ir. Jur.* (*N. S.*) 403: *R.* v. *Blakeman*, 3 *C. & K.* 97.

Where, on a trial for felony, the jury panel contained the names of J. T. and W. T., and when the name of J. T. was called, a person supposed to be J. T. went into the box and was sworn without objection; and the prisoner having been convicted, it was discovered the next day that W. T. had, by mistake, answered to the name of J. T., and was really the person who had served on the jury; it was held by a majority of the judges that this was not a mis-trial, but only ground of challenge. *R.* v. *Mellor, Dears. & B.* 468; 27 *L. J.* (*M. C.*) 121: *see R.* v. *Metcalf*, 3 *Cox*, 220; *Case of a Juryman*, 12 *East*, 231, *n.*; and *post*, pp. 224, 276.

Where several defendants are tried by the same inquest for treason or felony, each has a right to the full number of his challenges; and if they

refuse to join in their challenges, the crown has the right of trying each, or any number of them less than the whole, separately from the others, so as to prevent the delay which might arise from the whole panel being exhausted by the challenges. *Fost.* 106; *Co. Litt.* 156; 2 *Hale*, 268. But in *R.* v. *Fisher*, 3 *Cox*, 68, *Platt*, B., refused an application that principal and accessory be allowed to sever their challenges.

Challenge for cause.]—Challenges *for cause* may be made either by the prosecutor or by the defendant (2 *Hale*, 271; 2 *Co. Inst.* 431), whether the indictment is for treason, felony, or misdemeanor. *See R.* v. *Lovett*, 3 *St. Tr., N. S.* 1177, 1179. They are either to the *array* or to the *polls*, *i.e.*, to individual jurymen.

1. *To the array.* The challenge to the array is either a *principal* challenge, or *for favour*. "The only ground upon which the challenge to the array is allowed by the English law is the unindifferency or default of the sheriff." *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1, 799. The causes of a principal challenge to the array are—where the sheriff is the actual prosecutor or party aggrieved; *R.* v. *Sheppard*, 1 *Leach*, 101: *R.* v. *Edmonds*, 1 *St. Tr., N. S.* 785; 4 *B. & Ald.* 471; or where, at the time of the return, he was of actual affinity to either party, or if he return any jurors at the request of the prosecutor or defendant, or any person whom he believes to be more favourable to the one side than to the other; or if the defendant have an action depending against the sheriff; *Co. Litt.* 156 *a*; or if the sheriff, or the bailiff who made the return, be under the distress of the prosecutor or the defendant; or if he have any pecuniary interest in the event; or if he be counsel, attorney, servant, or arbitrator, in the same cause; *Id.*; *Bac. Abr., Juries* (*E.*): or a subscriber to a society which is the prosecutor. *R.* v. *Dolby*, 2 *St. Tr., N. S.* 939; 2 *B. & C.* 104; 1 *C. & K.* 238. It is no ground of challenge for unindifferency on the part of the sheriff, that the officer had omitted to summon one of the twenty-four special jurymen returned on the panel. *R.* v. *Edmonds*, 1 *St. Tr., N. S.* 785, 916; 4 *B. & Ald.* 471. It is a legal ground of challenge to the array that the sheriff has selected the jurors on the ground of religion; *R.* v. *O'Doherty*, 6 *St. Tr., N. S.* 831; but not that he has returned a large proportion of the panel of a different religion from the defendant. *Smith O'Brien* v. *R.* [1849] 7 *St. Tr., N. S.* 31. The religion of the jurors must be strictly proved, and the mere fact of a disproportion is not sufficient to prove unindifferency. *R.* v. *Mitchee*, 6 *St. Tr., N. S.* 599: *R.* v. *O'Doherty*, *ubi supra*: *R.* v. *Duffy*, 7 *St. Tr., N. S.* 795, 871; *Smith O'Brien* v. *R.*, 7 *St. Tr., N. S.* 1, 20, 24, 31. There can be no challenge to the array on the ground of unindifferency in the master of the crown office, he being the officer of the court expressly appointed to nominate the jury; in such case the only remedy is to apply to the court to appoint some other officer to nominate the jury. *R.* v. *Edmonds*, *supra*. It is no ground of challenge to the array that the justices have omitted the duties prescribed by the Jury Acts in making out the list of names for the special or common jury book, and that the sheriff has summoned the jury from a jury book so improperly made. *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 69, 78: *R.* v. *Burke*, 10 *Cox*, 519. 3 & 4 *W.* 4, *c.* 91 (*Irish Jury Act*), *s.* 9 (*rep.*), which in this respect corresponded with *s.* 12 of the English *Juries Act*, 1825 (6 *G.* 4, *c.* 50), directed a jurors' book to be made up in each year for use in the year following, and declared that such book should be in use from the 1st of January for and during one year. In November, 1865, at a sitting of a special commission, a panel was returned from the then existing jury book; the jurors were not then called, but the sitting was duly adjourned to 19th January, 1866, at

which time the trial took place, when the jurors named in the return of 1865 were called. It was held, that this was not a ground of challenge to the array; *Mulcahy* v. *R., L. R.*, 3 *H. L.* 306; and also that the fact of one of the jurors who had been duly returned in November, 1865, not being on the list for 1866, was no ground of challenge to him. *Id.*

The *default* of the sheriff may also be a ground of principal challenge to the array; as where, the array being returned by the bailiff of a liberty, the sheriff returns it as from himself; if, however, the sheriff returns a panel *from the liberty*, it will be good, though he may be liable to the lord of the franchise in an action. *Co. Litt.* 156 *a*; *Bac. Abr., Juries* (*E.*) 1. Since 1825 (6 *G.* 4, *c.* 50, *s.* 13), the jury has been taken from the body of the county: and this has put an end to the ancient right of challenging the array "for want of hundredors" *i.e.*, if four persons were not returned from the hundred in which the offence was alleged to have been committed; 2 *Hale*, 272.

There may also be a challenge to the array *for favour*, in cases where the ground of partiality is less apparent and direct: as where one of the parties is tenant to the sheriff; or the sheriff and one of the parties are united in the same office; or where a relationship exists between the children of one of the parties and of the sheriff or officer; or where the sheriff has an action of debt depending against one of the parties. *Co. Litt.* 156 *a*; *Bac. Abr., Juries* (*E.*) 1; 3 *Dyer*, 367 *a*, *pl.* 40.

A principal challenge to the array being founded upon some manifest partiality or error, if the cause be truly alleged, the court, it is said, will at once quash the array, and direct a new *venire* to issue. Where cause exists for a challenge to the array, on the ground of relationship or otherwise, the party liable to the objection may himself suggest it to the court, in order to prevent the delay which the challenge would occasion, and pray that the *venire* may be awarded to the coroners or elisors, as the case may be. *See* 1 *St. Tr., N. S.* 913. If the other party admits the fact, and agrees to the prayer, the *venire* will at once be so awarded; if he refuses, denying the existence of the cause of challenge, he cannot afterwards avail himself of it. *Co. Litt.* 157 *b*; 3 *Dyer*, 367 *a*, *pl.* 40; *Baynham's Case*, 5 *Co. Rep.* 36 *b*.

A challenge to the array ought to be in writing, so that it may be put upon the record, and the other party may demur or counterplead to it. *See R.* v. *Edmonds*, 1 *St. Tr., N. S.* 785; 4 *B. & Ald.* 471: *Mayor, etc., of Carmarthen* v. *Evans*, 10 *M. & W.* 274. The form of it is as follows:—

"*And now at this day come as well the said* J. N., *who for our said lord the King prosecutes in this behalf, as the said* J. S., *in his own proper person, and the jury thereupon empanelled likewise come; and thereupon the said* J. S. *challenges the array of the said panel, because he says that the said panel was arrayed and returned by* A. B., *esquire, now and at the time of the making of the array aforesaid sheriff of the said county of* ——, *which said sheriff is a kinsman of the said* J. N., *to wit* [setting out the mode of relationship]; *and this he is ready to verify, whereupon he prays judgment, and that the said panel may be quashed.*"

The ground of objection must be specifically stated in the challenge: for a challenge merely stating that the sheriff "has not chosen the panel indifferently and impartially, as he ought to have done, and that the panel is not an indifferent panel," is demurrable as being too general. *R.* v. *Hughes*, 1 *C. & K.* 235. The opposite party may either plead to the challenge, traversing the cause of challenge alleged, or demur to it for

insufficiency. In the latter case, the party challenging joins in the demurrer, and the matter is determined by the court. The demurrer and joinder may be in the following form:—

"*And the said* J. N. *says, that the said challenge of the said* J. S. *to the array of the panel aforesaid is not sufficient in law to quash the array of the panel aforesaid, and that there is no necessity for him the said* J. N., *nor is he obliged by the law of the land to answer to the said challenge in manner and form as it is above alleged; wherefore he prays judgment, and that the array of the said panel may be affirmed,*" etc.

"*And the said* J. S. *says, that he hath above alleged sufficient matter in law, in the said challenge by him above made to the array of the panel aforesaid, to quash the array of the said panel, which he the said* J. S. *is ready to verify; which said matter the said* J. N. *does not deny, nor in any manner answer thereto: wherefore the said* J. S., *as before, prays judgment, and that the array of the said panel may be quashed,*" etc.

In case the challenge is overruled, the judgment should be entered on the original record, or at *nisi prius* on the *postea*. *R.* v. *Edmonds*, 1 *St. Tr., N. S.* 785; 4 *B. & Ald.* 471. If the objection be overruled without demurrer, the ruling, it has been said, may be made the subject of a bill of exceptions; 8 *Rep. Cr. L.* 146; *Bac. Abr., tit. Juries* (*E.*) 21; *Skin.* 101; *but see post, chap. viii., sect.* 3, "*Bill of Exceptions.*" The challenge may be removed as part of the record, where it was a principal cause of challenge. 3 *Woodeson, s.* 347: *see O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1.

If the party pleads to the challenge, two *triers* are (in the case, at least, of a challenge *for favour*, and also, it would seem, in the case of a principal challenge, unless the fact be admitted or apparent) appointed by the court, who are sworn, and charged to try whether the array be an impartial or a favourable one. *See Smith O'Brien* v. *R.*, 7 *St. Tr., N. S.* 1; 2 *H. L. C.* 469. These triers are generally two of the jurymen returned. The court may, however, in its discretion, refer the trial to two coroners, or to two solicitors, or to any other two indifferent persons. 2 *Hale*, 275; 4 *Bl. Com.* 353; 2 *Rolle Rep.* 363. If the triers find against the challenge, the trial proceeds as if no such challenge had been made. The improper disallowance of a challenge is ground, not for a new trial, but for a *venire de novo*. *R.* v. *Edmonds*, 1 *St. Tr., N. S.* 785; 4 *B. & Ald.* 471; 23 *R. R.* 350. If the triers find in favour of the challenge, a new *venire* is awarded to the coroners, or, if they be interested, to elisors. *See* 1 *Co. Inst.* 158. In *R.* v. *Dolby*, 2 *B. & C.* 104, 2 *St. Tr., N. S.* 939, the defendant, being indicted for a seditious libel, challenged the array on the ground that the prosecution was instituted by an association called the Constitutional Association, and that one of the sheriffs who returned the jury was one of the association. The counsel for the prosecution thereupon took issue; the chief justice then appointed two triers to try the issue, who were accordingly sworn; the counsel for the defendant first addressed these triers, and called a witness, who proved that the sheriff named was one of the subcribers to the association. The counsel for the prosecution then addressed the triers, and called a witness to prove that the sheriff had ceased to be a subscriber to or member of the association before the return of the jury process, but failed in proving it for want of the letter by which the sheriff had withdrawn himself from it. The triers were then addressed by the counsel for the defendant in reply. The chief justice summed up. The triers found in favour of the challenge, and the cause was adjourned.

2. *To the Polls.*]—Even where a challenge to the array is determined against the party making it, he may afterwards still have his challenges *to the polls, i.e.*, he may object separately to each juryman as he is about to be sworn. The challenge must be made before the book is given into the hands of the juror and the officer has recited the oath; and it comes too late afterwards, although made before the juror has kissed the book. *R.* v. *Giorgetti*, 4 *F. & F.* 546; *and see ante*, p. 198. These challenges are generally made by parol, although, in strictness, if any question is raised upon the validity of such a challenge, it must be entered in due form on the record. The defendant, in treason or felony, may for cause shown object to all or any of the jurors called, after exhausting his peremptory challenges of thirty-five or twenty. Challenges to the polls for cause are, like those to the array, either *principal* or *to the favour*. The principal causes of challenge are:—1. *Propter honoris respectum*; where a peer or lord of parliament is sworn on a jury for the trial of a commoner. *Co. Litt.* 156 *b*; 2 *Hawk. c.* 43, *s.* 11; *Bac. Abr., Juries* (*E.*) 6; 3 *Bl. Com.* 361. 2. *Propter defectum, i.e.*, on account of some personal objection, as alienage (*R.* v. *Sutton*, 8 *B. & C.* 417; 6 *L. J. O. S.* (*M. C.*) 162), infancy, (*R.* v. *Tremearne*, 5 *B. & C.* 254), or a deficiency in the requisite qualification (as to which *see Statutes, ante*, p. 192). Where the disqualified juror is on the panel, and no challenge is made, the presence of the juror does not invalidate the trial. *R.* v. *Sutton, ubi supra.* A juror may challenge himself, by stating that he is not qualified, and he may be examined upon oath. *R.* v. *Cook*, 13 *St. Tr.*, 311, 316, 317. In Ireland the fact of a juror being over sixty years of age is not a ground for challenge, but only operates in the juror's favour as an exemption. *Mulcahy* v. *R.*, *L. R.*, 3 *H. L.* 306. This point was decided mainly on the words of 3 *& 4 W.* 4, *c.* 91 (*Irish Jury Act*), *ss.* 1 *and* 20. The analogous sections in 6 *G.* 4, *c.* 50 (*English Jury Act*), are *ss.* 1 *and* 27, but although analogous they are not identical, and it may be doubtful whether in England the fact of a juror being above sixty years old is not a disqualification. 3. *Propter affectum, i.e.*, on the ground of some presumed or actual partiality in the juror: as if he be of affinity to either party, or in his employment, or is interested in the event, etc.; in short, any such presumed partiality as would be a good ground for a principal challenge to the array in the case of the sheriff will be also a cause of principal challenge to an individual juryman. *See R.* v. *Martin*, 6 *St. Tr., N. S.* 925: *R.* v. *Swain*, 2 *M. & Rob.* 112; 2 *Lewin*, 116. So where an actual partiality is shown to exist, or if the juror has expressed a desire as to the result of the trial, or an opinion as to the guilt or innocence of the defendants, or personal ill will. In *R.* v. *O'Coigly*, 26 *St. Tr.* 1191, 1231 (a trial for treason), a juryman was set aside on the trial because, on looking on the prisoners, he had uttered the words "damned rascals." A person who has acted as a grand juror on the finding of a bill of indictment may also be challenged for cause if returned to serve on the petty jury, either on the trial of that indictment or of any other indictment for the same offence. 25 *Ed.* 3, *stat.* 5, *c.* 3; *Y. B.* 14 *&* 15 (ed. 3, *Pike*), p. xxvi.: *R.* v. *Cook*, 13 *St. Tr.* 311, 334: *R.* v. *Sullivan*, 8 *A. & E.* 831; 8 *L. J.* (*M. C.*) 3. But a person who has sat upon a former petty jury, which convicted other defendants on the same indictment, is not therefore subject to challenge. *See Co. Litt.* 157 *a*; *Bac. Abr. Juries* (*E.*) 5; 3 *Bl. Com.* 363. And in *R.* v. *Sawdon*, 2 *Lewin*, 117, it was held not to be a good ground of challenge that the juror who had sat on previous trials during the same assize had in no case returned a verdict for the crown. 4. *Propter delictum, i.e.*, on the ground of infamy, which meant at common law conviction or attainder of treason, felony, perjury, conspiracy, or any other

infamous offence, which is to be proved by the record of the conviction. And even a pardon would not remove this objection. 2 *Hale*, 278; *Bac. Abr., Juries* (*E.*) 2; *Brown* v. *Crashaw*, 2 *Bulstr.* 154. Under 33 & 34 *Vict.* c. 77, *s.* 10 (*ante*, p. 192), the disqualification attaches to jurors who are under outlawry, or attainted of treason or felony, or convicted of any infamous crime, unless a free pardon has been obtained.

Challenges to the polls *for favour* are where, although the juror is not so manifestly partial as to render him liable to a principal challenge, there are, nevertheless, reasonable grounds for suspicion that he will act under some prejudice or undue influence; as where he has been entertained in the house of the party, or has been arbitrator in the same matter; or where the juror and the party are fellow-servants, or any other cause exists, such as would constitute in the case of the sheriff a ground of challenge to favour to the whole panel. *Co. Litt.* 157 *b*; *Bac. Abr., Juries* (*E.*) 5.

In the case of a *principal challenge to the polls*, if the partiality be made apparent to the satisfaction of the court, the challenge is at once allowed, and the juror set aside. But in the case of a challenge *to the favour*, it is left to the discretion of two triers who are sworn and charged to try whether the juror challenged stands indifferent between the parties. The form of oath to a *trier*, to try whether a juror stands indifferent or not, is as follows:—

"*You shall well and truly try whether* A. B., *one of the jurors, stands indifferently to try the prisoner at the bar, and a true verdict give according to the evidence. So help you God.*"

No challenge of triers is admissible. The form of oath to be administered to a witness sworn to give evidence before the trial is as follows:—

"*The evidence which you shall give to the court and triers upon this inquest shall be the truth, the whole truth, and nothing but the truth.—So help you God.*"

If the challenge is to the first juror called, the court may select any two indifferent persons as triers; if they find against the challenge, the juror will be sworn, and be joined with the triers in determining the next challenge; but as soon as two jurors have been found indifferent, and have been sworn, every subsequent challenge will be referred to their decision. *R.* v. *Edmonds*, 1 *St. Tr., N. S.* 792, *n.*, 922; 2 *Hale*, 275; *Co. Litt.* 158 *a*; *Bac. Abr., Juries* (*E.*) 12. The burden of proof of a challenge for cause is on the person who makes it. *R.* v. *Savage*, 1 *Mood. C. C.* 51, and he is not entitled to question a juror before challenging him. *R.* v. *Dowling*, 7 *St. Tr., N. S.* 381; *R.* v. *Stewart*, 1 *Cox*, 174. When the challenge has been made, the trial proceeds by witnesses called to support or defeat the challenge; the juror objected to may also be examined on the *voir dire*, at to his qualification, or the leaning of his affection. *R.* v. *Dowling*, *ubi supra*. But he cannot be interrogated as to matters which tend to his own discredit, as whether he has been convicted of felony, etc., nor, as it seems, whether he has expressed a hostile opinion as to the guilt of the defendant. *R.* v. *Cook*, 13 *St. Tr.*, 311, 334: *R.* v. *Edmonds*, 1 *St. Tr., N. S.* 785: 4 *B. & Ald.* 471: *R.* v. *Martin*, 6 *St. Tr., N. S.* 925: *and see* 2 *Hawk. c.* 43, *s.* 28. In *R.* v. *Cuffey*, 7 *St. Tr., N. S.* 467, a trial at the Central Criminal Court, in 1848, for treason-felony, the latter question was asked of some of the jurors who had been challenged for favour, the attorney-general not objecting on the part of the crown.

The form of oath on the *voir dire* is as follows :—

" You shall true answer make to all such questions as the court shall demand of you.—So help you God."

If the panel be so far exhausted by challenges that a full jury is not left, a fresh panel will be returned; and thereupon the defendant may challenge peremptorily any of those who were sworn before, if they are now returned; but he cannot challenge them for cause, except for some matter which has arisen since the original hearing. 2 *Hale*, 274.

Whether or not a criminal court has the power to award a *tales*, in case of deficiency or default of jurors, without a warrant from the attorney-general, is not a settled point. *Hawkins* (*bk.* 2 *c.* 43, *s.* 18) says : " But it seems that such a *tales* cannot be prayed for by the King upon an indictment or criminal information, without a warrant from the attorney-general, or an express assignment from the court before which the inquest is taken ; " *see* 1 *Lev.* 223; but *Blackstone* says (4 *Cor.* 355), " If by reason of challenges, or default of jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded as in civil causes, till the number of twelve is sworn." In *R.* v. *Edmonds*, 1 *St. Tr., N. S.* 785, which was tried at Warwick, *tales* men were allowed (without any warrant from the attorney-general) to supply deficiences in the panel of a special jury struck in the crown office. His opinion is supported as to high treason by *R.* v. *Stapleton* [1680], *Sir T. Raym.* 367; 4 *Co. Inst.* 161 : *R.* v. *Dolby*, 2 *B. & C.* 104; 2 *St. Tr., N. S.* 939; 24 *R. R.* 645.

The judge, however, may, where the panel is exhausted and no *tales* has been prayed, order the sheriff to return a panel *instanter* without further precept : and the justice of the peace in sessions may issue a special precept commanding the sheriff to return a sufficient number of jurors immediately, and thereupon may proceed with the trial at the then sessions. 2 *Hale*, 28, 261, 265; *see* 6 *G.* 4, *c.* 50, *s.* 20 : *R.* v. *Cropper*, 2 *Mood. C. C.* 18.

The usual, and in general the proper course, where the panel is exhausted by challenges of the prisoner and the crown, or of either, before a full jury remains, is to call over the whole panel again in the same order as before, but omitting those peremptorily challenged by the prisoner; and then, as each juror again appears, whichever party challenges must show cause. If no sufficient cause of challenge be shown, the jurors are then sworn. *R.* v. *Geach*, 9 *C. & P.* 499. *See ante*, p. 199. And no cause of challenge to the jury, whether to the array or to the polls, can be taken, either in arrest of judgment, or otherwise, after the jury are sworn. *R.* v. *Sheppard*, 1 *Leach*, 101 : *R.* v. *Sutton*, 8 *B. & C.* 417. No challenge can be taken, nor need the jury be re-sworn, when the defendant is given in charge to them on an allegation of a previous conviction, under 7 *&* 8 *G.* 4, *c.* 28, *s.* 11, or 6 *&* 7 *W.* 4, *c.* 111, or on a charge of being a habitual drunkard under 61 *&* 62 *Vict. c.* 60, *s.* 1, *sub-s.* 2 : *R.* v. *Key*, 2 *Den.* 347; 21 *L. J.* (*M. C.*) 35. By the *Larceny Act*, 1861 (24 *&* 25 *Vict. c.* 96), *s.* 116, which now regulates most of such cases, *see ante*, p. 185, and the *Inebriates Act*, 1898 (61 *&* 62 *Vict. c.* 60), where the prisoner is given in charge to the jury on an allegation of a previous conviction, it is not necessary to swear the jury again (and therefore no challenge can be taken). The same rule appears to apply to the *Coinage Offences Act*, 1861 (24 *&* 25 *Vict. c.* 99), *s.* 37, which contains a like provision.

The court, even without challenge taken, may and ought to excuse a juryman on the panel when called, if he is obviously unfit to perform his duty, from physical or mental infirmity, or *semble*, from expressed

unindifferency. *Mansell* v. *R.*, 8 *St. Tr., N. S.* 831; 8 *E. & B.* 54; *Dears. & B.* 375; 27 *L. J.* (*M. C.*) 4.

Giving the prisoner in charge to the jury.]—When a full jury have been sworn [or have made solemn affirmation in cases where they are entitled to do so, under 51 *& 52 Vict. c.* 46, *s.* 2, or any other Act, *see post*, "*Evidence*," *chap. ii.*], in cases of treason and felony, the crier (at the assizes) makes proclamation in the following form:—"*If any one can inform my lords the King's justices, or the King's attorney-general, or the King's serjeant, or this inquest to be taken between our sovereign lord the King and the prisoners at the bar, of any treason, murder, felony, or misdemeanor, committed or done by them, or any of them, let him come forth, and he shall be heard; for the prisoners stand at the bar upon their deliverance.*" *Cro. Cir. Com.* 6 (10th ed.). The clerk of the court then calls the prisoner to the bar, and says:—"*Gentlemen of the jury, the prisoner stands indicted by the name of* A. B. *for that he, on the*" [stating the substance of the offences charged in the indictment]. "*Upon this indictment he has been arraigned, and upon his arraignment he has pleaded that he is not guilty: Your charge therefore, is to inquire whether he be guilty or not guilty, and to hearken to the evidence.*" *See R.* v. *Dowlin*, 5 *T. R.* 311, 313. As to the mode of giving the prisoner in charge to the jury where he is indicted for any offence punishable under the *Larceny Act*, 1861 (24 *& 25 Vict. c.* 96), committed after a previous conviction, *see s.* 116 of that Act (*ante*, p. 185). As to the mode of giving the prisoner in charge to the jury where he is indicted for an offence against the *Coinage Offences Act*, 1861 (24 *& 25 Vict. c.* 99), committed after a previous conviction, for an offence against any Act relating to the coin, *see s.* 37 of that Act: and as to the mode of giving the prisoner in charge to the jury where he is indicted for a crime as defined by 34 *& 35 Vict. c.* 112, after previous conviction for a crime, *see s.* 9 of that Act.

In cases of misdemeanor the defendant is not given in charge to the jury, but the counsel for the prosecution at once proceeds to open the case, and call witnesses in support of the indictment. *See R.* v. *Dowlin*, 5 *T. R.* 314.

Sect. 3.

Proceedings at Trial.

Case for the prosecution.]—In a criminal prosecution on indictment the prosecutor has no right to address the jury or state the case for the prosecution. *R.* v. *Brice*, 2 *B. & Ald.* 606; 1 *Chit. Rep.* (*K. B.*) 352: *R.* v. *Gurney*, 11 *Cox*, 414. He must be represented by counsel or by a solicitor in those courts of quarter sessions at which counsel do not attend. *Id.* It is usual, except in simple cases where the prisoner is undefended, for counsel to make an opening statement: *see Re Morgan*, 6 *Cox*, 116, *Talfourd*, J. When the prisoner is given in charge to the jury, the counsel for the prosecution, or, if there be more than one, the senior counsel, opens the case to the jury, stating the leading facts upon which the prosecution rely. In doing so he ought to state *all* that it is proposed to prove, as well declarations of the prisoners as facts, so that the jury may see if there be a discrepancy between the opening statements of counsel, and the evidence afterwards adduced in support of them; *per Parke*, B., *R.* v. *Edward*, 1 *M. & Rob.* 257: *R.* v. *Hartel*, 7 *C. & P.* 773: *R.* v. *Davis*, *Id.* 785; unless such declarations should amount to a *confession*, where it would be improper for counsel to open them to the jury.

R. v. *Swatkins*, 4 *C. & P.* 548, *Bosanquet*, J., *and Patteson*, J.: *R.* v. *Davis*, 7 *C. & P.* 785, *Parke*, B.: *R.* v. *Orrell*, *Id.* 774, *Bolland*, B.: *R.* v. *Creau*, 8 *Cox*, 509 (*Ir.*). The reason for this rule is, that the circumstances under which the confession was made may render it inadmissible in evidence. The *general effect* only of any confession said to have been made by a prisoner ought, therefore, to be mentioned in the opening address of the prosecuting counsel. When any additional evidence, not mentioned in the opening speech of counsel, is discovered in the course of a trial, counsel is not allowed to state it in a second address to the jury. *R.* v. *Courvoisier*, 9 *C. & P.* 362. In opening a case for murder, the counsel for the prosecution may put hypothetically the case of an attack upon the character of any particular witness for the crown, and say that should any such attack be made he shall be prepared to meet it. *Per Tindal*, C.J., *and Parke*, B., *R.* v. *Courvoisier*, 9 *C. & P.* 362. It was also ruled by the same learned judges that counsel may read to the jury the observations of a judge in a former case, as to the nature and effect of circumstantial evidence, provided that he adopts them as his own opinions, and makes them part of his address to the jury. And in *R.* v. *Dowling*, 7 *St. Tr., N. S.* 381, 390; 3 *Cox*, 509, the attorney-general having, in his opening address to the jury, made reference to disturbances in Ireland, *Erle*, J., held, on objection made, that such reference was not irregular, it being laid down in books of evidence that allusion might be made in courts of justice to notorious matters, even of contemporaneous history. *And see R.* v. *Duffy*, 7 *St. Tr., N. S.* 795, 917.

As to the order of proof, the mode of examining witnesses, and the evidence necessary to support the case for the prosecution, *see post*, *Part II.*, "*Evidence.*"

Since 1865 the counsel for the prosecution has been entitled, in certain cases, at the close of the examination of his witnesses, to sum up his evidence. This right was first given, and the circumstances under which it may be exercised are defined, by s. 2 of *Denman's Act* (28 *&* 29 *Vict. c.* 18), the first clause of which enacts that:—"If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel, whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants." The right to sum up is not taken away, nor is any right to reply given by the calling of the prisoner as sole witness on his own behalf under the *Criminal Evidence Act*, 1898 (61 *&* 62 *Vict. c.* 36, *s.* 3). The effect of that Act is to postpone the summing up until after the prisoner's evidence has been given, and counsel for the prosecution may comment on the prisoner's evidence: *R.* v. *Gardner* [1899] 1 *Q. B.* 150; 68 *L. J. Q. B.* 42 (*C. C. R.*).

In exercising this right of summing up evidence, it is not lawful for the counsel for the prosecution to comment on the failure of the prisoner, or the husband or wife of the prisoner, to give evidence; 61 *&* 62 *Vict. c.* 36, *s.* 1 (1) (b); nor is it proper to comment on the absence of other witnesses for the defence, unless it might be fairly expected that witnesses would be called; or to urge, on a trial for rape, as an argument for conviction, that otherwise the character of the prosecutrix would be blasted. *R.* v. *Rudland*, 4 *F. & F.* 495: *R.* v. *Puddick*, *Id.* 497. Nor is it the duty of counsel for the prosecution to sum up in every case in which the

prisoner's counsel does not call witnesses, or only calls the defendant. His right ought only to be exercised in exceptional cases, such as where erroneous statements have been made and ought to be corrected, or when the evidence differs from the instructions. The counsel for the prosecution should state his case before he calls the witnesses; and after the evidence has been given, either say simply, "I say nothing," or "I have already told you what would be the substance of the evidence, and you see the statement which I made is correct;" or, in exceptional cases, to say, "something is proved different to what I expected," and add any suitable explanation which is required. *R.* v. *Holchester*, 10 *Cox*, 226, *Blackburn*, J.: *R.* v. *Berens*, 4 *F. & F.* 842, 843, and *n.* *See also R.* v. *Webb*, *Id.* 862.

The defence.]—As to defence by counsel and *in formâ pauperis*, *see ante*, p. 187 *et seq.* Where a prisoner is undefended, he cross-examines the witnesses for the prosecution if he thinks fit, or the judge does so on his behalf. On a trial for misdemeanor in the court of King's Bench in 1824, where the defendant reserved to himself the right to address the jury, and to examine and cross-examine witnesses, he was allowed to do so, and his counsel was allowed to argue any points of law that arose in the course of the trial, and to suggest questions to him for the cross-examination of the witnesses; *R.* v. *Parkins*, *Ry. & M.* 166; 1 *C. & P.* 548; but the defendant cannot have counsel to examine and cross-examine the witnesses, and reserve to himself the right of addressing the jury. *R.* v. *White*, 8 *Camp.* 98; 13 *R. R.* 765; *and see R.* v. *Redhead*, *Yorke*, 25 *St. Tr.* 1003, 1021. Although a prisoner cannot have counsel to speak for him and also make a speech for himself, he may make such statement of facts as he relies on for his defence, but he must be strictly confined to such statement. *R.* v. *Everett*, *C. C. C. Sess. Pap.*, *vol.* 97, p. 335, *Hawkins*, J.

Since 1702 witnesses for the defence in treason and felony have been examined on oath under 1 *Anne*, *st.* 2, *c.* 9, *s.* 3. Witnesses for the defence in misdemeanor were always sworn. Under the *Criminal Evidence Act*, 1898, a prisoner is now a competent witness in his own defence in all criminal cases. *See post*, *Part II.*, *Evidence*, *chap. ii. sect.* 2.

[As to the cross-examination of witnesses, *see post*, *Part II. chap. ii. sect.* 5, *sub-s.* 8.

Where two prisoners are jointly indicted, and are defended by different counsel, there has been some difference of opinion as to the order in which counsel should cross-examine and address the jury. In *R.* v. *Esdaile*, 1 *F. & F.* 213, 237, Lord *Campbell* directed counsel to cross-examine and address the jury in the order of seniority at the bar. But the general, and it is submitted the established rule, is that in the absence of agreement between counsel the court will call on them to cross-examine and address the jury, not in the order of seniority, but in that in which the names stand on the indictment: *R.* v. *Barber*, 1 *C. & K.* 434; *R.* v. *Meadows* [1856] 2 *Jur. N. S.* 716, and *n.*, *Erle*, J.; *and see Fletcher* (*P. O.*) v. *Crosbie*, 2 *M. & Rob.* 417, *Rolfe*, B.: *R.* v. *Richards*, 1 *Cox*, 62.

Statement to jury by prisoner when defended by counsel.]—The *Criminal Evidence Act*, 1898 (61 *&* 62 *Vict. c.* 36), which enables every person charged with an offence to be a witness for the defence at every stage of the proceedings, provides (*s.* 1 (h) that "Nothing in this Act shall affect . . . any right of the person charged to make a statement without being sworn." This provision entitles the prisoner if he chooses to make an unsworn statement instead of giving evidence on his own behalf. *R.* v.

Pope, 18 *T. L. R.* 717. It was at one time held that the effect of *s.* 1 of the *Prisoners' Counsel Act*, 1836 (6 & 7 *W.* 4, c. 114), which first enabled counsel appearing on behalf of persons charged with felony to address the jury on their behalf, was to take away from the prisoner, except under some very special circumstances, any right to make any statement on his own account. *R.* v. *Rider*, 8 *C. & P.* 539: *R.* v. *Malings*, *id.* 242: *R.* v. *Manzano*, 2 *F. & F.* 64: *R.* v. *Stephens*, 11 *Cox*, 669. But for many years prior to the coming into operation of the *Criminal Evidence Act*, 1898, it became the practice of the judges to allow a prisoner defended by counsel to address the jury as well as his counsel. There was, however, considerable divergence of opinion as to whether the prisoner should address the jury before or after his counsel. Where the prisoners, who were indicted for robbery with violence, were defended by counsel, but called no witnesses, *Hawkins*, J., after consultation with *Lush*, J., allowed the prisoners to give their own account of the matter to the jury, *after* their counsel had addressed the jury. *R.* v. *Hull and Smith*, Yorkshire Winter Assizes at Leeds, 3rd Feb., 1880. Where a prisoner, who was indicted for murder, was defended by counsel, but called no witnesses, *Bowen*, J., allowed the prisoner to read a statement of his account of the matter to the jury, *before* his counsel addressed them. *R.* v. *Blades* (Yorkshire Summer Assizes at Leeds, Aug. 2nd, 1880). Under similar circumstances, *Stephen*, J., allowed a prisoner to make a statement to the jury *before* his counsel addressed them, at the same time warning the prisoner that his making such statement would give the counsel for the prosecution a right to reply. *R.* v. *Doherty*, 16 *Cox*, 306. This ruling was followed by *Phillimore*, J., in *R.* v. *Pope*, *ubi supra*, so far as relates to the making of the statement by his prisoner before his counsel's address. In *R.* v. *Millhouse*, 15 *Cox*, 622, *Lord Coleridge*, C.J., stated that by the resolution of the majority of the judges, in which he did not agree, but by which he was bound, it was undoubtedly competent for a prisoner defended by counsel to make a statement of facts to the jury, and that the proper time for his doing so was *after* his counsel had addressed the jury. His Lordship, however, held that the resolution did not extend to cases where it was proposed to call witnesses for the prisoner. Notwithstanding this resolution of the judges, the practice in recent years since the passing thereof has not been uniform. *See* the cases collected in *Warburton's Leading Cases in the Criminal Law* (3rd ed.), p. 393, and 3 *Russ. Cr.* (6th ed.) 465 *n.* In *R.* v. *Shimmin*, 15 *Cox*, 122 (*post*, p. 211), *Cave*, J., stated that the rule which the judges intended to follow was that a prisoner defended by counsel should make his statement at the conclusion of his counsel's speech, with this proviso, that what he states from the dock is subject to the right of reply on the part of the prosecution as being in the nature of new matter laid before the jury. *And see R.* v. *Everett* (*ante*, p. 209); *R.* v. *Doherty*, *ubi supra*. In *R.* v. *Sherriff*, 20 *Cox*, 334, *Darling*, J., held that a prisoner's unsworn statement must be made before the counsel for the prosecution sums up the case and before his own counsel addresses the court.

Address of prisoner's counsel.]—"In the opinion of the judges it is contrary to the administration and practice of the criminal law as hitherto allowed, that counsel for prisoners should state to the jury as alleged existing facts matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence." *Resolution of the Judges*, 26*th Nov.*, 1881: *R.* v. *Shimmin*, 15 *Cox*, 122. This resolution settled the practice as to a matter upon which there had previously been a conflict of authority. *See R.* v.

Butcher, 2 *M. & Rob.* 228; *R.* v. *Beard*, 8 *C. & P.* 142; *R.* v. *Weston*, 14 *Cox*, 346.

Where two prisoners are indicted together, and one of them only is defended by counsel, it seems to be in the discretion of the judge whether he will allow the prisoner who is undefended to make his statement to the jury before or after the address of counsel. Where A., B., and C. were jointly indicted, and separately defended, and at the close of the case for the prosecution C. was acquitted, and was then called as a witness for A., and his evidence tended to criminate B., it was held that B.'s counsel had a right to cross-examine C., and to reply. *R.* v. *Burdett*, *Dears.* 431; 24 *L. J.* (*M. C.*) 63; 6 *Cox*, 458; *R.* v. *Woods*, 6 *Cox*, 224: *R.* v. *Copley*, 4 *F. & F.* 1097. The same rule applies where one defendant is called as a witness and inculpates a co-defendant. *R.* v. *Hadwen and Ingham* [1902] 1 *K. B.* 882: 18 *Cox*, 206 (*C. C. R.*).

The counsel for the prisoner, or the prisoner himself, is entitled, at the close of the examination of his witnesses, to sum up his evidence. This right was first given by *Denman's Act* (28 & 29 *Vict. c.* 18), *s.* 2, in the following terms:—"Upon every trial for felony or misdemeanor, whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present." In summing up the evidence for the defence, the prisoner's counsel is not to be restricted merely to remarks on the evidence of his witnesses, but if anything occurs to him which it is desirable to say on the whole case, he is at liberty to say it. *R.* v. *Wainwright*, 13 *Cox*, 171, *Cockburn*, C.J.

The reply.]—If any witness other than the defendant is called for the defence or any document is put in evidence for the defence, the counsel for the prosecution has the right to reply. 28 & 29 *Vict. c.* 18, *s.* 2, *supra*; 61 & 62 *Vict. c.* 36 (*Criminal Evidence Act*, 1898), *s.* 3: *see R.* v. *Gardner* [1899] 1 *Q. B.* 150 (*C. C. R.*). Even if the evidence for the defendant be only as to his character, it gives, in strictness, a right of reply, although the right is never now exercised in such case. *R.* v. *Stannard*, 7 *C. & P.* 676; 6 *L. J.* (*M. C.*) 37; *R.* v. *Corfell*, 1 *Cox*, 123, *Alderson*, *B.* *But see R.* v. *Dowse*, 4 *F. & F.* 492. And even if the defendant's counsel, in addressing the jury, introduces new matter (whether it be the prisoner's own account of the transaction or not), without intending to support it by evidence, it has been said that the prosecutor will be entitled to a reply. *R.* v. *Butcher*, 2 *M. & Rob.* 228. The better opinion, however, is that no such right can be claimed, though the judge in his discretion might, in a flagrant case, permit its exercise. 1 *Tayl. Evid.*, p. 274 (9th ed.), and authorities there cited. The decision to the contrary in *R.* v. *Shimmin*, 15 *Cox*, 122 (*ante*, p. 210), will probably not now be followed since the passing of the *Criminal Evidence Act*, 1898, as the course adopted in *R.* v. *Sherriff*, 20 *Cox*, 334 (*ante*, p. 210), gives the prosecutor adequate opportunity of dealing with any new matter introduced by a prisoner in an unsworn statement. If two prisoners are indicted jointly for the same offence, and one call witnesses, it seems that the counsel for the prosecution is entitled to a general reply; but if the offences are separate, and they might have been separately indicted, he can reply only on the case

of the party who had called witnesses. *R.* v. *Hayes*, 2 *M. & Rob.* 155: *R.* v. *Jordan*, 9 *C. & P.* 118. Where four prisoners were jointly indicted for an assault with intent to do grievous bodily harm, and one of them was not defended by counsel and the other three were defended by counsel, and the prisoner who was not defended by counsel called witnesses to prove an alibi, but no witnesses were called on behalf of the other three prisoners, it was held that counsel for the prosecution had no general right of reply, but that the proper course was that he should sum up his evidence generally and reply upon the evidence called by the prisoner who was not defended by counsel, before the counsel for the other prisoners addressed the jury. *R.* v. *Kain*, 15 *Cox*, 388, *Stephen*, J. So where several prisoners were jointly indicted, and defended by several counsel, and witnesses were called for some of the prisoners but not for the others, it was held that the counsel for the prosecution should first reply to the counsel of those prisoners who called witnesses, but that the counsel for the prisoners who called no witnesses had the right to address the jury last. *R.* v. *Burns*, 16 *Cox*, 195, *Day and Wills*, JJ.; *and see Warburton, Leading Cases on Cr. Law* (3rd ed.). Where on an indictment against several defendants, one of them calls evidence which is applicable to the cases of all, the prosecution has a general right of reply, although the other defendants call no witnesses; *R.* v. *Hayes*, 2 *M. & Rob.* 155; *R.* v. *Davis*, 17 *T. L. R.* 164, *Lawrance*, J.; but where such evidence is applicable only to the case of the defendant calling it, and does not apply to the cases of the other defendants, the right of the prosecution to reply is confined to the case of the defendant calling the evidence. *R.* v. *Trevelli*, 15 *Cox*, 289, *Hawkins*, J. Where the prosecution has the right of reply, no comment may be made by the prosecution on failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence. 61 & 62 *Vict. c.* 36, 1 (*b*); and *see ante*, p. 209.

Rebutting evidence.]—Whenever the defendant gives evidence to prove, by way of defence, new matter, which the crown could not foresee, the counsel for the prosecution is entitled to give evidence in reply to contradict it. *See R.* v. *Frost*, 4 *St. Tr., N. S.* 85, 386; 9 *C. & P.* 159. If he does so, counsel for the defence has the right to comment on the evidence so called. *Id.* 4 *St. Tr., N. S.* p. 387.

Right of reply by officers of the crown.]—"In those crown cases in which the attorney or solicitor-general is personally engaged, a reply, where no witnesses are called for the defence, is to be allowed as of right to the counsel for the crown, and in no others." *Resolution of the Judges of Dec.* 1884: 5 *St. Tr., N. S.* 8, *n.* (*c*). (*a*) This disposes of doubts formerly existing as to the right of reply in such cases by counsel other than the law officers appearing for a government office. *See* 2 *St. Tr., N. S.* 1019.

View of locus in quo by the jury.]—It is competent for the judge to permit the jury to view the *locus in quo* at any time during the trial, even

(*a*) Prior to this resolution the solicitor-general appearing for the attorney-general in post office prosecutions had been allowed his right of reply. *R.* v. *Toakley*, 10 *Cox*, 406: *R.* v. *Borrow*, *id.* 407. In *R.* v. *Gardner*, 1 *C. & K.* 628, the right had been admitted where counsel prosecuting on behalf of a government office stated that he appeared as the representative of the attorney-general. But in *R.* v. *Christie*, 7 *Cox*, 506: 1 *F. & F.* 75, *Martin*, B., refused the right to the attorney-general of the Duchy of Lancaster, and stated that he should confine the right to the attorney-general in person. All these decisions seem to be superseded by the rule above enunciated, which is not affected by the *Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36): *see s.* 3.

without the consent of the prosecutor (*R.* v. *Whalley*, 2 *C. & K.* 376; 2 *Cox*, 231), and even after his summing up, but he should take precautions not to allow improper communications being made to them at the view. *R.* v. *Martin*, *L. R.* 1 *C. C. R.* 378; 41 *L. J.* (*M. C.*) 113. A view may be permitted on an indictment for perjury. *Anon.* 2 *Chit. Rep.* (*K. B.*) 422. Where it is alleged that the jury upon the view have received evidence in the absence of the judge and of the prisoner, it is for the court before which the trial takes place to investigate the facts, and ascertain whether the alleged irregularity has occurred. *R.* v. *Martin*, *ubi supra*. *Quære*, whether if such irregularity be so found to have occurred, the court for Crown Cases Reserved has jurisdiction to order a *venire de novo*, as for a mis-trial. *Id.*; and *see post*, *chap. viii. sect.* 1. 276.

Adjournment of trial.]—If the trial is not concluded on the same day on which it began, the judge has authority to adjourn it from day to day without the defendant's consent. *R.* v. *Castro*, *L. R.*, 9 *Q. B.* 350, 356; 43 *L. J.* (*Q. B.*) 105, 108; *R.* v. *Stone*, 25 *St. Tr.* 1155; 6 *T. R.* 530; 3 *R. R.* 253; *R.* v. *Hardy*, 24 *St. Tr.* 199, 418. The adjournments should be stated in the record if it is made up. *O'Brien* v. *R.*, 26 *L. R. Ir.* 451. But for purposes of a record at assizes they are treated as one day. *Whitaker* v. *Wisbey*, 6 *Cox*, 109, 114, *Maule*, J.

On the adjournment of a trial for treason, treason felony, or murder, the jury must be kept together during the night, under the charge of officers of the court, and may have a fire and reasonable refreshment at their own expense (33 & 34 *Vict. c.* 77, *s.* 23).

In the case of other felonies the judge may by statute (60 & 61 *Vict. c.* 18, *s.* 1), and in the case of misdemeanors the judge may at common law, allow the jury to separate during any adjournment of the court, and to return to their homes for the night, being charged not to converse with any person on the subject of the trial. If they separate without leave, the jury must be discharged and a new trial had. *R.* v. *Ward*, 10 *Cox*, 573; 16 *W. R.* 281; *R.* v. *Kinnear*, 2 *B. & Ald.* 462. Where the witnesses for the prosecution have all been examined, the court may order the case to be adjourned, and direct another trial to be proceeded with, in order to give time for the production of a thing essential to the proof, but deposited at a distance. *R.* v. *Wenborn*, 6 *Jur.* 267. And on a trial for murder, where, after the opening address of counsel, it was discovered that, in consequence of the detention of a railway train, the witnesses for the prosecution had not arrived in the city, the trial was adjourned, the jury were locked up, a fresh jury was called into the jury box, and another case was proceeded with. *R.* v. *Foster*, 3 *C. & K.* 201, *Maule*, J.; but *see R.* v. *Parr*, 2 *F. & F.* 861, *Wightman*, J. It has been held that adjournments except to the next day are not permitted after the jury is sworn or evidence called. *R.* v. *Tempest*, 1 *F. & F.* 381, *Watson*, B.: *R.* v. *Robson*, 4 *F. & F.* 360, *Willes*, J. But in *R.* v. *Fernandez*, 2 *F. & F.* 862, *n.*, *Cockburn*, C.J., said that the trial could be temporarily suspended for part of a day, the jury remaining in the box; and the *Juries Detention Act*, 1897 (60 & 61 *Vict. c.* 18), gets rid of the difficulty by allowing a jury, with the consent of the judge, to separate except in the cases of treason, treason felony, and murder. Where a juror was sworn in a wrong name, and the objection was taken before verdict, *Maule* intimated that the proper course was to *discharge* the jury, and try the prisoners again; although, there being in that case a second indictment against the prisoners, such a course was there not necessary. *R.* v. *Metcalf*, 3 *Cox*, 220. The same course is adopted when it is discovered during the trial that a juror not on the panel is sworn. *R.* v. *Phillips*, 11 *Cox*, 142. But it has been held that a trial

must proceed, although in the course of the proceedings it is discovered that one of the jurors is related to the prisoner on trial, as that fact was a ground of challenge. *R.* v. *Wardle, C. & Mar.* 647. But under 7 *G.* 4, *c.* 64, *s.* 21, a judgment after verdict cannot be stayed or reversed because a person has served on the jury who has not been returned as a juror, nor for a misnomer or misdescription of any juror. *R.* v. *Tremearne*, 5 *B. & C.* 254; 20 *R. R.* 234, appears to be overruled by this enactment. Where a prisoner indicted for felony, with whom the jury were charged, was by sudden illness rendered incapable of remaining at the bar, the jury were discharged, and the prisoner on recovering was tried before another jury. *R.* v. *Stevenson*, 2 *Leach*, 546: and *see post*, p. 224. The usual course is to swear a fresh juror in place of the one incapacitated, but to offer the prisoner in a case of felony his full right of challenge to the whole panel. *R.* v. *Edwards*, *R. & R.* 224: 3 *Camp.* 207. The trial must begin *de novo*, and the witnesses be resworn and examined afresh, and it is not sufficient to reswear the witnesses and read over to them the judge's note of their evidence. *R.* v. *Bertrand*, *L. R.*, 1 *P. C.* 520, 534, *L. J. P. C.*, which disapproves the contrary practice followed in *R.* v. *Beere*, 2 *M. & Rob.* 242, and *R.* v. *Foster*, 7 *C. & P.* 495. In *R.* v. *Monson*, 67 *J. P. Rep.* 267; 47 *Sol. J.* 529, 574; 38 *L. J. Newsp.* 261; these cases were followed, *R.* v. *Bertrand* not being cited. In a case of misdemeanor, where the prisoner became ill and was carried out of court, the judge discharged the jury, being of opinion that the consent of his counsel, that the case should proceed in the absence of the defendant, was not, under such circumstances, sufficient. *R.* v. *Streek*, 2 *C. & P.* 413; *contrà*, *R.* v. *Castro*, *ante*, p. 213. That case was, however, tried in the Court of Queen's Bench. If a prisoner so taken ill recovers during the assizes, he may be put on his trial again, the trial being, of course, begun *de novo*. *R.* v. *Streek*, *ubi supra*.

[As to the discharge of the jury, when they cannot agree as to their verdict, *see post*, p. 223.]

Agreement to withdraw from or to stifle prosecution.]—*See post, Bk. II. Part II. c. iii. sect.* 14, *tit.* "*Compounding Offences.*"

Summing up.]—The court, in summing up the case after the conclusion of the evidence and arguments, is bound to direct the jury as to the law applicable, and may go through and comment on the evidence given, and may even comment on the absence of evidence which might have been given, including the failure of the defendant to exercise his right to give evidence under 61 & 62 *Vict. c.* 36, if in the discretion of the court such comment appears to be fair and just. *See R.* v. *Rhodes* [1899] 1 *Q. B.* 77; 68 *L. J.* (*Q. B.*) 83 (*C. C. R.*): *Kops* v. *R.* [1894] *App. Cas.* 650. The existence of this power to direct the jury is recognized in *Fox's Libel Act*, 32 *G.* 3, *c.* 60, *s.* 2. As to the mode of correcting errors in law made by the court, *see post, chap. viii., Criminal Appeal.*

Sect. 4.

VERDICT.

Verdict.]—After the conclusion of the trial the jury are not allowed to separate until they have considered and returned their verdict, or have been discharged for failure to agree. *See post*, p. 222. On a trial for treason or felony the jurors must deliver their verdict in open court, in

the presence of the defendant. *R.* v. *Haynes* [1900] 64 *J. P.* 441. *Ridley*, J., allowed a verdict of not guilty to be found on a coroner's inquisition for manslaughter on proof that the accused was certified insane and detained in an asylum; but the case was exceptional, and affords no precedent. In cases of misdemeanor, the presence of the defendant during the trial is not essential. *Co. Litt.* 227 *b*; 3 *Co. Inst.* 110; *Bac. Abr.*, *Verdict* (*B.*). It is very doubtful whether a verdict can be received and recorded on Sunday. *Winsor* v. *R.*, *L. R.*, 1 *Q. B.* 289, 317, 322; 35 *L. J.* (*M. C.*) 121. The verdict is delivered by the foreman; and the assent of all the jurors to a verdict pronounced by the foreman in the presence and hearing of the rest, without their express dissent, is to be conclusively presumed. *R.* v. *Wooller*, 2 *Stark.* (*N. P.*) 111; 18 *R. R.* 402. The verdict in a criminal case is either (1) *general*, on the whole charge (which the jury are at liberty to find in all cases, both upon the law and facts of the case; *Co. Litt.* 228; 4 *Bl. Com.* 361): or (2) *partial*, as to a part of the charge; as where the jury convict the defendant on one or more counts of the indictment, and acquit him of the residue; or convict him on one part of a divisible count, and acquit him as to the residue: or (3) *special*, where the facts of the case alone are found by the jury, the legal inference to be derived from them being referred to the court. As to special verdicts, *see post*, p. 219, and as to libel, *see* 32 *G.* 3, *c.* 60, *ss.* 1, 3. Where several defendants are included in the same indictment, the jury may find one guilty and acquit the others, and *vice versâ*; and under 24 & 25 *Vict. c.* 96, *s.* 94, the jury may do so, even where the prisoners are *jointly* charged with a felonious receiving. *See ante*, p. 87. But if several be indicted for a riot, and the jury acquit all but two, they must acquit those two also, unless it be charged in the indictment, and proved, that they committed the riot together with some other person not tried upon that indictment. 2 *Hawk. c.* 47, *s.* 8. And if, upon an indictment for a conspiracy, the jury acquit all the defendants but one, they must acquit that one also, unless it be charged in the indictment, and proved, that he conspired with some other person not tried upon that indictment. 2 *Hawk. c.* 47, *s.* 8; 3 *Chit. Cr. L.* 1141: *R.* v. *Thompson*, 16 *Q. B.* 832; 20 *L. J.* (*M. C.*) 183: *R.* v. *Manning*, 12 *Q. B. D.* 241; 53 *L. J.* (*M. C.*) 85: *R.* v. *Plummer* [1902] 2 *K. B.* 339; 20 *Cox*, 269 (*C. C. R.*). And where a count in an indictment charged eight defendants with one conspiracy to effect certain objects, a finding that three of the defendants were guilty generally, and that five of them were guilty of conspiracy to effect some, and not guilty as to the residue of these objects, was held bad and repugnant. *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1; 11 *Cl. & F.* 155; 8 *Eng. Rep.* 1061. The principle underlying that decision is that where there are two or more persons charged with conspiracy in the same count, the count is a single and complete count, and cannot be separated into parts. *R.* v. *Manning* (*ubi supra*), *per Coleridge*, L.C.J.: *R.* v. *Plummer* (*ubi supra*).

Verdict of lesser offence than charged in the indictment. 1. *Common law.*]—At common law a defendant cannot be convicted of an offence of an entirely different character from that charged in the indictment. For instance, he may not be convicted of misdemeanor on an indictment for felony, or of felony on an indictment for misdemeanor. For felony and misdemeanor are different things, and on an indictment for one there can be no conviction of the other, except under the express provisions of some statute. *R.* v. *Thomas*, *L. R.*, 2 *C. C. R.* 141; 44 *L. J.* (*M. C.*) 42. Therefore where the prisoner was indicted under 24 & 25 *Vict. c.* 99, *s.* 12, for the *felony* of uttering counterfeit coin after a previous conviction for uttering, and the jury found him guilty of the subsequent

uttering, but negatived the previous conviction, it was held that he could not be convicted of the *misdemeanor* of uttering. *Id.* So a prisoner indicted under 24 & 25 *Vict. c.* 96, *s.* 42, of the felony of an assault with intent to rob, cannot be convicted of a common assault. *R.* v. *Woodhall*, 12 *Cox*, 240. So where the prisoner was indicted under 38 & 39 *Vict. c.* 94, *s.* 3 (*rep.*), for the felony of unlawfully and carnally knowing and abusing a girl under the age of twelve years, it was held that he could not be convicted of a common assault. *R.* v. *Catherall*, 13 *Cox*, 109, *Amphlett*, B.

This rule is subject to the statutory exceptions stated below at p. 218. But at common law a defendant may be convicted of a less aggravated felony or misdemeanor on an indictment charging a felony or misdemeanor of greater aggravation, provided that the indictment contains words apt to include both offences. In other words, it is not necessary to prove the offence charged in the indictment to the whole extent laid, provided that the facts proved constitute an offence punishable by law, for which the defendant may by law be convicted on the indictment. *R.* v. *Hollingberry*, 4 *B.* & *C.* 329: *R.* v. *Hunt*, 2 *Camp.* 583; 31 *St. Tr.* 367, 408; *and see ante*, p. 71, *Surplusage*. Thus, where a statute annexes a higher degree of punishment to a common law felony, if committed under certain circumstances, if, upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant may be convicted of the common law felony. So, if a misdemeanor at common law be subject to severer punishment by statute, if committed under certain circumstances, the defendant may be convicted of the misdemeanor at common law, if the prosecutor succeed in proving the commission of the offence, but fail in proving that it was committed under the circumstances specified in the statute. 2 *Hale*, 191, 192.

Upon an indictment for murder, if the prosecutor fail in proving the *malice prepense*, the defendant may be convicted of manslaughter; *R.* v. *Mackalley*, 9 *Co. Rep.* 67 *b.* On a charge of burglary and stealing goods, if no burglary be proved; or of robbery, if the property be not taken from the person by violence or putting in fear, the prisoner may be convicted of the simple larceny. 2 *Hale*, 302. Indeed, upon an indictment for burglary and stealing, the prisoner may be convicted either of burglary, of entering a dwelling-house in the night with intent to commit felony therein, of housebreaking, of stealing in a dwelling-house to the amount of 5*l.* (if the property stolen be laid to be of that value in the indictment), or of simple larceny, according to the facts proved. *R.* v. *Compton*, 3 *C.* & *P.* 418: *R.* v. *Bullock*, 1 *Mood. C. C.* 324, *n.*: *R.* v. *Brookes*, *C.* & *Mar.* 543. So, upon an indictment for housebreaking and stealing, the prisoner may be convicted, as the proof may be, either of housebreaking, of stealing in a dwelling-house to the amount of 5*l.* (if the property be laid as of that amount), or of simple larceny. 2 *Russ. Cr.* (6th ed.) 59. And upon an indictment for robbery the prisoner may be convicted either of the robbery, of stealing from the person, of simple larceny, or (under 24 & 25 *Vict. c.* 96, *s.* 41) of an assault with intent to rob, according to the facts proved. Upon an indictment for assaulting and unlawfully wounding and ill-treating the prosecutor, and thereby occasioning him actual bodily harm (24 & 25 *Vict. c.* 100, *s.* 47), the defendant may be convicted of a common assault. *R.* v. *Oliver*, *Bell*, 287; 30 *L. J.* (*M. C.*) 12: *R.* v. *Yeadon*, *L.* & *C.* 81; 31 *L. J.* (*M. C.*) 70. In the latter case a *venire de novo* was awarded by the Court of Crown Cases Reserved. So, also, the defendant might have been convicted of a common assault upon

an indictment containing one count only, charging that the defendant in and upon a girl between the ages of ten and twelve, "unlawfully did make an assault, and her did then unlawfully and carnally know and abuse against the form," etc., being the ordinary form of an indictment for a misdemeanor under 24 & 25 *Vict. c.* 100, *s.* 51 (*rep.*): *R.* v. *Guthrie*, *L. R.*, 1 *C. C. R.* 241; 39 *L. J.* (*M. C.*) 95. The defendant may also be convicted of a common assault upon an indictment charging him in the first count with unlawfully and maliciously wounding, and in the second count with unlawfully and maliciously inflicting grievous bodily harm, although the word "assault" is not used in the indictment. *R.* v. *Taylor*, *L. R.*, 1 *C. C. R.* 194; 38 *L. J.* (*M. C.*) 106. On a count for indecent assault, and *semble* even on a count under 48 & 49 *Vict. c.* 69, *s.* 5 (1), the defendant may be convicted of common assault. *R.* v. *Bostock*, 17 *Cox*, 700, *Charles*, J. Where an indictment contained a count for an assault upon a gamekeeper, framed on 9 *G.* 4, *c.* 69, *s.* 2, and a count for a common assault, and the prosecution at the trial elected to abandon the latter count, it was held, that the defendant could not, after such abandonment, be convicted of a common assault upon the first count. *R.* v. *Day*, 11 *Cox*, 505 (*C. C. R.*). Any person charged with a *corrupt* practice at an election for parliament, or a municipal office, or a county, district, or parish council, may, if the circumstances warrant such finding, be found guilty of an *illegal* practice (which offence is ordinarily punishable on summary conviction, but for that purpose shall be an indictable offence). 46 & 47 *Vict. c.* 51, *s.* 52; 47 & 48 *Vict. c.* 70, *s.* 30; 51 & 52 *Vict. c.* 41, *s.* 75; 56 & 57 *Vict. c.* 73, *s.* 48. On an indictment for publishing a defamatory libel, "knowing the same to be false," the misdemeanor the punishment of which is provided for by 6 & 7 *Vict. c.* 96, *s.* 4, the defendant may be convicted of merely publishing a defamatory libel, the misdemeanor the punishment of which is provided for by *s.* 5. *Boaler* v. *R.*, 21 *Q. B. D.* 284; 57 *L. J.* (*M. C.*) 85. Where the defendant was indicted for stealing a colt, it was held that he could not be convicted under 1 *Edw.* 6, *c.* 12, *s.* 10, which did not mention colts, but might be convicted of the simple larceny. *R.* v. *Beaney*, *R. & R.* 416. Upon an indictment for perjury, it is sufficient if any one of the assignments of perjury be proved. *See R.* v. *Rhodes*, 2 *Ld. Raym.* 886. And if upon the trial of an indictment for perjury it appears that the false oath, although taken before a competent authority, was not taken in a judicial proceeding, the defendant may be convicted of the common law misdemeanor of taking a false oath. *R.* v. *Hodgkiss*, *L. R.*, 1 *C. C. R.* 212; 39 *L. J.* (*M. C.*) 14. *See* 52 & 53 *Vict. c.* 10, *s.* 7. Upon an indictment for high treason, proof of any one overt act is sufficient, provided the overt act so proved be a sufficient overt act of the treason laid in the indictment. 1 *Hale*, 122; *Fost.* 194; 2 *Hawk. c.* 46, *s.* 188. Upon an indictment for conspiring to prevent the workmen of J. G. from continuing to work, it was held sufficient to prove a conspiracy to prevent any of the workmen from working. *R.* v. *Bykerdike*, 1 *M. & Rob.* 179.

Upon an indictment against two charging two persons jointly with an offence, as stealing in the dwelling-house, either may be found guilty; but they cannot be found guilty of separate parts of the charge, or upon proof of two distinct felonies. In the former case, a pardon must be obtained, or a *nolle prosequi* entered, as to the one who stands second upon the indictment, before judgment can be given against the other; *R.* v. *Hempstead*, *R. & R.* 344; in the latter case, judgment may be given against the party who is proved to have committed the first felony in order of time, but the other must be acquitted. *R.* v. *Dovey*, 2 *Den.* 86; 20 *L. J.* (*M. C.*) 105. But where several are indicted for burglary and

larceny, one may be found guilty of the burglary and larceny, and the others of the larceny only. *R.* v. *Butterworth*, *R. & R.* 520; *and see ante*, p. 87.

2. *Under statute.* (*a*) *Conviction of a felony not charged.*]—On an indictment for embezzlement or fraudulent application or disposition of property (under 24 & 25 *Vict. c.* 96, *ss.* 68, 70) the accused may be convicted of simple larceny or larceny as a clerk or servant or as a person employed in the public service or police, and on indictment for larceny under *ss.* 67 & 69 of the same Act the accused may be convicted of embezzlement within *ss.* 68 or 70: 24 & 25 *Vict. c.* 96, *s.* 72.

(*b*) *Proof of felony on indictment for misdemeanor, or vice versâ.*]—By 14 & 15 *Vict. c.* 100, *s.* 12, "if, upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor." By the *Larceny Act*, 1861 (24 & 25 *Vict. c.* 96, *s.* 88), on the trial of an indictment for false pretences the defendant is not entitled to be acquitted because it is proved that he obtained the property in question by means amounting to larceny. But a conviction for false pretences is not possible on an indictment for larceny.

Upon an indictment for child murder the jury may find the defendant guilty of endeavouring to conceal the birth of the child. 24 & 25 *Vict. c.* 100, *s.* 60. Upon an indictment charging the defendant with any felony (except murder or manslaughter) where the indictment alleges that the defendant cut, stabbed, or wounded any person, the jury may acquit of the felony charged, and find him guilty of unlawfully wounding (14 & 15 *Vict. c.* 19, *s.* 5), and thereupon the defendant is liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of unlawful wounding. This enactment does not apply to an indictment charging felonious shooting with intent to do grievous bodily harm. *R.* v. *Miller*, 14 *Cox*, 356, *Bowen*, J.; *see* 24 & 25 *Vict. c.* 100, *ss.* 11, 18, 20. Upon an indictment for the felony of administering poison, etc., so as to endanger life or to inflict grievous bodily harm, the jury may find the defendant guilty of the misdemeanor of administering poison, etc., with intent to injure, aggrieve, or annoy. 24 & 25 *Vict. c.* 100, *s.* 23, 24, 25.

On an indictment for felonious rioting within *s.* 11 of the Malicious Damage Act, 1861 (24 & 25 *Vict. c.* 97), the accused may be convicted of a misdemeanor within *s.* 12 of that Act; on an indictment for robbery the accused may be convicted of assault with intent to rob (24 & 25 *Vict. c.* 96, *s.* 41). And by 48 & 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 9, "If upon the trial of any indictment for rape, or any offence made felony by *s.* 4 of this Act, the jury shall be satisfied that the defendant is guilty of an offence under *ss.* 3, 4, or 5 of this Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault, and thereupon such defendant shall be liable to be

punished in the same manner as if he had been convicted upon an indictment for such an offence as aforesaid, or for the misdemeanor of indecent assault." This enactment overrides the decision in *R.* v. *Catherall*, 13 *Cox*, 139. And on indictments for corrupt practices at elections the accused may be convicted of an illegal practice. 46 & 47 *Vict.* c. 51, *s.* 52, *and see post, Bk. II. ch. vi. sects.* 9, 10.

(*c*) *Conviction of attempt on indictment for complete offence.*]—*S.* 9 of 14 & 15 *Vict.* c. 100, after reciting that offenders often escape conviction by reason that such persons ought to have been charged with attempting to commit offences, and not with the actual commission thereof; for remedy thereof enacts, that "if, on the trial of any person charged with any felony or misdemeanor, it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried." Under this enactment the defendant can only be convicted of the attempt to commit the very offence with which he is charged; *R.* v. *McPherson, Dears. & B.* 197; 26 *L. J.* (*M. C.*) 134 (*C. C. R.*)

In *R.* v. *Connell*, 6 *Cox*, 178, to an indictment for administering poison with intent to murder, a plea of *autrefois acquit* was pleaded, setting up a prior acquittal of murder; and it was argued that on the former trial the accused might under 14 & 15 *Vict.* c. 100, *s.* 9, have been convicted of the attempt. The court held the plea bad, on the ground that that section only authorized a conviction of the attempt where it was a misdemeanor. But see thereon *R.* v. *Cook* [1899] 20 *New South Wales Rep.* (*Law*), 264.

On an indictment which charged H. with rape, and W. with aiding and abetting in the rape, the jury found H. guilty of attempting to commit a rape, and W. of aiding H. in the attempt. It was contended that this finding amounted to an acquittal of W., as the case was not within *s.* 9 of 14 & 15 *Vict.* c. 100. The objection was, however, overruled, and the conviction of W. for misdemeanor was affirmed. *R.* v. *Hapgood*, *L. R.*, 1 *C. C. R.* 221: *S. C. sub nom. R.* v. *Wyatt*, 39 *L. J.* (*M. C.*) 83.

Special verdict.]—The jury have a right, in all criminal cases, to find a special verdict: 2 *Hawk. c.* 47, *s.* 3: but the judge has no power to compel them to find a special verdict. *R.* v. *Allday*, 8 *C. & P.* 136. (*See* forms of special verdict in *R.* v. *Dudley*, 14 *Q. B. D.* 273; 54 *L. J.* (*M. C.*) 32.) *R.* v. *Staines Local Board*, 52 *J. P.* 215. Such verdict must state positively the facts themselves, and not merely the *evidence* adduced to prove them, and all the facts necessary to enable the court to give judgment must be found; for the court cannot supply by intendment or implication any defect in the statement. 2 *Hawk. c.* 47, *s.* 9; 2 *East, P. C.* 708, 784; *see R.* v. *Plummer, Kel.* (J.) 109: *R.* v. *Francis*, 2 *Str.* 1015: *R.* v. *Royce*, 4 *Burr.* 2073; 1 *Chit. Cr. L.* 643. But if the jury find all the substantial requisites of the charge, they are not bound to follow in terms the technical language of the indictment. Thus where the defendant

was charged with forgery of a bank note, and the special verdict stated that he erased and altered the note by changing the word "two" into "five," this was held sufficient. *R.* v. *Dawson*, 1 *Str.* 19. So, where an indictment for murder enumerated three wounds, and the special verdict mentioned one only, this was held not to be a fatal variance. *R.* v. *Morgan*, 1 *Bulstr.* 84, 87. So, where the evidence need not correspond precisely with the statement in the indictment (*see post, Part II. ch. i.*), the special verdict will be good, although in the same respects it vary from the statement in the indictment; as where the fact is found to have occurred, in a case of a transitory nature, at a different place within the jurisdiction of the court, or (where time is immaterial) on a day different from that stated in the indictment. *Dowdale's case*, 6 *Co. Rep.* 47; 2 *Rolle Abr.* 689. If the verdict does not state the time when the facts occurred, it seems that the court will intend them to have happened in the order in which the jury have stated them. *R.* v. *Keite*, 1 *Ld. Raym.* 138, 142. The jury need not, and indeed ought not, after stating the facts, to draw any legal conclusion, for that is the matter referred to the court: and if they do so, and the inference drawn by them is erroneous, the court will reject it as superfluous, and pronounce the judgment warranted by the facts stated. *See* 1 *Chit. Cr. L.* 645, *and the cases there cited.* A special verdict is not amendable as to matters of fact (*ante*, p. 219); but a mere error of form may be amended, even, as it seems, in capital cases, in order to fulfil the evident intention of the jury, where there is any note or minute to amend by. 2 *Hawk. c.* 47, *s.* 9; *R.* v. *Hayes*, 2 *Str.* 844; *R.* v. *Hazel*, 1 *Leach*, 368, 382; 1 *East, P. C.* 236; *R.* v. *Woodfall*, 5 *Burr.* 2661. If three offences are charged in the indictment, and the special verdict state evidence which applies to two of them only, the court may adjudge the defendant guilty of those two, and enter an acquittal as to the residue. *R.* v. *Hayes, supra.* The court cannot, however, on a special verdict on an indictment for felony, adjudge the defendant guilty of a misdemeanor. *R.* v. *Westbeer*, 2 *Str.* 1133; 1 *Leach*, 12. But where it appears clearly from the facts stated in the special verdict, that the defendant has been guilty of a crime, though not of the degree charged upon him in the indictment, the court will not discharge him, but will direct a fresh indictment to be preferred. *R.* v. *Francis*, 2 *Str.* 1015. Where the verdict is so imperfect that no judgment can be given upon it, *venire de novo* may, in misdemeanors, be awarded. *See post, ch. viii. sect.* 5, *Venire de novo.* In cases of felony the court may enter a judgment of acquittal where the facts found by the special verdict do not warrant a judgment *against* the defendant; *see R.* v. *Huggins*, 2 *Ld. Raym.* 1574, 1585; 17 *St. Tr.* 309; but this will be no bar to another prosecution for the same felony. *R.* v. *Burridge*, 3 *P. Wms.* 439, 480; 24 *Eng. Rep.* 1133, 1148; *Com. Dig., Indictment (N.).*

A verdict is not vitiated by surplusage. 2 *Hawk. c.* 47, *s.* 10.

Where a special verdict has been found at the assizes, the record may be brought into the High Court of Justice by an order of that court only, without a writ of *certiorari*, the courts of oyer and terminer and gaol delivery (including the Central Criminal Court) being now by the 16th section of the *Judicature Act*, 1873 (36 & 37 *Vict c.* 66), made part of the High Court. *R.* v. *Dudley*, 14 *Q. B. D.* 273, 280, 560; 54 *L. J.* (*M. C.*) 32, 34; *R.* v. *Parke* [1903] 2 *K. B.* 432, 439. Where on a special verdict the High Court is of opinion that the defendant ought to be convicted, that court ought to pronounce judgment and pass sentence. *R.* v. *Dudley*, 14 *Q. B. D.* 273, 278.

Special verdict of insanity.]—By *s.* 1 of the *Criminal Lunatics Act*, 1800

(39 & 40 *Geo.* 3, *c.* 94), the petty jury was empowered to find a verdict of insanity upon the evidence; and under *s.* 2 of the same Act they can, if it appears to them that a person on trial is insane, return a verdict to that effect. As to what constitutes insanity, *see ante, pp.* 23, *et seq.*

Where, on the trial of a deaf mute for felony, the jury returned the following verdict: "We find the prisoner guilty on the evidence; and we also find that he is not capable of understanding, and, as a fact, has not understood the nature of the proceedings;" it was held that the prisoner could not be convicted, but must be detained as a non-sane person during the Queen's pleasure. *R.* v. *Berry*, 1 *Q. B. D.* 447; 45 *L. J.* (*M. C.*) 123; 13 *Cox*, 189. *S.* 1 was expressly, and *s.* 2 on this point is virtually, repealed by the *Trial of Lunatics Act*, 1883 (46 & 47 *Vict. c.* 38, *s.* 4). *S.* 2 of the latter Act provides that, "Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried, that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission" (*sub-s.* 1).

"Where such special verdict is found, the court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the court shall direct, till his Majesty's pleasure shall be known; and it shall be lawful for his Majesty thereupon, and from time to time, to give such order for the safe custody of the said person during pleasure, in such place and in such manner as to his Majesty may seem fit" (*sub s.* 2).

"All provisions in any existing Act, or in any rules or orders made in pursuance of any existing Act, having reference to a person or persons acquitted on the ground of insanity, shall apply to a person or persons in respect of whom a special verdict is found under this Act" (*sub-s.* 4).

The Acts referred to in *sub-s.* 4 are the *Criminal Lunatic Acts* (*see Wood-Renton, Lunacy*, 792–880, 856). A form of detention order was prescribed in 1884. Broadmoor was in 1861 appointed as a prison for prisoners detained at the King's pleasure. These orders and the rules regulating the prison are printed in *Statutory Rules and Orders Revised* (ed. 1904), *vol.* 8, *tit.* "*Lunatic* (*E.*)." The Act of 1883 is modified as to the control of persons detained under it by the *Criminal Lunatics Act*, 1884 (47 & 48 *Vict. c.* 64).

Ambiguous verdicts.]—Where on an indictment for obtaining food and money by false pretences the jury found the following verdict of "guilty of obtaining food and money under false pretences: but whether there was any intent to defraud the jury consider there is not sufficient evidence, and therefore strongly recommend the prisoner to mercy," it was held that this amounted to a verdict of not guilty, as it negatived one of the most material allegations in the indictment, namely, the intent to defraud. *R.* v. *Gray*, 17 *Cox*, 299 (*C. C. R.*)

Receiving the verdict.]—A judge is not bound (unless the jury insist on having it recorded) to receive the first verdict which the jury give, but may direct them to reconsider it: and the verdict which the jury ultimately return is the verdict to be recorded. *R.* v. *Meany*, *L. & C.* 213;

32 *L. J.* (*M. C.*) 24: *per Pollock*, C.B., in *R.* v. *Yeadon*, *L. & C.* 81; 31 *L. J.* (*M. C.*) 70: *and see Cromp.* 114; 2 *Harg. St. Tr.* 60. The jury may, before the verdict is recorded (or even promptly after the verdict is recorded, *R.* v. *Parkin*, 1 *Mood. C. C.* 45), rectify their verdict, and it will stand as ultimately amended. 1 *Chit. Cr. L.* 647. This may be done even after the defendant has been discharged out of the dock (in pursuance of a supposed verdict of acquittal), if done before the jury have left the box. *R.* v. *Vodden*, *Dears.* 229; 23 *L. J.* (*M. C.*) 7. On the trial at *nisi prius* of a criminal case the *postea* could be amended, on sufficient cause shown, where there was a judge's note or other sufficient document to show that it was incorrect. *R.* v. *Virrier*, 12 *A. & E.* 317; 9 *L. J.* (*M. C.*) 120; *and see R.* v. *King*, 7 *Q. B.* 782. Where an indictment contains two counts for misdemeanor, to which the defendant pleads not guilty, and the finding of the jury is guilty on the second count (without noticing the first), whereupon judgment is passed, such judgment is not affected by reason of no finding being entered on the first count, for each count is a separate indictment on which a separate judgment can be entered. *Latham* v. *R.*, 5 *B. & S.* 635; 33 *L. J.* (*M. C.*) 197: *cf. Selvester* v. *U. S.* [1898] 170 *U. S.* 262.

Upon the delivery of the verdict, if the defendant be thereby acquitted *on the merits*, he is for ever free and discharged from that accusation, and is entitled to be immediately set at liberty, unless there be some other legal ground for his detention. (The old form of recording acquittal was *quorum eat quietus sine die*). As to pleading an acquittal in bar of another indictment, *see ante*, p. 169, "*Autrefois acquit.*"

Retirement of jury.]—If the jury are unable to agree upon their verdict without retiring from their box, they withdraw to a convenient place appointed for that purpose, an officer being sworn to keep them, and to suffer none to speak to them without leave of the court, nor to speak to them himself, except only to ask them whether they are agreed. 2 *Hale*, 297. There was an old rule against allowing them food, drink, or fire. 1 *Co. Inst.* 227; 4 *B. & Ald.* 681; *Doct. & Student*, 158, 272: *Winsor* v. *R.*, *L. R.*, 1 *Q. B.* 289, 308, 317; 35 *L. J.* (*M. C.*) 121. But it was abolished in 1870, and they may now have fire or reasonable refreshment at their own expense. 33 & 34 *Vict. c.* 77, *s.* 23. The jury when once enclosed must not separate or leave the place appointed for their deliberations without the special permission of the court. *Co. Litt.* 227 *b*: 4 *Bl. Comm.* 360: *R.* v. *O'Connell*, 1 *Cox*, 410. The law in this respect has not been altered by 60 & 61 *Vict. c.* 18 (*ante*, p. 218). If a juror falls ill while the jury are enclosed, a medical man may, by leave of the court, see and prescribe for him. *R.* v. *Newton*, 13 *Q. B.* 716, 735, *Rolfe*, B.; 18 *L. J.* (*M. C.*) 201.

Disagreement of jury.]—If the jury agree to a verdict on some counts of an indictment, but disagree on others, it would seem that the defendant can be retried on the counts on which the disagreement has taken place, even after judgment on the counts on which he has been convicted or acquitted, as each count is a separate indictment. *Latham* v. *R.*, 5 *B. & S.* 636: *cf. Selvester* v. *U. S.*, 170 *U. S.* 262. But where the counts are not for distinct offences, but merely vary the legal description of a single transaction, the defendant would apparently be entitled to plead *autrefois convict* or *acquit* on the second trial. *R.* v. *Grimwood*, 60 *J. P.* 809, *Pollock*, B.

Entry of verdict.]—The *form* of entry of the verdict on the record is

as follows:—After the *similiter* (*ante*, p 169), comes the award of *venire*, thus:—"*Therefore let a jury thereupon here immediately come before the said justices of our lord the King last above mentioned, and others their fellows aforesaid, of free and lawful men of the said county of ——, by whom the truth of the matter may be better known, and who are not of kin to the said* J. S., *to recognize upon their oath whether the said* J. S. *be guilty of the felony in the indictment above specified, or not guilty; because as well the said* H. K. A., *who prosecutes for our said lord the King in this behalf, as the said* J. S., *have put themselves upon the said jury. And the jurors of the said jury, by the sheriff for this purpose impanelled and returned, to wit* [naming them], *being called, come: who, to speak the truth of and concerning the premises being chosen, tried, and sworn, upon their oath say, that the said* J. S. *is guilty* [or *not guilty*] *of the felony aforesaid, on him above charged, in manner and form aforesaid, as by the said indictment is above supposed against him.*"

An indictment for perjury contained two counts, charging perjury to have been committed by the defendant on two separate occasions. The verdict was in the following form, "that the said T. C. is guilty of the premises on him above charged in and by *both* counts of the indictment aforesaid above specified, in the manner and form aforesaid, as by the indictment aforesaid is above supposed against him." It was held that this was in fact a finding of guilty upon *each* count of the indictment. *Castro* v. *R.*, 6 *App. Cas.* 229; 50 *L. J.* (*Q. B.*) 497: *cf. O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1.

Discharge of Jury.(*a*)]—It is now established law that a jury sworn and charged with a prisoner, even in a capital case, may be discharged by the judge at the trial, without giving a verdict, if a "necessity," that is, a high degree of need, for such discharge is made evident to his mind. *Winsor* v. *R.*, *L. R.* 1 *Q. B.* 289, 390; 35 *L. J.* (*M. C.*) 121, 161 (dissenting from *Conway* v. *R.*, 7 *Ir. L. R.* 149; 1 *Cox* 210:) *R.* v. *Shields*, 28 *St. Tr.* 619, 646: *R.* v. *Cobbett*, 2 *St. Tr., N. S.* 789, 903; 3 *Burn's J.* 98 (30th ed.); 4 *Bl. Com.* 360.

Where the jury, on a trial for murder at the assizes, were locked up from the middle of the day until the following morning, and then, on their being sent for into court, stated that it was impossible they should ever agree, and that was the first day of business at the next assize town, whereupon the judge discharged them, it was held that he was warranted by law in doing so. *R.* v. *Newton*, 13 *Q. B.* 716; 18 *L. J.* (*M. C.*) 201.

(*a*) It has been said that, in the case of a trial at the assizes, the jury, if they do not agree before the judges depart the county, may be carried with them in a cart to the borders of the county, or, according to some authorities, from place to place through the circuit, until they are unanimous: 19 *Ass. Pl.* 6: 41 *Ass. Pl.* 11: 2 *Hale*, 297; *Bac. Abr., Juries* (*G.*); *R.* v. *Ledgingham* (1670); 1 *Vent.* 97. This dictum, however, rests on no foundation of judicial decision or actual practice, and if it was ever law, which seems doubtful, is not so at the present day. *Winsor* v. *R.*, *L. R.* 1 *Q. B.* 289, 326; 35 *L. J.* (*M. C.*) 121. It has also been said to be a general rule of law, "that a jury sworn and charged in case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict." *Co. Litt.* 227 *b. See also* 3 *Co. Inst.* 110; *Bro. Abr. Enquest*, 30; *Bac. Abr., Juries* (*G.*); 2 *Hawk. c.* 47, *s.* 1; *Fost.* 29-39. This doctrine, however, which, if taken literally, seems to command the confinement of the jury till death if they do not agree, is too broadly stated by Lord *Coke*, and was denied to be law in *Ferrar's case*, *Sir T. Raym.* 84 (an indictment for forgery), where it is laid down as having been "resolved by all the justices, that although the jury be charged and sworn in the case of a plea of the crown, yet a juror may be drawn or the jury dismissed, contrary to common tradition which hath been held by many learned in the law."

It is for the judge alone to decide whether a necessity exists for discharging the jury, and his decision is not subject to review. *Winsor* v. *R.*, *ubi supra*: *R.* v. *Davison*, 8 *Cox*, 360; 2 *F. & F.* 250. *R.* v. *Charlesworth*, 1 *B. & S.* 460, so far as it dissents from this view is no authority. The same view has been adopted in the United States. *U. S.* v. *Perez* [1824] 9 *Wheaton* 579, *Story*, J.: *Dreyer* v. *Illinois* [1903] 187 *U. S.* 71, 86; and in New South Wales, *R.* v. *Grand* [1903] 3 *N. S. W. State Rep.* 216.

If one of the jury die before the delivery of the verdict, the remaining eleven will be discharged, and a new jury may be at once sworn or a new juror added to the eleven, and the defendant tried by them, or (if necessary) remanded to the next assizes. *R.* v. *Gould*, 3 *Burn's Justice*, 98 (30th ed.). So, also, if one of the jurors be taken so ill that he is not able to proceed with the trial. *R.* v. *Scalbert*, 2 *Leach*, 620: *R.* v. *Beere*, 2 *M. & Rob.* 472: *R.* v. *Ashe*, 1 *Cox*, 150. In case another juror is added to the eleven, they must be sworn anew, and the prisoner must again have his challenges. *R.* v. *Edwards*, *R. & R.* 224; 4 *Taunt.* 309; 13 *R. R.* 601; 2 *Leach*, 621 *n.*; 3 *Camp.* 207 *n.* The evidence must be taken *de novo*: and it is not proper to read over to the witnesses the note taken of their evidence at the first trial. *R.* v. *Bertrand*, *L. R.* 1 *P. C.* 520 (*see ante*, p. 214). Where, in the course of a trial, one of the jurors, without leave, left the jury box and also the court, whereupon the jury was discharged, and a fresh one impanelled for the trial of the prisoner, it was held, that this was the only course that could have been adopted. *R.* v. *Ward*, 10 *Cox*, 573; 11 *W. R.* 281 (*C. C. R.*). And so where in the course of a trial it was discovered that a person was on the jury who was not on the jury panel, and who had by mistake been summoned as a juryman, the jury were discharged, and a fresh jury constituted by taking another juryman in the place of the one who had served in mistake. *R.* v. *Phillips*, 11 *Cox*, 142. This defect would have been cured by verdict under 7 *G.* 4, *c.* 64, *s.* 21: and *see ante*, p. 200.

In *Hill* v. *Yates*, 12 *East*, 229, it was held that the grant of a new trial because a juror not summoned had served was discretionary, and that if no injustice had resulted, a new trial should be refused. *Per Ellenborough*, L.C.J. "If we were to listen to such an objection we might set aside the verdicts given at every assize, where the same thing might happen from accident or advertence, and possibly sometimes from design, especially in criminal cases." He cited the *case of a juryman* (1783, 12 *East*, 231, *n.*), where the judges in a crown case held that service of a man not summoned was no ground of objection to verdict even on a writ of error, much less on a summary application. *See post*, p. 279.

It has been also held, that in order to enable a prisoner to take a point in his defence which he could not otherwise have taken, the court might, *by his consent*, discharge the jury, and that the doing so would not bar any further proceedings. *Kinloch's case*, *Fost.* 16, 31: 18 *St. Tr.* 395: *R.* v. *Stokes*, 6 *C. & P.* 151: *and see R.* v. *Deane*, 5 *Cox*, 501, *Erle*, J. The jury has also been discharged, or a juror withdrawn, in a criminal case, on account of the sudden illness of a witness; 2 *Harg. St. Tr.* 832: *R.* v. *Streek*, 2 *C. & P.* 413: *R.* v. *Stevenson*, 2 *Leach*, 546; and so, also, where material witnesses had been kept away by collusion; 1 *Vent.* 69; or even were absent by accident; *R.* v. *Stokes*, 6 *C. & P.* 151. *But see R.* v. *Wedderburn*, *Fost.* 22, 30; 18 *St. Tr.* 425; *and see* 2 *Hale*, 295. In *R.* v. *Charlesworth*, 1 *B. & S.* 460; 31 *L. J.* (*M. C.*) 25, all the judges who decided that case expressed a strong opinion against the propriety of discharging the jury, merely because the case for the prosecution fails for want of evidence, and in the hope that further evidence may be got on a second trial. In *R.* v. *Wade* (1825), 1 *Mood. C. C.* 86, it was not held proper to

discharge a jury sworn to try an indictment for rape in order to give time for the instruction of a witness to fit her to be sworn.

The power of discharge, while discretionary, ought not to be exercised without very strong reasons: yet it may be exercised without any absolute "necessity." Where a material and necessary witness for the prosecution refused to answer a question put to him, and, although informed by the judge that he was bound to do so, persisted in such refusal, and was thereupon adjudged to be guilty of a contempt of court, and fined and imprisoned, the judge on the application of the counsel for the prosecution, and against the will of the defendant, discharged the jury. *R.* v. *Charlesworth*, 2 *F. & F.* 326, *Hill*, J. The course pursued in this case was afterwards questioned in the court of Queen's Bench, and although it did not become necessary to give judgment upon its propriety, *Blackburn*, J., expressed an opinion that it was right, which opinion seems to have been shared by *Cockburn*, C.J., who denied that the rule laid down in 4 *Bl. Com.* 360, that "the jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict," is a true or correct exposition of the law as practised in our day. *Wightman*, J., and *Crompton*, J., on the other hand, thought the discharge of the jury under the circumstances mentioned above, was improper. *R.* v. *Charlesworth*, 1 *B. & S.* 460; 31 *L. J.* (*M. C.*) 25.

Effect of discharge.]—The discharge of the jury is not equivalent to a verdict of acquittal: and the prisoner can be remanded for a fresh trial. *Id.*: *R.* v. *Davison*, 8 *Cox*, 360; 2 *F. & F.* 250.

A defence founded on the improper discharge of the jury cannot be taken by *plea*, for the only pleas known to the law founded upon a former trial are pleas of a former conviction, or a former acquittal, for the same offence (*ante*, pp. 169, 174); but if the former trial had been abortive without a verdict, there has been neither a conviction nor an acquittal. *Winsor* v. *R.*, *L. R.* 1 *Q. B.* 390, 395; 35 *L. J.* (*M. C.*) 161 *Ex. Ch.* And the discretion exercised by the judge in this respect, at all events where he discharges the jury on the ground of *necessity*, of the existence of which necessity it is for him alone to determine, cannot be reviewed in any way. *Winsor* v. *R.*, *ubi supra*.

As to discharge of the jury where the prisoner appears to be insane, *see ante*, pp. 183.

Sect. 5.

Proceedings between verdict and judgment.

The allocutus.]—If the defendant be found guilty, it is thereupon demanded of him by the court, in cases of treason and felony, what he has to say why the court should not proceed to judgment against him; and if this (which is called the *allocutus*) do not appear on the record when made up, it will be bad on writ of error. *R.* v. *Geary*, 2 *Salk.* 630, 3 *Mod.* 265. It is not necessary to demand of the defendant why the court should not proceed to judgment, *and execution* against him. *O'Brien* v. *R.*, 2 *H. L. C.* 465; 9 *Eng. Rep.* 1169; 7 *St. Tr., N. S.* 1; 3 *Cox*, 360; *cf. O'Neill* v. *R.*; 6 *Cox*, 495 (*Ir.*). In misdemeanors, it is not usual thus to call upon the defendant before judgment. "On all trials for felonies or misdemeanors in the King's Bench Division, except upon informations filed by leave of the court, and *ex-officio* informations where the attorney-general shall pray that the judgment may be postponed, judgment may be pronounced during the sittings or assizes at which the trial has taken place

by the judge before whom the verdict has been taken, as well upon the defendant who shall have suffered judgment by default or confession as upon those who shall have been tried and convicted, and whether such persons be present or not in court." *Cr. Off. Rules*, 1886, *s.* 172, which reproduces 11 *G.* 4 *&* 1 *W.* 4, *c.* 70, *s.* 9 (*rep.* 51 *&* 52 *Vict. c.* 7). "The judge before whom the trial shall be had may either issue an immediate order or warrant, for committing the defendant in execution, or respite the execution of the judgment on such terms as he shall think fit, and for such time as may be necessary, for the purpose of enabling the defendant to move for a new trial, or in arrest of judgment, and if imprisonment be part of the sentence, may order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison," *r.* 173.

The *allocutus* is entered on the record after the verdict in the following form :—"*And thereupon it is forthwith demanded of the said* J. S., *if he hath or knoweth anything to say why the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment against him; who nothing further saith, unless as he had before said. Whereupon*," etc. [continuing with the judgment, as *post*, p. 230.

Suspending entry of judgment.]—On this subject *see R.* v. *N. E. Railway Co.*, 70 *L. J.* (*K. B.*) 548: 19 *Cox*, 682; 49 *W. R.* 524.

Arrest of judgment.]—The defendant may, at any time between the conviction and the sentence, but not afterwards, move the court in *arrest of judgment*. 1 *Chit. Cr. L.* 661. This motion can be grounded only on some objection arising on the face of the record itself; and no defect in the evidence, or irregularity at the trial, can be urged at this stage of the proceedings. But any want of sufficient certainty in the indictment, as in the statement of time or place (where material), of the person against whom the offence was committed, or of the facts and circumstances constituting the offence, or otherwise, which has not been amended during the trial, and is not aided by the verdict, will be a ground for arresting the judgment. We have already seen (*ante*, pp. 51, 84) what defects of form are cured by verdict, or have become altogether immaterial, under 7 *G.* 4, *c.* 64, *s.* 21, and 14 *&* 15 *Vict. c.* 100, *s.* 24 (*ante*, p. 54). Even if the defendant himself omits to make any motion in arrest of judgment, the court, if on a review of the case it be satisfied that the defendant has not been found guilty of any offence in law, will of itself arrest the judgment. *R.* v. *Waddington*, 1 *East*, 143, 146. If the judgment is arrested, all the proceedings are set aside, and judgment of acquittal is given; but this will be no bar to a fresh indictment. *Com. Dig. Indictment (N.)*: 4 *Bl. Com.* 375: *Vaux' case*, 4 *Co. Rep.* 45 *a.*

Where a statute upon which an indictment is founded was repealed after the finding of the indictment, but before plea pleaded, the court arrested the judgment. *R.* v. *Denton*, *Dears.* 3; 18 *Q. B.* 761; 21 *L. J.* (*M. C.*) 207: *see also R.* v. *Mawgan in Meneage*, 8 *A. & E.* 496; 7 *L. J.* (*M. C.*) 98: *R.* v. *McKenzie*, *R. & R.* 429.

On a motion in arrest of judgment in misdemeanor, the defendant must be present in court. *R.* v. *Spragg*, 2 *Burr.* 928.

Where a court of oyer and terminer or gaol delivery or quarter sessions refuses to arrest judgment, it may reserve a case under 11 *&* 12 *Vict. c.* 78 (*see post, ch. viii. s.* 1); or the defendant may sue out a writ of error (*see post, ch. viii. s.* 2). As to proceedings by way of appeal from a conviction on a trial for misdemeanor in the High Court or in the civil court at the assizes, *see post, ch. viii. s.* 4, *tit.* "*New Trial.*"

Process after verdict and before judgment.]—In the case of treason or felony the defendant must be present when judgment is given. 1 *Ld. Raymond*, 48, 267. In the case of a misdemeanor it is not necessary that the defendant should be present when judgment is given; but his presence is usually required (*R.* v. *Harwood*, 2 *Str.* 1088), unless the judgment is to be only for payment of a fine (*R.* v. *Williams*, 18 *W. R.* 806); or the court is satisfied by evidence that the defendant is too ill or infirm to be brought up; *R.* v. *Constable*, 7 *D. & R.* 663; *R.* v. *Kinglake*, 18 *W. R.* 806, *cit.*; or is in prison and unable to find bail. *R.* v. *Boltz*, 5 *B. & C.* 334; 4 *L. J.* (*O. S.*), *K. B.* 262. Wherever it is necessary that a defendant found guilty by verdict of a jury should be present in court when judgment is pronounced against him (*see R.* v. *Chichester*, 17 *Q. B.* 504, *n.*; 2 *Den.* 458), if he is at large and will not voluntarily attend in court, process may be issued for the purpose of bringing him up to receive judgment, in the same way as process is issued for the purpose of bringing an offender into court to answer to an indictment found or information filed against him, and he is liable upon such process to be prosecuted to outlawry. (*See ante*, p. 109.) If a defendant be under recognizance to appear and receive sentence in a King's Bench Division, notice of the intention to bring him up for judgment on a day specified is served on such defendant and his bail; and in default of appearance after such notice served and appearance required according to the course and practice of the court, the recognizances, in the discretion of the court, will be estreated, and a warrant issued for his apprehension, or a *capias* for proceeding to outlawry. *R.* v. *Chichester*, *ubi supra*.

As an aid to determining the appropriate punishment the court will, after verdict, hear evidence for the crown or the defendant, either *vivâ voce* or by affidavit. *R.* v. *Bunts*, 2 *T. R.* 683: *R.* v. *Dignam*, 7 *A. & E.* 593: *R.* v. *Cox*, 4 *C. & P.* 540. But the court may consider the acts of the defendant subsequent to the trial and up to the day of sentence. *R.* v. *Withers*, 3 *T. R.* 428. Under 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 9 (*rep.*), it was held that the defendants could not move in mitigation of punishment on affidavits showing nothing which might not have been adduced at the trial. *R.* v. *Lloyd*, 4 *B. & Ad.* 135. The section is now represented by *Cr. Off. Rules*, 1886, *r.* 172 (*ante*, p. 226). It is the practice at the Central Criminal Court, after verdict, to hear evidence of character generally, and of previous convictions not included in the indictment. This is disapproved of by some judges, and in *R.* v. *Ellis*, 6 *B. & C.* 145, 148; 5 *L. J.* (*O. S.*) *M. C.* 1, it was ruled that affidavits in aggravation were not admissible in felony.

The court may, at any time during the same assizes or sessions, or any adjournment thereof, vacate the judgment passed upon the defendant, before it has become matter of record, and pass another less or even more severe. *Com. Dig. Indictment* (*N.*): *Bac. Abr., Court of Sessions*: 2 *Salk.* 606: *R.* v. *Price*, 6 *East*, 323, 328: *R.* v. *Leicestershire*, JJ. [1813] 1 *M. & Sel.* 442. When once the judgment is solemnly entered on the record, no court can make any alteration in it; but if any material defect appear on the face of it, it can be reversed by *writ of error*; *R.* v. *Fox*, 10 *Cox*, 502 (*Ir.*); or amended on a case reserved. *R.* v. *Horn*, 15 *Cox*, 205 (*C. C. R.*); *R.* v. *Turner* [1904] 1 *K. B.* 181; *see post, ch. viii. s.* 1, "*Crown Cases Reserved*," p. 271.

Right to copy of indictment on acquittal.]—Whether a person indicted for felony is *of right* entitled to a copy of the indictment against him, after acquittal by verdict of the jury or on the bill being ignored by the grand jury is a question on which there is a conflict of authority. It is laid

down (*R.* v. *Brangan*, 1 *Leach*, 27, *Willes*, C.J.; *and see* 31 *R. R.* 328, *n.*), that he is entitled to it *ex debito justitiæ*. The contrary is laid down by *Lord Holt* in *Groenvelt* v. *Burrell*, 1 *Ld. Raym.* 252; *and see Browne* v. *Cumming*, 10 *B. & C.* 70, *note by reporters*. In cases of misdemeanor there seems to be no doubt that a party acquitted is entitled to a copy of the record. *Morrison* v. *Kelly*, 1 *W. Bl.* 385, *and note*. *See* the authorities on this subject collected, 2 *Tayl. Evid.* (9th ed.), p. 986; 3 *Russ. Cr.* (6th ed.) 463; *and see Attorney-General* v. *Scully*, 4 *Ontario L. R.* 394; 33 *Canada*, 16, in which it is stated (4 *Ontario L. R.* p. 410) that inquiry of the attorney-general in England had elicited the reply that the fiat of the attorney-general was never asked for to enable a person acquitted to get a copy of the record of his indictment.

Discharge of prisoners.]—Every prisoner charged with or indicted for any felony, or with or for any misdemeanor, or as an accessory thereto, before any court of criminal jurisdiction in England and Wales, against whom no bill of indictment shall be found by the grand jury, or who on his or her trial shall be acquitted, or who shall be discharged by proclamation for want of prosecution, shall be *immediately* set at large without payment of any fee or sum of money, for or in respect of such discharge, to the sheriff, gaoler or keeper of the gaol or prison, from whence he shall be so discharged and set at liberty, or to the clerks of the court, or for their appearance to the indictment or information, or for allowing them to plead thereto, or for recording the appearance or plea, or for discharging any recognizance taken by him or by any sureties for him. 55 *G.* 3, *c.* 50, *ss.* 4, 5, as amended by 8 *& 9 Vict. c.* 114. Detention of an acquitted prisoner is illegal. *Mee* v. *Cruikshank* [1902] 20 *Cox*, 210. Persons who disobey these directions are guilty of misdemeanor. 55 *G.* 3, *c.* 50, *ss.* 9, 13. As to discharge on bail, *see Bail*, *ante*, p. 110. As to discharge on endurance of punishment, *see* 61 *& 62 Vict. c.* 41, *s.* 12, *post*, p. 231.

Respite.]—The term "respite" is usually applied to postponement of the judgment or sentence of the court until a future date. *See Keen* v. *R.*, 10 *Q. B.* 928. This is done when a case is stated for the court for Crown Cases Reserved, or where the court, having regard to the nature of the offence, or the antecedents or mental or physical condition of the convict desires to defer sentence. It is common to put the offender under recognizances to come up for judgment when called upon, coupled in some cases with an undertaking not to offend again. The offender, if he offends again, may be called up and sentenced on the first conviction, instead of being tried for the subsequent charge. *See R.* v. *Ryan*, 7 *Cox*, 109 (*Ir.*). On a conviction by verdict for a capital offence where judgment has been respited, it may be given by subsequent justices of gaol delivery for the same jurisdiction. 1 *Edw.* 6, *c.* 7, *s.* 5.

Reprieve.]—A reprieve is the withdrawal of the sentence for an interval of time, whereby the execution of it is suspended; and it may be granted either by the King or by the court empowered to award the execution. 4 *Bl. Com.* 395; 1 *Hale*, 368; 2 *Hale*, 412; 2 *Hawk. c.* 51, *s.* 8; 1 *Chit. Cr. L.* 758. A reprieve is grantable by the crown (*ex mandato regis*) at its mere discretion; and it is grantable by the court (*ex arbitrio judicis*) at its discretion, whenever substantial justice requires it. As to reprieve in capital cases, *see* 4 *G.* 4, *c.* 48 (*post*, p. 233); 24 *& 25 Vict. c.* 100, *s.* 2 (*post*, p. 233). The judges of assize have the power of reprieve after their commission is determined; 8 *Rep. Crim. L.* 176; though the learned

commissioners observe, that the continuance of this power is said to be rather of common usage than strict right. *See* 2 *Hale*, 412; 4 *Bl. Com.* 394: 2 *Hawk. c.* 51, *s.* 8. In two cases the court is *bound* (*ex necessitate legis*) to grant a reprieve. First, where the prisoner under sentence, being a female, is pregnant. 3 *Co. Inst.* 17; *and see authorities last above cited.* Secondly, where the prisoner becomes insane after judgment pronounced against him. 3 *Co. Inst.* 4; 4 *Bl. Com.* 395; 1 *Chit. Cr. L.* 761.

Jury of matrons.]—Where a female, upon a capital conviction (on the *allocutus*, *ante*, p. 225), alleges, or the court has reason to suppose, that she is pregnant, the law is, that a jury of twelve matrons shall be impanelled and sworn to try whether or not she is quick with child; *see* 1 *Chit. Cr. L.* 759; 4 *St. Tr.*, 634; and in case they shall find in the affirmative, the court is to respite such offender until she shall be delivered of a child, or it is no longer possible in the course of nature that she should be so delivered. They are entitled to hear medical evidence before returning their verdict. *R.* v. *Wycherley*, 8 *C. & P.* 262. The forms of oaths to such jury of matrons are as follows:—

"*You, as forematron of this jury, shall swear that you will search and try the prisoner at the bar, whether she be with child of a quick child, and thereof a true verdict give, according to your skill and understanding.—So help you God.*"

The oath to each of the other matrons is then administered:—

"*The same oath which your forematron has taken on her part, you shall well and truly observe and keep on your part.—So help you God.*"

Unless pregnancy is pleaded on the *allocutus*, the right to a jury of matrons appears not to be absolute. *R.* v. *Hunt*, 2 *Cox*, 261, *Erle*, J.

Sect. 6.

JUDGMENT AND PUNISHMENTS.

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Preliminary.]—The punishments assigned by the law of England for particular indictable offences will be found under the appropriate headings in the subsequent parts of this work. There are, however, certain general

statutory provisions relating to sentences and punishments, which are collected here for facility of reference. Each of the *Criminal Law Consolidation Acts* of 1861, besides affixing a specific punishment for each offence, considerably modified by the *Penal Servitude Act*, 1891, *post*, p. 235, and by consequential repeals effected by *Statute Law Revision Acts*) contains certain general provisions for punishment of offences against its provisions, which are collected at the head of the titles. *Larceny, Book II. Part I. chap. i. s.* 1: *Arson, Id., s.* 6: *Forgery, Id., s.* 8: *Murder, Id., chap. ii. s.* 1: *Part II. chap. i.*: and *Coinage Offences, Id., s.* 5, *post*. The punishment of persons on a second or subsequent conviction is dealt with, *post, Book II. Part V.* and the punishment of habitual drunkards under the *Inebriates Act*, 1898, is dealt with, *post, Book II. Part V.*

The judgment or sentence of the court is given orally by the presiding judge, and a note thereof made on the indictment and in the calendar of the cases for trial, signed by the judge at the conclusion of the sittings of the court. By 14 *H.* 6, *c.* 1, justices of *nisi prius* are empowered to give judgment, and award execution on acquittal or conviction in treason and felony. A similar provision was contained in 11 *G.* 4 *&* 1 *W.* 4, *c.* 70, *s.* 9 (*rep.*), as to giving judgment on trial of felony or misdemeanor, on a record of the court of King's Bench. Under the *Judicature Act*, 1873, *s.* 29, courts of assize and the Central Criminal Court are parts of the High Court of Justice. *R.* v. *Dudley*, 16 *Q. B. D.* 273, 560; 1 *Steph. Hist. Cr. L.* 97: *R.* v. *Parke* [1903] 2 *K. B.* 432. Where, in a capital case at the assizes, judgment of death is respited, it may be given by the judges sitting on a subsequent commission of gaol delivery for the same jurisdiction. 1 *Edw.* 6, *c.* 7, *s.* 5.

Form of judgment.]—The judgment when pronounced is minuted on the indictment or in the books of the court; but a formal conviction is not usually drawn up except where the record is made up for the purposes of a writ of error. 1 *Steph. Hist. Cr. L.* 309. At common law in strictness a conviction consists of verdict, judgment and sentence. *Burgess* v. *Boetefeur*, 7 *M. & G.* 481; 13 *L. J.* (*M. C.*) 122; 8 *Scott, N. R.* 194; and *cf.* 1 *Hale*, 685: *R.* v. *Kenworthy*, 1 *B. & C.* 711. But in *Jephson* v. *Barker*, 3 *Times L. R.* 40, *Stephen*, J., held that an order made after a verdict of guilty, and that the prisoner should enter into recognizances to come up for judgment when called for, was a conviction within 25 *G.* 3, *c.* 36, *s.* 5. And for the purposes of the *Criminal Law Consolidation Acts* of 1861, "conviction" seems to mean plea or verdict of guilty. *R.* v. *Blaby* [1894] 2 *Q. B.* 170.

The *form* of judgment, on conviction, is as follows: "*Wherefore all and singular the premises being seen and fully understood by the said court here, it is considered and adjudged by the said court here, that the said* J. S., *for the said offence be imprisoned*," etc., etc., [as the case may be.] The form in case of an acquittal (or an allowance of a plea of pardon) is—"*Whereupon all and singular the premises being seen and fully understood by the said court here, it is considered and adjudged by the said court here, that the said* J. S. *be discharged of the premises, and do depart hence without delay in this behalf.*" *See Co. Ent.* 356-390; *Rast. Ent.* 47, 51, *etc.*; 2 *Hale*, 392; 1 *Chit. Cr. L.* 719.

Where the judgment was, that the defendant, "for the *felony*, aforesaid," should be transported for ten years, and it appeared that the indictment contained two counts, the offence charged in the first count warranting a sentence of transportation for ten years, but the other not, this was held bad on error, "*felony*" not being *nomen collectivum*. *Campbell* v. *R.*, 11 *Q. B.* 799, 814; 2 *Cox*, 463; 17 *L. J.* (*M. C.*) 89.

But "*misdemeanor*" is *nomen collectivum*: and therefore if an indictment for misdemeanor contains several counts, all of which are good in law, and all found by the jury to be proved, a judgment of transportation or imprisonment "for the misdemeanor aforesaid" is good. *R.* v. *Powell*, 2 *B. & Ad.* 75. *See Ryalls* v. *R.*, 11 *Q. B.* 781, 795; 18 *L. J.* (*M. C.*) 69. But if any one count be bad, a general judgment against the defendant "for his offences aforesaid" is also bad. *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1; 11 *Cl. & F.* 155; 1 *Cox*, 413; 8 *Eng. Rep.* 1061: *Gregory* v. *R.*, 15 *Q. B.* 974; 19 *L. J.* (*Q. B.*) 366: *see ante*, p. 92. The miscarriage of justice which arose in *Campbell* v. *R.* (*supra*), and *O'Connell* v. *R.* (*supra*), may be entirely avoided by the court passing a separate judgment upon each count, and it is now the practice to enter up judgment and sentence on each count on which the jury has given a verdict of guilty, so that if any count is found good on error, or a case reserved, the judgment thereon may stand. *Holloway* v. *R.*, 17 *Q. B.* 317; 2 *Den.* 287: *O'Connell* v. *R.* 11 *Cl. & F.*, at p. 377. It is not the law that, however many counts there may be, whether charging distinct offences or not, only one judgment can properly pass upon one indictment for misdemeanor, and it is not only allowable, but proper, and advisable for the reasons above mentioned, to pass a separate judgment upon each count. *Castro* v. *R.*, 6 *App. Cas.* 229; 59 *L. J.* (*Q. B.*) 497. Errors of law and fact in the judgment as drawn up can be corrected. *Boaler* v. *R.*, 57 *L. J.* (*M. C.*) 85: *and see post, ch. viii. s.* 2, "*Writ of Error.*"

Commencement and termination of sentence.]—The sittings of a court of oyer and terminer or gaol delivery or quarter sessions are for most purposes contemplated in law as one day; *see Whitaker* v. *Wisbey*, 6 *Cox*, 109. And the sentence runs from the first day of the sittings of the court of trial, unless otherwise ordered; *R.* v. *Wilkes*, 4 *Bro. P. C.* 367; 4 *Burr.* 2527: *King* v. *R.*, 7 *Q. B.* 782; 14 *L. J.* (*M. C.*) 172, *Ex. Ch.*; and at quarter sessions from the day when it is pronounced, unless otherwise ordered. 21 *& 22 Vict. c.* 73, *s.* 12.

The *Prison Act*, 1898 (61 *& 62 Vict. c.* 41), *s.* 14, provides that "(1) In any sentence of imprisonment passed after the commencement of this Act [12th August, 1898], the word month shall, unless the contrary is expressed, be construed as meaning calendar month" (*cf.* 52 *& 53 Vict. c.* 63, *s.* 3, as to Acts passed since 1850); "(2) A prisoner whose term of imprisonment or penal servitude expires on any Sunday, Christmas Day, or Good Friday, shall be discharged on the day next preceding." The sentence is computed by including the day on which the sentence of imprisonment begins, and excluding the numerically corresponding day in the month in which the sentence expires. If there is no such day the imprisonment, subject to the above enactment, ends on the last day of the month. *Migotti* v. *Colville*, 4 *C. P. D.* 233; 48 *L. J.* (*C. P.*) 695; 14 *Cox*, 305. If a prisoner is detained beyond the term of imprisonment adjudged, the gaoler is liable to an action for false imprisonment. *Id.*; *and see Mee* v. *Cruikshank*, *ante*, p. 228.

Sentence for felony where convict is under previous sentence for another crime.]—"Wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence, either of imprisonment or of transportation

[*penal servitude*], the court if empowered to pass sentence of transportation [*penal servitude*], may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation [*penal servitude*] to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation [*penal servitude*] respectively may exceed the term for which either of those punishments could be otherwise awarded. 7 & 8 *G.* 4, *c.* 28, *s.* 10.

Concurrent or consecutive sentences.]—The court has power to direct that sentences for different offences shall run consecutively or concurrently, except in the case of conviction of a convict released on licence, for a fresh offence, in which case the new sentence must be consecutive on the *remanet* of the old sentence. *R.* v. *King* [1897] 1 *Q. B.* 214; 66 *L. J.* (*Q. B.*) 87; 18 *Cox*, 447, *Hawkins*, J.

So where a defendant is charged with several offences at the same time, of the same kind, he may be sentenced to several terms of imprisonment or penal servitude, one after the conclusion of the other. *R.* v. *Rhenwick Williams*, 1 *Leach*, 529, 536: *R.* v. *Wilkes*, 19 *St. Tr.* 1132: *R.* v. *Cutbush*, *L. R.* 2 *Q. B.* 379; 36 *L. J.* (*M. C.*) 70; 10 *Cox*, 489. 7 & 8 *G.* 4, *c.* 28, *s.* 10 (*supra*), relates only to cases where sentence is passed for *felony*, but the rule thus laid down by statute with regard to felony, also holds good at common law where sentence is passed for misdemeanor. *R.* v. *Castro*, 5 *Q. B. D.* 490: *Castro* v. *R.*, 6 *App. Cas.* 229; 50 *L. J.* (*Q. B.*) 497; 14 *Cox*, 452. Therefore, upon an indictment for misdemeanor, containing two counts for distinct offences, the defendant, if found guilty on each count, may be sentenced to imprisonment or penal servitude for two consecutive terms of punishment, one in respect of each count, although the aggregate of the punishments may exceed the punishment allowed by law for one offence. *Id.* The judges, in answer to a general question by the House of Lords whether a sentence of imprisonment to commence from and after the termination of an imprisonment to which the defendant had been before sentenced for another offence, was good in law, replied that it was good. *R.* v. *Wilkes*, *ubi supra*. So also, where an indictment contained two counts for the misdemeanor of passing false coin, and the defendant was sentenced to two years' imprisonment, the judges held that this sentence was wrong, but they stated that a sentence of one year's imprisonment might have been passed for each offence, and that the commencement of the second might be postponed until the termination of the first. *R.* v. *Robinson*, 1 *Mood. C. C.* 413. Where an indictment for misdemeanor contained four counts, the third of which was held on error to be bad in substance, and the defendant, being convicted on the whole indictment, was sentenced to four successive terms of imprisonment, of equal duration, one on each count, it was held that the sentence on the fourth count was not invalidated by the insufficiency of the third count, and that the imprisonment on it was to be computed from the end of the imprisonment on the second count. *Gregory* v. *R.*, 15 *Q. B.* 974; 19 *L. J.* (*Q. B.*) 366.

Punishments.

Death.

Judgment of death can now be awarded on a conviction on indictment only for four offences: viz. treason (*post*, *Book II. Part II. ch. i. s.* 1), murder (*post*, *Book II. Part I. ch. ii. s.* 1), offences against *s.* 2 of the

Piracy Act, 1837 (7 *W.* 4 & 1 *Vict. c.* 88), and offences against the *Dockyards Protection Act*, 1772 (12 *G.* 3, *c.* 24). The provisions of 2 *G.* 2, *c.* 25, *s.* 2, punishing with death as a felon persons who voluntarily escape or break prison, or return from transportation after sentence of transportation for perjury, though not expressly repealed, appear to be superseded by 5 *G.* 4, *c.* 84, *s.* 22, and 4 & 5 *W.* 4, *c.* 67. The provisions as to the execution of the sentence in cases of treason or murder are collected under "*Treason*" and "*Murder*," *post*. The treatment in prison of persons under sentence of death is regulated by the *Local Prison Rules*, 1899 (*St. R. & O., No.* 322), *rr.* 93–95.

4 *G.* 4, *c.* 48 (*Judgment of Death Act*, 1823), *s.* 1.]—"Whenever any person shall be convicted of any felony *except murder* and shall by law be excluded (*sic*) the benefit of clergy in respect thereof, and the court before which such offender shall be convicted shall be of opinion that, under the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the royal mercy, it shall and may be lawful for such court, if it shall think fit so to do, to direct the proper officer then being present in court to require and ask, whereupon such officer shall require and ask, if such offender hath or knoweth anything to say why judgment of death should not be recorded against such offender; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall and may, and is hereby authorized to abstain from pronouncing judgment of death upon such offender; and instead of pronouncing such judgment to order the same to be entered on record, and thereupon such proper officer as aforesaid shall and may, and is hereby authorized to enter judgment of death on record against such offender, in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender by the court before whom such offender shall have been convicted." By the *Central Criminal Court Act*, 1837 (7 *W.* 4 & 1 *Vict. c.* 77, *ss.* 1, 3–7), the practice of that court was assimilated to that of other criminal courts: the report to the crown on capital sentences was abolished, and the practice of recording sentence of death made the same as in other courts under 4 *G.* 4, *c.* 48.

The only felonies to which 4 *G.* 4, *c.* 48, now applies are those under the *Dockyards Protection Act*, 1772 (12 *G.* 3, *c.* 24): and *s.* 2 of the *Piracy Act*, 1837 (7 *W.* 4 & 1 *Vict. c.* 88).

4 *G.* 4, *c.* 48, excepted murder from the cases in which death might be recorded, but by the effect of 6 & 7 *W.* 4, *c.* 30, *s.* 2 (now *repealed* by 24 & 25 *Vict. c.* 95), sentence of death might from 1836 until 1861 be recorded even in cases of murder. *R.* v. *Hogg*, 2 *M. & Rob.* 380, *Denman*, L.C.J. The *Offences against the Person Act*, 1861 (24 & 25 *Vict. c.* 100, *s.* 2), directs that "upon every conviction for murder the court *shall pronounce* sentence of death."

As to sentence of death on pregnant women, *see ante*, p. 229.

Penal Servitude.

The *Penal Servitude Act*, 1853 (16 & 17 *Vict. c.* 99), introduced this punishment in lieu of transportation in certain cases and under certain regulations. *Ss.* 1–4 of that Act were *repealed* by the *Penal Servitude Act*, 1857 (20 & 21 *Vict. c.* 3), *s.* 1 (*post*, p. 235). By transportation was meant not the mere conveyance of the convict to the place to which he was ordered to be transported, but his remaining there during the currency of the sentence. *Bullock* v. *Dodds*, 2 *B. & Ald.* 258; 20 *R. R.* 420. Banishment beyond the seas, which could be imposed as a sentence on certain

members of Romanist monastic orders, by 10 *G.* 4, *c.* 7, *ss.* 29, 34, was included in the Act of 1851 (*see s.* 15). Banishment was not a lawful punishment, except under the obsolete procedure of abjuring the realm or under statutory authority. *See Countess of Portland* v. *Prodgers*, 2 *Vern.* 104; 2 *Hawk. c.* 33, *s.* 137.

Penal servitude can be imposed only where specifically allowed by statute. 7 *&* 8 *G.* 4, *c.* 28, *s.* 8, provides "that every person convicted of any felony not punishable with death shall be punished in the manner prescribed by the statute or statutes specially relating to such felony; and that every person convicted of any felony, for which no punishment hath been, or hereafter may be specially provided, shall be deemed to be punishable under this Act, and shall be liable at the discretion of the court to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years" [*now penal servitude for not more than seven nor less than three years, or imprisonment with or without hard labour for not more than two years*: 20 *&* 21 *Vict. c.* 3, *s.* 2; 54 *&* 55 *Vict. c.* 69, *s.* 1, *post*, p. 235.]

The following enactments are all those authorizing and regulating sentences of penal servitude, which it appears necessary to set out here:—

16 *&* 17 *Vict. c.* 99 (*Penal Servitude Act*, 1853), *s.* 6—*Place and mode of confinement of offenders sentenced to penal servitude—Hard labour.*]—Every person who under this Act shall be sentenced or ordered to be kept in penal servitude may, during the term of the sentence or order, be confined in any such prison or place of confinement in any part of the United Kingdom, or in any river, port, or harbour of the United Kingdom, in which persons under sentence or order of transportation may now by law be confined, or in any other prison in the United Kingdom, or in any part of her majesty's dominions beyond the seas, or in any port or harbour thereof, as one of her majesty's principal secretaries of state may from time to time direct; and such person may during such term be kept to hard labour, and otherwise dealt with in all respects as persons sentenced to transportation may now by law be dealt with while so confined.

[*As to the scope of this section*, see R. *v.* Mount, L. R. 6 P. C. 283; *and the* Colonial Prisoners Removal Acts *of* 1869 *and* 1884 (32 & 33 Vict. c. 10; 47 & 48 Vict, c. 31); *and the Orders in Council made under these Acts and published in* Statutory Rules and Orders Revised (ed. 1904), vol. 2, *tit.* "*Colonial Prisoner.*"]

Sect. 7.—All Acts and provisions of Acts now applicable with respect to persons under sentence of transportation shall, so far as may be consistent with the express provisions of this Act, be considered to extend and be applicable to all persons under any sentence or order of penal servitude under this Act. . . . [*The rest of the section deals with the appointment of convict prisons in England.*]

Sect. 13.—*Saves the prerogative of mercy.*

Sect. 14.—Provided, also, that no thing herein contained shall interfere with or affect the authority or discretion of any court in respect of any punishment which such court may now award or pass on any offender other than transportation; but where such punishment may be awarded at the discretion of the court, instead of transportation or in addition thereto the same may be awarded instead of or (as the case may be) in addition to the punishment substituted for transportation under this Act.

20 & 21 *Vict.* (*Penal Servitude Act*, 1857), *c.* 3.]—*Recites* 16 & 17 *Vict. c.* 99, *and* (*s.* 1) *repeals ss.* 1, 2, 3, *and* 4 *of the recited Act.*

Sect. 2.—*Penal servitude substituted for transportation.*]—"No person shall be sentenced to transportation; and any person who, if this Act and the said Act had not been passed, might have been sentenced to transportation, shall be liable to be kept in penal servitude for a term of the same duration as the term of transportation to which such person would have been liable if the said Act and this Act had not been passed; and in every case where, at the discretion of the court, one of any two or more terms of transportation might have been awarded, the court shall have the like discretion to award one of any two or more of the terms of penal servitude which are hereby authorized to be awarded instead of such terms of transportation."

Sect. 3—*Conveyance of convicts beyond the seas.*]—"Any person under sentence or order of penal servitude may, during the term of the sentence or order, be conveyed to any place or places beyond the seas to which offenders under sentence or order of transportation may be conveyed, or to any place or places beyond the seas which may be hereafter appointed as herein mentioned; and all Acts and provisions now applicable to and for the removal and transportation of offenders under sentence or order of transportation to and from any places beyond the seas, and concerning their custody, management, and control, and the property in their services, and the punishment of such offenders if at large without lawful cause before the expiration of their sentence, and all other provisions now applicable to and in the case of persons under sentence or order of transportation, shall apply to and in the case of persons under sentence or order of penal servitude, as if they were persons under sentence or order of transportation."

Sect. 4.—*Provides for the appointment of places beyond the seas to which persons under sentence of penal servitude may be conveyed.* [*This power has not been exercised.*]

Sect. 6.—*Construction of statutes referring to "transportation."*]—"Where in any enactment now in force the expression "any crime punishable with transportation," or any expression of the like import, is used, the enactment shall be construed and take effect as applicable also to any crime punishable with penal servitude."

54 & 55 *Vict. c.* 69 (*Penal Servitude Act*, 1891), *s.* 1—*Length of sentences of penal servitude and authorizing imprisonment in lieu thereof.*]—"(1.) Where under any enactment in force when this section comes into operation [*5th August*, 1891] a court has power to award a sentence of penal servitude, the sentence may, at the discretion of the court, be for any period not less than three years, and not exceeding either five years, or any greater period authorized by the enactment. (2.) Where under any Act now in force or under any future Act a court is empowered or required to award a sentence of penal servitude, the court may in its discretion, unless such future Act otherwise provides, award imprisonment for any term not exceeding two years, with or without hard labour. (3.) *S.* 2 of the *Penal Servitude Act*, 1864 [27 & 28 *Vict. c.* 47, *s.* 2], is hereby *repealed* with respect to any sentence awarded after the date at which this section comes into operation."

Note.—The Act of 1891 introduced some very important changes in the punishment of indictable offences, the main one being the abolition of the *minimum* sentence of five years' penal servitude introduced by 27 & 28 *Vict.* c. 47, s. 2 (*rep.*), and the substitution of a *minimum* sentence of three years' penal servitude. The last-named sentence was the minimum prescribed by the *Criminal Law Consolidation Acts* of 1861, with a single exception, *viz.*, the minimum sentence of ten years' penal servitude for sodomy prescribed by 24 & 25 *Vict.* c. 100, s. 61. This exception was done away with by 54 & 55 *Vict.* c. 69, s. 1, under which the minimum sentence of penal servitude for sodomy, as for other crimes, is now three years.

In some cases, as in 24 & 25 *Vict.* c. 96 (*Larceny Act*), ss. 4 *and* 42, the *only* term of penal servitude prescribed by the original enactment was three years. This enactment so far as *length* of penal servitude was concerned was virtually repealed by 27 & 28 *Vict.* c. 47, s. 2 (*rep.*), but in such cases the court is now empowered by 54 & 55 *Vict.* c. 69, s. 1, *sub-s.* 1, to pass a sentence of penal servitude for not exceeding *five* years and not less than *three* years.

As an alternative sentence to that of penal servitude the *Criminal Law Consolidation Acts* of 1861 gave, again with a single exception, that of imprisonment for any term not exceeding two years, with or without hard labour. That exception occurred in 24 & 25 *Vict.* c. 100, s. 61, to which we have already referred, the only punishment prescribed for the offence dealt with by that section being penal servitude *for life* or for not less than *ten* years, with no alternative of imprisonment. In this case the court has now power by 54 & 55 *Vict.* c. 69, s. 1, *sub-s.* 2, to impose as an alternative punishment to penal servitude imprisonment for any term not exceeding two years, with or without hard labour.

Excepting in the cases to which reference has already been made in this note, that is, cases in which the *only* sentence of penal servitude prescribed was *three* years, and the case of sodomy, the effect of 54 & 55 *Vict.* c. 69, on the punishments prescribed by the *Criminal Law Consolidation Acts* of 1861, appears to be to restore them as they stood originally in those Acts. So much of those Acts, however, as authorized a minimum sentence of penal servitude of three years, or an alternative punishment of two years' imprisonment, with or without hard labour, or a sentence of penal servitude for three years *only*, or, as in the case of sodomy, a minimum sentence of ten years' penal servitude, has been *expressly repealed* by 55 & 56 *Vict.* c. 19 (*Statute Law Revision Act*, 1892). It becomes therefore necessary in every case where the *Criminal Law Consolidation Acts* of 1861 prescribe a sentence of penal servitude, to read into them the provisions of 54 & 55 *Vict.* c. 69, s. 1. The editors have endeavoured to do this in describing the punishments for each offence.

Several statutes authorize a sentence of penal servitude, and as an *alternative*, imprisonment for terms *exceeding* two years—for examples *see* 39 & 40 *Vict.* c. 36, s. 193 (*Smuggling*). By the *Penal Servitude Act*, 1891 (54 & 55 *Vict.* c. 69), s. 1, *sub-s.* 2 (*ante*, p. 235), the power to inflict an *alternative* sentence of imprisonment is now confined in all such cases to a term *not exceeding two years*. The discretion given by the sub-section seems to mean a discretion to substitute imprisonment for penal servitude, and the sub-section appears not to affect statutes under which imprisonment is not an alternative to penal servitude. The sub-section expressly excepts *future* Acts.

The mode of treatment of persons sentenced to penal servitude is regulated by the *Convict Prison Rules*, 1899 (*Stat. Rules & Orders*, 1899, *No.* 321).

Imprisonment.

(*a*) *General Provisions.*

Imprisonment without hard labour is a common-law punishment for misdemeanors, and is also, under many statutes, a substantive or alternative punishment for felony, and for many misdemeanors.

There is not at common law any limit to the term of imprisonment. *Castro* v. *R.*, 5 *Q. B. D.* 490, 509, *Bramwell*, L.J.; 1 *Stephen, Hist. Cr. L.* 490; *and see Re Forbes*, 8 *New South Wales Rep.* (*Law*), 68, and 3 *St. Tr., N. S.* 1353, *Appendix H.* The ordinary statutory maximum term of imprisonment is two years (*see* 54 *&* 55 *Vict. c.* 69, *s.* 1, *ante*, p. 235), and in practice this is not exceeded even in the case of offences to which it has not been specifically applied.

Certain Acts which do not authorize penal servitude but authorize imprisonment for three or more years, *e.g.*, 9 *W.* 3, *c.* 35, *s.* 1 (blasphemy); 6 *&* 7 *Vict. c.* 96, *s.* 3 (threats to publish libel), appear not to be affected by 54 *&* 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

The mode of treatment of prisoners sentenced to imprisonment is regulated by the *Local Prison Rules*, 1899 (*St. R. & O.*, 1899, *No.* 322).

(*b*) *Solitary Confinement.*

The power of courts of justice in England to impose the punishment of solitary confinement has been taken away by the repeal of the enactments conferring it; *see* 56 *&* 57 *Vict. c.* 54 (*S. L. R.*). For some time before 1893 solitary confinement was very rarely, if ever, imposed by a criminal court as part of its sentence. This probably arose from the fact that criminal prisoners when consigned to gaol were subjected to a confinement, which, if not in name, was in effect almost solitary, under the *Prison Act*, 1865 (28 *&* 29 *Vict. c.* 126), *s.* 17, *sub-s.* 5:—"In a prison where criminal prisoners are confined, such prisoners shall be prevented from holding any communication with each other, either by every prisoner being kept in a separate cell by day and by night, except when he is at chapel or taking exercise, or by every prisoner being confined by night to his cell and being subjected to such superintendence during the day as will, consistently with the provisions of this Act, prevent his communicating with any other prisoner."

This enactment was *repealed* by *s.* 15 (2) of the *Prison Act*, 1898 (61 *&* 62 *Vict. c.* 41), on the coming into force (on May 1st, 1899), of the *Local Prison Rules*, 1899, made and approved by parliament under *s.* 4 of that Act, and the separate confinement of prisoners is now regulated by these rules, for which *see Statutory Rules and Orders, Revised* (ed. 1904), vol. 10, *tit.* "*Prison, E.*," pp. 6, 77.

(*c*) *Imprisonment with Hard Labour.*

Imprisonment with hard labour can be imposed only under statutory authority. *See* 54 *&* 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235), and the particular enactment dealing with the offence in question.

Imprisonment with hard labour for not over two years can be imposed *instead* of penal servitude. 54 *&* 55 *Vict. c.* 69, *s.* 1 (2) (*ante*, p. 235), and also for the following misdemeanors:—

3 *G.* 4, *c.* 114 (*Hard Labour Act*, 1822.]—*Recites* 56 *G.* 3, *c.* 162, *and* enacts, that "whenever any person shall be convicted of any of the offences thereafter specified and set forth: that is to say, . . . any attempt

to commit felony; any riot, . . . keeping a common gaming-house, a common bawdy-house, or a common ill-governed and disorderly house; wilful and corrupt perjury, or of subornation of perjury; . . . in each and every of the above cases, and whenever any person shall be convicted of any or either of the aforesaid offences, it shall and may be lawful for the court before which any such offender shall be convicted, or which by law is authorized to pass sentence upon any such offender, to award and order (if such court shall think fit) sentence of imprisonment with hard labour, for any term not exceeding the term for which such court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders by any law in force before the passing of this Act; and every such offender shall thereupon suffer such sentence, in such place, and for such time as aforesaid, as such court shall think fit to direct."

14 & 15 *Vict.* c. 100 (*Criminal Procedure Act*, 1851), *s.* 29.]—"Whenever any person shall be convicted of any one of the offences following, as an indictable misdemeanor; that is to say, any cheat or fraud punishable at common law; any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice; any escape or rescue from lawful custody on a criminal charge; any public and indecent exposure of the person; . . . any public selling, or exposing for public sale or to public view, of any obscene book, print, picture, or other indecent exhibition; it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment." This enactment does not extend to common law forgery. *R.* v. *Hamilton* [1901] 1 *K. B.* 740; 70 *L. J., K. B.* 480: 65 *J. P.* 265, 19 *Cox*, 675.

The nature of the labour to be performed under a sentence of imprisonment with hard labour is prescribed by the *Local Prison Rules*, 1899 (*St. R. & O.* 1899, *No.* 322), *rr.* 39, 42, 44.

(*d*) *Imprisonment without Hard Labour.*

Imprisonment without hard labour was substituted in 1816 (56 *G.* 3, *c.* 138, *s.* 2) as a punishment for the pillory. And that mode of punishment was last inflicted in 1830, and was wholly abolished by 7 *W.* 4, & 1 *Vict.* c. 23.

Imprisonment without hard labour can be imposed for any common law misdemeanor not subjected to special statutory punishment: and, in cases within 54 & 55 *Vict.* c. 69, *s.* 1 (2) (*ante*, p. 235), may be imposed as an alternative to penal servitude.

The common-law rules as to imprisonment without hard labour are modified by the following statutory provisions:—

40 & 41 *Vict.* c. 21 (*Prison Act*, 1877), *s.* 40.]—"The Prison Commissioners shall see that any prisoner under sentence inflicted on conviction for sedition or seditious libel shall be treated as a misdemeanant of the first division, within the meaning of *s.* 67 of the *Prison Act*, 1865 (*see post*, p. 239) notwithstanding any statute, provision, or rule to the contrary."

Sect. 41.—"Any person who shall be imprisoned under any rule, order or attachment" [*but not on judgment on conviction on indictment*] "for contempt of any court shall be in like manner treated as a misdemeanant of the first division, within the meaning of the said section of the said Act."

61 & 62 *Vict. c.* 41 (*Prison Act*, 1898), *s.* 6.]—"(1.) Prisoners convicted of offences either on indictment or otherwise, and not sentenced to penal servitude or hard labour, shall be divided into three divisions.

"(2.) Where a person is convicted by any court of an offence and is sentenced to imprisonment without hard labour, the court may, if it thinks fit, having regard to the nature of the offence and the antecedents of the offender, direct that he be treated as an offender of the first division or as an offender of the second division. If no direction is given by the court, the offender shall, subject to the provisions of this section, be treated as an offender of the third division.

"(4.) Any person imprisoned for default of entering into a recognizance or finding sureties to keep the peace, or for being of good behaviour, shall be treated under the same rules as an offender of the second division, unless he is a convicted prisoner, or unless the court direct that he be treated under the same rules as an offender of the first division.

"(5.) References in *ss.* 40 and 41 of the *Prison Act*, 1877 (*supra*, 40 & 41 *Vict. c.* 21), to a misdemeanant of the first division within the meaning of *s.* 67 of the *Prison Act*, 1865, shall be construed as references to an offender of the first division within the meaning of this section."

[*The classification and treatment of persons under this section is regulated by the Local Prison Rules*, 1899, *Parts III., IV., and V.* (*Stat. Rules & Orders*, 1899, *No.* 322). *By the effect of s.* 15 (2) *of the Prison Act*, 1898 (61 & 62 *Vict. c.* 41), *s.* 67 *of the Prison Act*, 1865, *was repealed on May* 1, 1899, *on the coming into operation of the Local Prison Rules*, 1899, *No.* 322), *made under ss.* 2, 6, *of the Act of* 1898.]

Whipping.

Whipping was one of the ordinary common-law punishments for misdemeanors committed by persons of either sex, but is not now in practice inflicted except under statutory authority. In 1820 it was made illegal to whip females, and imprisonment was substituted. 1 *G.* 4, *c.* 57.

Of adult males.]—The power of whipping males for felony given by 7 & 8 *G.* 4, *c.* 28, *s.* 8, was repealed by 51 & 52 *Vict. c.* 57 (*S. L. R.*), but the whipping of adult males is still authorized by statute in the following cases: on the sentence of incorrigible rogues at quarter sessions, 5 *G.* 4, *c.* 83, *s.* 10; on conviction of offences against the person of the Sovereign under 5 & 6 *Vict. c.* 51, *s.* 2 (*see R.* v. *O'Connor*, 7 *St. Tr., N. S.* 3 & *n.*); on conviction of offences against *s.* 43 of the *Larceny Act*, 1861, or *s.* 21 of the *Offences against the Person Act*, 1861. The offences in question are robbery under arms, assault under arms with intent to rob, robbery or assault with intent to rob by a gang, or robbery with violence; and attempting by any means whatever to choke, strangle, or suffocate any person, or any of such cases; or attempting to render any person insensible, unconscious, or incapable of resistance by any means calculated to choke, suffocate, or strangle such person with intent in any of such cases thereby to enable himself or any person to commit, or with intent in any of such cases to assist another in committing any indictable offence (26 & 27 *Vict. c.* 44). Whipping has been awarded for use of the violence indicated, with intent to commit rape. *R.* v. *Smallbones, Hants Winter Assizes* [1898], 33 *L. J. Newsp.* 124. On conviction of a male person of offences under either of these sections:—"The court before whom he is convicted may, in addition to the punishment awarded by the said sections, or any part thereof, direct that the offender, if a male, be once, twice, or thrice privately whipped, subject to the following provisions: 1. That in the case of an offender whose

age does not exceed sixteen years, the number of strokes at each whipping do not exceed twenty-five, and the instrument used shall be a birch rod: 2. That in the case of any other male offender the number of strokes do not exceed fifty at each such whipping: 3. That in each case the court in its sentence shall specify the number of strokes to be inflicted, and the instrument to be used: provided that in no case shall such whipping take place after the expiration of six months from the passing of the sentence: provided also, that every such whipping to be inflicted on any person sentenced to penal servitude shall be inflicted on him before he shall be removed to a convict prison with a view to his undergoing his sentence of penal servitude." 26 & 27 *Vict. c.* 44, *s.* 1 (*Garrotters Act*, 1862).

Of youthful male offenders.]—Males under sixteen may be sentenced to whipping on conviction under many sections of the *Larceny Act*, 1861, the *Malicious Damage Act*, 1861, and the *Offences against the Person Act*, 1861, and under *s.* 4 of the *Criminal Law Amendment Act*, 1885. The mode of adjudging the sentences on conviction on indictment is prescribed by 24 & 25 *Vict. c.* 96, *s.* 119; 24 & 25 *Vict. c.* 97, *s.* 75; 24 & 25 *Vict. c.* 100, *s.* 70. As to whipping offenders on summary conviction for indictable offences, *see Stone, Justices' Manual* (36th ed.).

Of prisoners.]—Prisoners in any convict or local prison may not now be flogged for offences committed against prison discipline except under the provisions of *s.* 5 of the *Prison Act*, 1898 (61 & 62 *Vict. c.* 41), and of the *Convict Prison Rules*, 1899, *rr.* 82-85, and the *Local Prison Rules*, 1899, *rr.* 88-91, *Stat. R. & O. Revised* (ed. 1904), *vol.* 10, *tit.* "*Prison, E.*"

Fine.

Treason and felony.]—At common law a fine was rarely, if ever, imposed on conviction of treason or felony. Its place was taken by the forfeiture on conviction and attainder, abolished in 1873 (33 & 34 *Vict. c.* 23, *s.* 1, *post*, p. 244). The *Criminal Law Consolidation Acts* of 1861 do not contain any powers to inflict a fine on conviction of felony (except in the case of manslaughter), 24 & 25 *Vict. c.* 100, *s.* 5; nor is such a fine now ever inflicted without statutory authority.

Misdemeanor.]—At common law the court may impose as part or the whole of a sentence for misdemeanor, a fine or ransom, *i.e.*, a pecuniary penalty, or pecuniary forfeiture. There is no general statutory limit to the amount of such fine, except the provisions of Magna Charta, 25 *Edw.* 1, *c.* 14, and the *Bill of Rights* (1 *W. & M.*), *sess.* 2, *c.* 2, against excessive and unreasonable fines and assessments; and *see* 1 *Steph. Hist. Cr. L.* 490: *Re Forbes*, 8 *N. S. W. Rep.* (*Law*), 68. A married woman could not be fined for misdemeanor at common law: *R.* v. *Thomas*, *cas.* (*K. B.*) *temp. Hard.* 278; but since the *Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), there seems no reason why she should not be fined, if she has separate estate not subject to restraint on anticipation.

The *Criminal Law Consolidation Acts* of 1861 all contain a discretionary power to fine for misdemeanors within the Acts. Reference should be made to the particular enactment, *post*, creating a misdemeanor, or fixing its punishment.

Recognizances.

Felony.]—A person convicted of any felony within the *Criminal Law Consolidation Acts* of 1861 (except murder), may, if the court think fit,

be required, *in addition* to any other punishment, to enter into his own recognizances, with or without sureties, to keep the peace, and on failure to find sureties may be imprisoned for not over a year. 24 & 25 *Vict. c.* 96 (*Larceny*), *s.* 117: *c.* 97 (*Malicious Damage*), *s.* 73: *c.* 98 (*Forgery*), *s.* 51: *c.* 99 (*Coinage Offences*), *s.* 38: *c.* 100 (*Offences against the Person*), *s.* 71.

Misdemeanor.]—A person convicted of any misdemeanor, whether at common law or by statute, may, *in addition to, or in substitution for* any other punishment, be required to enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for a reasonable time to be specified in the order; *R.* v. *Dunn*, 12 *Q. B.* 1026, 1031, 1041, *n.*; *Short & Mellor, Cr. Off. Pr.* 234; and in cases within the *Criminal Law Consolidation Acts* of 1861 (*see* the sections above quoted), may, in default of sureties, be imprisoned for not over one year. For the enactments, *see* the particular titles. A married woman may be required to find sureties: 1 *Russ. Cr.* (6th ed.), 66 *n.* Where such an order is made, it usually prescribes imprisonment until the recognizances are entered into. Where the conditions of such recognizances are broken, the recognizance may be estreated. *See C. O. R., ss.* 124, 126; *Short & Mellor, Cr. Off. Pr.* 424, and *ante*, p. 117, *et seq.*

Punishment of First Offenders.

See post, p. 243.

Punishment of Youthful Offenders.

As to whipping of youthful offenders.]—*See ante*, p. 240.

As to treatment of youthful offenders in prison.]—*See Part VII.* of the *Local Prison Rules*, 1899 (*St. R. & O.*, 1899, No. 322).

29 & 30 *Vict. c.* 118 (*Industrial Schools Act*, 1866), *s.* 15].—Where a child, apparently under the age of twelve years, is charged before two justices or a magistrate with an offence punishable by imprisonment or a less punishment, but has not been in England convicted of felony, or in Scotland of theft, and the child ought in the opinion of the justices or magistrate (regard being had to his age and the circumstances of the case) to be dealt with under this Act, the justices or magistrate may order him to be sent to a certified industrial school.

1 *Edw.* 7, *c.* 20 (*Youthful Offenders Act*, 1901) *s.* 5.] A court of assize or quarter sessions may exercise the like power of committing a child to an industrial school as may be exercised by two justices or a magistrate under *s.* 15 of the *Industrial Schools Act*, 1866 (*q.v. supra*), and the provisions of that Act shall be construed accordingly. [By "*child*" *is meant a person who in the opinion of the court before whom he is brought is under the age of* 12 *years* (42 & 43 *Vict. c.* 49, *s.* 49: 1 *Edw.* 7, *c.* 20, *s.* 11)].

56 & 57 *Vict. c.* 48 (*Reformatory Schools Act*, 1893), *s.* 1.]—"Where a youthful offender who, in the opinion of the court before whom he is charged is less than 16 years of age, is convicted whether on indictment or by a court of summary jurisdiction of an offence punishable with penal servitude or imprisonment, and either (*a*) appears to the court to be not less than 12 years of age; or, (*b*) is proved to have been previously convicted of an offence punishable with penal servitude or imprisonment, the court may, in addition to or in lieu of sentencing him according to law to any punishment, order that he be sent to a certified reformatory school, and be there detained for a period of not less than three and not

more than five years, so, however, that the period is such as will in the opinion of the court, expire at or before the time at which the offender will attain the age of 19 years." *See proviso*, 62 & 63 *Vict. c.* 12, *infra.*

Sect. 4.]—*Repeals the first part of* 29 & 30 *Vict. c.* 117, *s.* 14, *omitted below, and substitutes for it the above provisions.*

29 & 30 *Vict. c.* 117 (*Reformatory Schools Act*, 1866), *s.* 14.]—"The particular school to which the youthful offender is to be sent, may be named either at the time of his sentence being passed, or within seven days thereafter by the court justices or magistrate who sentenced him, or in default thereof at any time before the expiration of his imprisonment by any visiting justice of the prison to which he is committed. In choosing a certified reformatory school, the court justices, magistrate or visiting justices, shall endeavour to ascertain the religious persuasion to which the youthful offender belongs, and as far as possible a selection shall be made of a school conducted in accordance with the religious persuasion to which the youthful offender appears to the court, justices, magistrate, or visiting justice to belong, which religious persuasion shall be specified by the court justices, magistrate, or visiting justice. . . ."

Sect. 15.]—*Provision for delivery of the offender to the superintendent of the reformatory by the gaoler, and with the warrant or order of detention, possession whereof by the superintendent, &c., to be sufficient authority for detention.*

56 & 57 *Vict. c.* 48, *s.* 2.]—"Without prejudice to any other powers of the court, the court may direct that the offender be taken to a prison, or to any other place not being a prison, which the court thinks fit, and the occupier of which is willing to receive him, and be detained there for any time not exceeding seven days, or in case of necessity for a period not exceeding fourteen days, or until an order is sooner made for his discharge, or for his being sent to a reformatory school, or otherwise dealt with under this or any other Act; and the person to whom the order is addressed is hereby empowered and required to detain him accordingly: and if the offender escapes he may be apprehended without warrant and brought back to his place of detention."

62 & 63 *Vict. c.* 12 (*Reformatory Schools Act*, 1899), *s.* 1.]—The *Reformatory Schools Act*, 1893, shall be read and have effect as if the following proviso were added at the end of *s.* 1, that is to say, "provided that when the offender is ordered to be sent to a certified reformatory school, he shall not in addition be sentenced to penal servitude or imprisonment."

Postponing or mitigating Punishment.

Binding over to come up for judgment.]—Instead of imposing any of the punishments above described the court may, except in the case of murder, require the convicted person to enter into recognizances with or without sureties to come up for judgment when called upon.

This course may be adopted (1) when a case is reserved for the consideration of the Court of Crown Cases Reserved. *See* 11 & 12 *Vict. c.* 78, *s.* 1, *post*, p. 271): and *R.* v. *Hamilton* [1899] 12 *Manitoba*, 507; (2) in cases within the *Probation of First Offenders Act*, 1887 (*infra*), or in any other case where the circumstances of the case make such a course expedient in the interests of justice. It is not unusual also to require the defendant to enter into recognizances in the mean time to keep the peace and be of good behaviour.

At common law an order of this kind is a substitute for punishment by stay of judgment, and not a judgment of the Court. *Burgess* v. *Boetefeur*, *ante*, p. 230.

Where no time is specified for coming up for judgment, and it is proposed to bring the defendant up for judgment, a notice must be given to him and to his bail, which in the King's Bench Division is a four days' notice. *R.* v. *Chichester*, 17 *Q. B.* 804, *n.*: *R.* v. *Williams*, 18 *W. R.* 806: *Short* v. *Mellor*, *Cr. Off. Pr.* 231, 640. If he does not appear, a *capias* is issued, and if he cannot be found, proceedings for outlawry may be taken. The recognizance may also be estreated by order of the court. *See Short & Mellor*, *Cr. Off. Pr.* 231. In a Canadian case, *R.* v. *Young* [1901] 2 *Ontario L. R.* 228, it has been held that it is for the crown and not for a private prosecutor to take action in such cases.

Release on probation.]—*The Probation of First Offenders Act*, 1887 (50 & 51 *Vict.* c. 25). *After reciting that it is expedient to make provision for cases where the reformation of persons convicted of first offences may, by reason of the offender's youth or the trivial nature of the offence, be brought about without imprisonment, enacts as follows:—*

Sect. 1.]—(1) In any case in which a person is convicted of larceny or false pretences, or any other offence punishable with not more than two years' imprisonment before any court, and no previous conviction is proved against him, if it appears to the court before whom he is so convicted that, regard being had to the youth, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed (*see* 56 *J. P.* 330), it is expedient that the offender be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognizance, with or without sureties, and during such period as the court may direct, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour. (2) The court may, if it thinks fit, direct that the offender shall pay the costs of the prosecution, or some portion of the same, within such period and by such instalments as may be directed by the court.

Sect. 2.]—(1) If a court having power to deal with the offender in respect of his original offence, or any court of summary jurisdiction, is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(2) An offender when apprehended on any such warrant shall, if not brought forthwith before the court having power to sentence him, be brought before a court of summary jurisdiction, and that court may either remand him by warrant until the time at which he was required by his recognizance to appear for judgment, or until the sitting of a court having power to deal with his original offence, or may admit him to bail with a sufficient surety conditioned on his appearing for judgment.

(3) The offender when so remanded may be committed to a prison either in the county in or for which the court remanding him acts, or for the county or place where he is bound to appear for judgment, and the warrant of remand shall order that he be brought before the court before which he was bound to appear for judgment, or answer as to his conduct since his release.

Sect. 3.]—The court, before directing the release of an offender under this Act, shall be satisfied that the offender or his surety has a fixed place of abode or regular occupation in the county or place for which the court acts, or in which the offender is likely to live during the period named for the observance of the conditions.

Sect. 4.]—In this Act the term "court" includes a court of summary jurisdiction.

Note.]—This statute does not give courts of record in England any jurisdiction which they had not already. *Vide supra*, and *see* 32 *L. J. Newsp.* 538, for the reasons which have led such courts rarely to use the Act. As to indictable offences tried summarily, *see s.* 16 of the *Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49); and *s.* 1 of the *Youthful Offenders Act*, 1901 (1 *Edw.* 7, *c.* 20), *post*, p. 245.

Commutation of Sentence.

7 & 8 *G.* 4, *c.* 28, *s.* 13.]—"Where the King's Majesty should be pleased to extend his royal mercy to any offender convicted of any felony punishable with death or otherwise, and by warrant under his royal sign manual countersigned by one of his principal secretaries of state shall grant to such offender either a free or a conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon shall have the effect of a pardon under the great seal for such offender as to the felony for which such pardon shall be so granted: Provided always that no free pardon nor any such discharge in consequence thereof, nor any conditional pardon, or the performance of the condition thereof in any of the cases aforesaid shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any felony committed after the granting of any such pardon." *Cf.* 9 *G.* 4, *c.* 54, *s.* 33 (*I.*). [*Where a pardon is granted conditional on imprisonment for a term, the procedure for giving effect to the condition is prescribed by* 11 *G.* 4, & 1 *W.* 4, *c.* 39, *s.* 7, *and where after sentence of death a pardon is granted conditional on penal servitude, the enforcement of the condition is regulated by* 16 & 17 *Vict. c.* 99, *s.* 5, *ante*, *p.* 178. *As to the effect of pardon, see R. v. Beacall*, 1 *C. & P.* 456, *n.*

Forfeitures and Disqualifications consequent on Conviction.

33 & 34 *Vict. c.* 23 (*Forfeitures*), *s.* 1.]—"No confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture (*which word by s.* 5 *of the same statute does not include any fine or penalty imposed on any convict by virtue of his sentence*), or escheat; provided that nothing in this Act shall affect the law of forfeiture consequent upon outlawry." [*The Act also contains provisions with reference to the property of convicts*, i.e., *persons* "against whom judgment of death, or of penal servitude, shall have been pronounced or recorded by any court of competent jurisdiction in England, Wales, or Ireland, upon any charge of treason or felony" (*s.* 6). *The object of these provisions appears to be to provide for the payment out of such property of all just claims upon it, and, while placing it out of the power of the convict during the continuance of his sentence, to provide for its management and to secure its eventual return to himself or to his representatives. See Carr v. Anderson* [1903] 1 *Ch.* 90, 2 *Ch.* 279.]

33 & 34 *Vict.* c. 23, s. 2. *Effect of conviction for treason or felony on capacity for holding office, etc., and exercising certain civil rights.*]—"If any person hereafter (*i.e., after 4th July*, 1870) convicted of *treason or felony, for which he shall be sentenced to death, or penal servitude, or any term of imprisonment with hard labour, or exceeding twelve months*, shall at the time of such conviction hold any military or naval office, or any civil office under the crown or other public employment, or any ecclesiastical benefice, or any place, office, or emolument in any university, college, or other corporation, or be entitled to any pension or superannuation allowance, payable by the public, or out of any public fund, such office, benefice, employment, or place, shall forthwith become vacant, and such pension or superannuation allowance or emolument shall forthwith determine and cease to be payable, unless such person shall receive a free pardon from his Majesty, within two months after such conviction, or before the filling up of such office, benefice, employment or place, if given at a later period; and such person shall become and (until he shall have suffered the punishment to which he had been sentenced, or such other punishment as by competent authority may be substituted for the same, or shall receive a free pardon from his Majesty) shall continue thenceforth incapable of holding any military or naval office, or any civil office under the crown, or other public employment, or any ecclesiastical benefice, or of being elected or sitting or voting as a member of either house of parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise whatever within England, Wales, or Ireland." [*Many other disqualifications for particular offices are created by conviction of crime. See Official Index to Statutes* (ed. 1904), *tit.* "*Disqualification.*" *As to what is* "*crime,*" *see Conybeare* v. *London School Board* [1891] 1 *Q. B.* 118.]

1 *Edw.* 7, *c.* 20 (*Youthful Offenders Act*, 1901), *s.* 1.]—"Where a child or young person having been convicted of felony is discharged in accordance with *s.* 16 of the *Summary Jurisdiction Act*, 1879, or the *Probation of First Offenders Act*, 1887 (*ante*, p. 243), or is punished with whipping only, the conviction shall not be regarded as a conviction of felony for the purposes of *s.* 15 of the *Industrial Schools Act*, 1866 (*ante*, p. 241), or of any disqualification attaching to felony." [*By* "*young person*" *is meant a person who in the opinion of the court before whom he is brought is of the age of* 12 *years and under the age of* 16 *years* (42 & 43 *Vict. c.* 49, *s.* 49: 1 *Edw.* 7, *c.* 20, *s.* 11). *As to the meaning of* "*child,*" *see ante*, p. 241].

9 *G.* 4, *c.* 32, *s.* 3. *Effect of endurance of punishment for felony.*]—"And whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged: Be it therefore enacted that where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured shall have the like effect and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted. Provided always, that nothing herein contained nor the enduring of such punishment shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony." [*See ante*, p. 178, and *Hay* v. *Tower Division Justices*, 24 *Q. B. D.* 561.]

CHAPTER VI.

COSTS AND REWARDS.

SECT. 1. *Costs payable out of public funds*, p. 246.
2. *Costs payable by the prosecutor*, p. 259.
3. *Costs payable by the defendant*, p. 259.
4. *Rewards*, p. 261.

SECT. 1.

Costs payable out of Public Funds.

AT common law the crown neither pays nor receives costs: and all the provisions as to payment of costs in criminal cases rest upon statute. 25 *G.* 2, *c.* 36, *and* 27 *G.* 2, *c.* 3, authorized payment out of the county rates of the costs of prosecution for felony in the event of conviction. 18 *G.* 3, *c.* 19, extended the power to award costs to cases of acquittal where the prosecution was properly instituted, and to witnesses attending on recognizance or *subpœna*, and *see* 58 *G.* 3, *c.* 70. These Acts were repealed and consolidated by 7 *G.* 4, *c.* 64 (*ss.* 22–25, on which, as subsequently amended, the law as to costs in criminal cases now rests. For the history of this subject, *see Parl. Pap.* 1903, *c.* 1650, 1651.

Costs of prosecution when allowable.]—Courts competent to try indictments may order payment to the prosecutor of the costs and expenses of preferring an indictment, and to the prosecutor and to the witnesses for the prosecution if they appear on recognizance or *subpœna* in the case of the following offences:—

1. Any felony (*except treason felony:* 11 *&* 12 *Vict. c.* 12, *s.* 10), and subject in the case of coinage offences to the provisions of 24 *&* 25 *Vict. c.* 99, *s.* 42, *infra*, p. 248.

And the following misdemeanors (*except where otherwise stated the misdemeanor is named in* 7 *G.* 4, *c.* 64, *s.* 23):—

2. "Assault with intent to commit felony."
3. "Attempt to commit felony."
4. "Conspiring to commit felony" (14 *&* 15 *Vict. c.* 55, *s.* 2).
5. "Conspiring to charge any person with any felony, or to indict any person of any felony" (*Id.*).
6. "Riot."
7. "Assault upon a peace officer [or upon a workhouse officer or relieving officer, 13 *&* 14 *Vict. c.* 101, *s.* 9] in the execution of his duty, or upon persons acting in aid of such officer."
8. "Neglect or breach of duty as a peace officer" (and *see* 5 *G.* 4, *c.* 83, *s.* 12).
9. "Assault committed in pursuance of any conspiracy to raise the rate of wages" (*see* 24 *&* 25 *Vict. c.* 100, *s.* 41 (*rep.*); 34 *&* 35 *Vict. c.* 32, *s.* 7 (*rep.*), and 38 *&* 39 *Vict. c.* 86).

10. "Any misdemeanor for receiving any stolen property knowing the same to have been stolen" (*see now* 24 & 25 *Vict. c.* 96, *s.* 77).

11. "Knowingly and designedly obtaining any property by false pretences" (*see* 24 & 25 *Vict. c.* 96, *ss.* 88, 117), including winning money by cheating at cards (8 & 9 *Vict. c.* 109, *s.* 17: *R. v. Gardner*, 5 *Cox*, 140).

12. "Wilful and indecent exposure of the person" (*cf.* 5 *G.* 4, *c.* 83, *s.* 4, and *R. v. John*, 7 *L. J.* (*M. C.*) 92; *S. C. Anon*, 8 *A. & E.* 589) and "indecent assault" (48 & 49 *Vict. c.* 69, *s.* 18).

13. "Wilful and corrupt perjury and subornation of perjury."

14. "Unlawfully taking or causing to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her" (14 & 15 *Vict. c.* 55, *s.* 2; 24 & 25 *Vict. c.* 100, *ss.* 55, 77).

And indictable misdemeanors against the following Acts:—

15. The *Prevention of Offences Act*, 1851 (14 & 15 *Vict. c.* 19, *s.* 14).

16. The *Criminal Law Consolidation Acts of* 1861, 24 & 25 *Vict. c.* 94, *s.* 8 (*Accessories and abettors*), 24 & 25 *Vict. c.* 96, *s.* 121 (*Larceny*), including it would seem misdemeanors under Acts to be read as one with the *Larceny Act*, viz., 31 & 32 *Vict. c.* 116; 38 & 39 *Vict. c.* 24, *s.* 3; 59 & 60 *Vict. c.* 52; 1 *Edw.* 7, *c.* 10; 24 & 25 *Vict. c.* 97, *s.* 77 (*Malicious Damage*), *c.* 98, *s.* 54 (*forgery*), *c.* 99, *s.* 42 (*Coinage offences*): in case a conviction takes place, *see infra*, p. 248); *c.* 100, *s.* 77 (*Offences against the person*) including common assault: *R. v. Waldron*, 18 *Cox*, 373.

17. The *Debtors Act*, 1869, as amended by the *Bankruptcy Acts*, 1883 (46 & 47 *Vict. c.* 52, *s.* 163), and 1890 (53 & 54 *Vict. c.* 71, *s.* 26), where a prosecution has been ordered by a court having bankruptcy jurisdiction, *see* 32 & 33 *Vict. c.* 62, *s.* 17.

18. Forgery, etc., under *s.* 17 of the *Sea Fisheries Act*, 1883, if prosecuted on indictment (46 & 47 *Vict. c.* 22, *s.* 17).

19. The *Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69, *s.* 18).

20. The *Official Secrets Act*, 1889 (52 & 53 *Vict. c.* 52, *s.* 4).

21. The *Public Bodies Corrupt Practices Act*, 1889 (52 & 53 *Vict. c.* 69, *s.* 5).

22. The *Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15), *s.* 20 (1).

23. The *Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60, *s.* 700).

24. Corrupt practices (including personation) at or in connexion with a parliamentary or municipal election, including elections under the *Local Government Acts of* 1888 & 1894: 17 & 18 *Vict. c.* 102, *ss.* 10, 13: 35 & 36 *Vict. c.* 33, *s.* 24: 46 & 47 *Vict. c.* 51, *s.* 53, *sub-s.* 1, *s.* 57, *sub-s.* 2: 47 & 48 *Vict. c.* 70, *s.* 30: 51 & 52 *Vict. c.* 41, *s.* 75: 56 & 57 *Vict. c.* 73, *s.* 48: 62 & 63 *Vict. c.* 14. 35 & 36 *Vict. c.* 33, *s.* 24, is *temp.* but continued annually by the *Expiring Laws Continuance Act*. The costs are not to be allowed on a private prosecution unless the prosecutor has entered into a recognizance in the form prescribed in 17 & 18 *Vict. c.* 102, *s.* 13.

25. Offences summarily punishable with more than three months' imprisonment which are tried on indictment at the election of the accused made under 42 & 43 *Vict. c.* 49, *s.* 17 (1) (*a*).

26. Offences tried on indictment under the *Inebriates Act*, 1898, *s.* 2 (61 & 62 *Vict. c.* 60); *see Inebriates Act*, 1899 (62 & 63 *Vict. c.* 35), *s.* 1.

(*a*) It is submitted that this enactment does not apply to cases where the defendant elects under the provisions of another Act to be tried on indictment, *eg.*, the *Merchandise Marks Act*, 1887 (50 & 51 *Vict. c.* 28), as *s.* 14 of that Act makes specific provision with costs; and the *Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *s.* 9 of which is silent as to costs.

Discretion of the Court.]—The power to award costs in all these cases is discretionary, and in frivolous prosecutions the court can disallow costs even where there has been a committal. *R.* v. *Powell*, 1 *C. & P.* 96: *R.* v. *Rawson*, 2 *B. & C.* 598: 4 *D. & R.* 124. The discretion is, however, subject to the following limitations. Where a prosecution for perjury is ordered by a court or officer competent to make the order, the costs of the prosecution are to be allowed by the court of trial, unless the latter specially otherwise direct. 14 & 15 *Vict. c.* 100, *s.* 19. In prosecutions under the *Debtors Act* (*ante*, *No.* 17), under the order of a court having bankruptcy jurisdiction, the costs seem to be allowable as of right on production of the order for prosecution. 32 & 33 *Vict. c.* 62, *s.* 17. Where a prosecution for any offence under the *Coinage Offence Act*, 1861, is conducted under the direction of the Solicitor to the Treasury, the court *must* allow the costs. On a private prosecution for such offence the court may not allow the costs unless a conviction takes place. 24 & 25 *Vict. c.* 99, *s.* 42. On prosecution for felony it has been held that costs may be allowed, though neither prosecutor nor his witnesses appear on *subpœna* or recognizance. *R.* v. *Butterwick*, 2 *M. & Rob.* 196. In misdemeanors it would seem that the prosecutor will not get his costs as a prosecutor unless bound over to prosecute or under *subpœnâ*. *See R.* v. *Jeyes*, 3 *A. & E.* 416: *R.* v. *Sheering*, 7 *C. & P.* 440. The costs may be allowed at assizes where the prosecutor has been bound over by the quarter sessions to prosecute at the assizes. *R.* v. *Paine*, 7 *C. & P.* 135. As to indictments tried in the King's Bench Division or Central Criminal Court, *see post*, p. 257, 258.

Costs may be awarded when the prosecutor or witnesses have *bonâ fide* attended on recognizance or *subpœna* where no bill is preferred; 7 *G.* 4, *c.* 64, *ss.* 22, 23; and where the accused has been by mistake discharged on proclamation; *R.* v. *Robey*, 5 *C. & P.* 552; and where the recognizances are to prosecute for felony, and then on the advice of counsel the bill is sent up for a misdemeanor on which costs cannot be allowed. *R.* v. *Hanson*, 2 *C. & K.* 912.

As a general rule the costs are not allowed until after the trial has actually taken place; but this rule, which, if strictly carried out, would often work grievous hardship, is by no means inflexibly followed. In *R.* v. *Hunter*, 3 *C. & P.* 591 and *Re Young*, 2 *Cox*, 280, interlocutory orders for costs were refused where the trial was postponed. In *R.* v. *Flannery* [1832] 1 *Lewin*, 133, *Alderson*, B., allowed the costs where a trial was postponed for non-appearance by the defendant who was not under recognizance, and in *R.* v. *Bolam*, *Roscoe*, *Cr. Ev.* (12th ed.), 24, the same judge made a similar order where a trial for murder was postponed on the application of the defendant. In *R.* v. *Dwerryhouse*, 2 *Cox*, 446, and *R.* v. *Dooley* [1871] 12 *Cox*, 623, *n.*, similar orders were made where the defendant was in an asylum and hopelessly insane; and in *R.* v. *Wilson*, 12 *Cox*, 622, *Lush*, J. allowed the costs up to postponement where it was due to the illness of an essential witness for the crown.

It sometimes happens at the trial that two distinct prosecutors appear, each having instructed and appearing by separate counsel, and each claiming as against the other to conduct the prosecution and to be entitled to the costs, one of such prosecutors being a police officer or other official person bound over to prosecute by the committing magistrate, and the other of such prosecutors being the person injured by the alleged crime. *See R.* v. *Yates*, 7 *Cox*, 361, and *R.* v. *Bushell*, 16 *Cox*, 367.

What costs and expenses may be allowed.]—The costs allowable are: (1) The costs and expenses which the prosecutor incurs in preferring the indictment, including the costs of solicitor and counsel, *post*, p. 254.

(2) A sum reasonable and sufficient in the opinion of the court to reimburse the prosecutor and witnesses for the expenses severally incurred by them in attending before the examining magistrate and the grand jury, and in otherwise carrying on the prosecution, and to compensate them for their trouble and loss of time therein. 7 *G.* 4, *c.* 64, *ss.* 22, 23. These do not include costs of witnesses attending before a coroner on an inquiry previous to the indictment, nor of an autopsy directed by the coroner. *R.* v. *Rees*, 5 *C. & P.* 302: *R.* v. *Taylor*, *Id.* 301; nor the costs of a gaoler in taking a prisoner to the county assizes. *R.* v. *Waters*, 8 *Cox*, 350; nor the costs of obtaining the arrest of a prisoner who flies from the realm. *R.* v. *Barrett*, 6 *Cox*, 78; but have been held to include the cost of getting up evidence. *R.* v. *Lewen*, 2 *Lewin*, 161. And the costs of arguing a special case may be allowed, *see post*, p. 278.

Costs where no committal for trial.]—Even where on a prosecution for an offence mentioned in 7 *G.* 4, *c.* 64, *ss.* 22, 23, or 14 *&* 15 *Vict. c.* 55, *s.* 2 (*see ante*, pp. 246, 247), the magistrate does not commit for trial, he can, in a case of a charge of felony, *bonâ fide* made on reasonable and probable cause, or on a charge of misdemeanor *bonâ fide* made, certify for the expenses of and trouble and loss of time of the witnesses called before him. The certificate is sent to the clerk of the peace, and a court of quarter sessions may, on the report of the proper officer that the certificate is correct and in accordance with the scales printed, *infra*, may order payment of the certified amount by the treasurer of the county or borough. 29 *&* 30 *Vict. c.* 52, *temp.*, continued by 4 *Edw.* 7, *c.* 29.

Indictable offences summarily dealt with.]—Where indictable offences are punishable summarily orders for payment of costs may be made under *s.* 28 of the *Summary Jurisdiction Act*, 1879, which has been extended by the *Inebriates Act*, 1899 (62 *&* 63 *Vict. c.* 35, *s.* 1), to prosecutions under *s.* 2 of the *Inebriates Act*, 1898 (61 *&* 62 *Vict. c.* 60).

Scale of costs.]—A secretary of state may make and alter regulations as to the rates or scales of payment of all or any of the costs, expenses and compensations already mentioned, and as to the rates or scales according to which the examining magistrate may certify for the costs, etc., of prosecutors and witnesses at the preliminary inquiry, and the forms of such certificates and the details to be inserted therein of expenses, trouble, or loss of time to which the certificates relate. The regulations so made bind all courts and persons. 14 *&* 15 *Vict. c.* 55, *s.* 5.

The regulations at present in force are as follows:—

REGULATIONS MADE BY THE SECRETARY OF STATE, DATED JUNE 14, 1904, GOVERNING THE ALLOWANCES PAYABLE TO PROSECUTORS AND WITNESSES IN CRIMINAL PROSECUTIONS. (STAT. R. & O. [1904] No. 1219, LEGAL SERIES No. 9).

In pursuance of the powers vested in me by section 5 of the *Criminal Justice Administration Act*, 1851 (14 *&* 15 *Vict. c.* 55), I hereby make the following regulations:— (*a*)

(*a*) These regulations supersede all the former regulations, viz., those of March 6, 1857, Feb. 9, 1858, Feb. 14, 1868, Feb. 27, 1895, Dec. 21, 1895, Sept. 7, 1896, April, 1900, and Nov. 12, 1903, of which all but the last two were printed in the 22nd edition of this work, at pp. 224-233.

1. *Witnesses giving Professional Evidence.*

There may be allowed to practising members of the legal and medical professions, for attending to give professional evidence, but not otherwise, allowance not exceeding the sums stated in the following scale:—

For attending to give evidence in the town or place where the witness resides or practices—

If the witness attends to give evidence in one case only, not more than one guinea per diem;

If the witness gives evidence on the same day in two or more separate and distinct cases, not more than two guineas;

For attending to give evidence elsewhere than in any town or place where the witness resides or practices, whether in one or more cases, not more than two guineas per diem.

In this Regulation "town" means municipal borough or urban district; and "place" means within a radius of three miles from the court at which the witness attends to give evidence.

No allowance may be given under this Regulation to the solicitor for the prosecution, except that, if such solicitor gives professional evidence which, in the opinion of the court, was necessary and saved the attendance of another witness, a fee of 6*s*. 8*d*. may be allowed.

2. *Expert Witnesses and Interpreters.*

There may be allowed (a) to expert witnesses such allowances for attending to give expert evidence as the court may consider reasonable, including, where necessary, an allowance for qualifying to give evidence, and (b) to persons employed as interpreters, such allowances as the court may consider reasonable.

3. *Police Officers.*

There may be allowed to police officers:—

When attending as prosecutors or witnesses at courts situate within the area of their own police authority, no allowance other than travelling allowances as provided in Regulation 8.

When attending as prosecutors or witnesses at courts situate outside the area of their own police authority—

(*a*) In the case of constables and sergeants, a sum not exceeding—

For the day	4*s*.
For the night	4*s*.

(*b*) In the case of inspectors, a sum not exceeding—

For the day	5*s*.
For the night	5*s*.

(*c*) In the case of superintendents and chief constables, a sum not exceeding—

For the day	7*s*.
For the night	5*s*.

For the purposes of this Regulation, any court at which cases arising in the area of any police authority or part thereof are ordinarily heard or tried, shall be deemed, so far as regards such cases, to be situate within that area.

4. *Prison Warders.*

There may be allowed to prison warders attending as prosecutors or witnesses or in charge of a prisoner produced to give evidence, a sum equal to that allowed them by the Regulations of the Prison Department, viz.:—

	Day and night.	Day only.	
Chief warders . .	8*s.*	Breakfast . . 1*s.* Dinner . 2*s.* 6*d.* Supper . . 1*s.*	4*s.* 6*d.*
Principal warders .	6*s.* 6*d.*	Same as above.	
Warders and assistant warders . .	6*s.*	Breakfast . . 1*s.* Dinner . . 2*s.* Supper . . 1*s.*	4*s.*

For a prisoner so produced in the custody of warders, such sum for subsistence as the warders have been authorized to spend, and has been actually expended, on his behalf.

5. *Ordinary Witnesses.*

There may be allowed to witnesses, other than those hereinbefore mentioned, allowances not exceeding 7*s.* for the day and 5*s.* for the night: Provided that the day allowance to the under-mentioned classes of witnesses, *when they are not necessarily detained from home for a night*, shall not, except for special reasons allowed by the court, exceed the following rates:—

(1) For children the allowance shall not exceed 1*s.* per diem;
(2) For persons of the pauper or vagrant class the allowance shall not exceed 1*s.* per diem;
(3) For other persons *who do not lose wages, earnings, or income by attendance*, the allowance shall not exceed 2*s.* 6*d.* per diem;
(4) For persons in the service of an employer *who lose wages by attendance*, the allowance shall not exceed the following rates, except on the production of a certificate from the employer showing that the wages so lost are in excess of such rates:—

	s.	*d.*	
For agricultural labourers, unskilled labourers, and others similarly employed	3	6	per diem.
For artisans, mechanics, and others similarly employed	5	0	„
For clerks, shop assistants, and others similarly employed	5	0	„

Provided also that no night allowance, within the above-mentioned limit of 5*s.* shall exceed the expense reasonably incurred by the witness.

6. *Seamen.*

Where seamen have been detained on shore for the purpose of giving evidence in a criminal prosecution, the amount actually and reasonably incurred for their maintenance during their detention may be allowed in addition to any allowances made under the foregoing rule.

7. *General Regulation.*

No full day allowance under Regulations 1, 3, and 5 shall be paid unless the witness is necessarily detained away from his home, or place of business or employment, for at least four hours for the purpose of giving evidence.

If the time during which the witness is necessarily detained away from his home, or place of business or employment, be less than four hours, he shall receive not more than one-half of the allowance which he would have received had he been detained for the full day:

Provided that this regulation shall not apply (1) where the full day allowance is not more than 1*s.*; and (2) where the court is satisfied that a witness, though absent for less than four hours, necessarily loses, in consequence of his attendance, his whole day's wages.

No night allowance under Regulations 3, 4, and 5 shall be paid unless the witness in order to give evidence is necessarily detained away from home for the night.

There may be allowed to any prosecutor or other person who, in the opinion of the court, necessarily attends for the purpose of the prosecution otherwise than as a witness, the same allowance, including travelling allowance as to an ordinary witness.

8. *Travelling Allowances.*

For attending court from a distance of over two miles there may be allowed:—

(1) To witnesses travelling by railway or other public conveyance, the fare actually paid. Railway fares, except for special reasons allowed by the court, shall be 3rd class; and if return tickets are available, only return rates shall be allowed. In the case of police witnesses, the reduced rates under the *Cheap Trains Act*, 1883, shall not be exceeded, except where the single fare is less than 1*s.*, or for special reasons allowed by the court.

(2) Where no railway or other public conveyance is available, and one or more witnesses necessarily travel by a hired vehicle, the sum actually paid for the hire of such vehicle, not exceeding 1*s.* a mile each way: provided that, where two or more witnesses attend from the same place, the total allowance shall not exceed 1*s.* a mile each way, unless the court is satisfied that it was reasonably necessary to hire more than one vehicle.

(3) To each witness travelling on foot or by a private conveyance, where no railway or other public conveyance is available, a sum not to exceed 2*d.* a mile each way.

Allowances made under (2) and (3) shall be made separately as mileage.

For the conveyance of witnesses suffering from serious illness, or for the carriage of heavy exhibits, sums in excess of the above rates may be allowed if the court is satisfied that the expense incurred was reasonably necessary.

Warders in charge of prisoners produced to give evidence may be allowed the cost of travelling by such means of conveyance as the governor of the prison may have directed.

9. *Form of Certificate.*

The form of certificate in Appendix A hereto shall be used when a magistrate or magistrates acting under the *Indictable Offences Act*, 1848 (11 & 12 *Vict. c.* 42), grants a certificate of the allowances payable to

prosecutors, witnesses, and other persons appearing before them. The profession, trade, or occupation, of each person, or the fact that he is without employment or occupation, must be stated on the form.

The form in Appendix B may be used when a magistrate grants a certificate under sect. 28 of the *Summary Jurisdiction Act*, 1879 (42 & 43 *Vict.* c. 49), for the costs of prosecution of an indictable offence tried summarily.

10. *Date of Commencement.*

These regulations shall take effect on and after the 1st July, 1904.

The Order of the 12th November, 1903 (*ante*, p. 249, *n.*), is hereby revoked.

Given under my hand at Whitehall this 14th day of June, 1904.

A. Akers-Douglas,
One of His Majesty's Principal Secretaries of State.

Appendix A.

CERTIFICATE OF COSTS OF PROSECUTION.

In the [*County of* —— *Petty Sessional Division of* ——].

A.B. —— *having been examined before* —— *on a charge of* ——; *it is certified that the undermentioned persons are, for their expense, trouble, and loss of time in connection with the said charge, entitled to compensation as follows:—*

	£	*s.*	*d.*
To C.D. —— [state profession, trade, or occupation], *the prosecutor, residing at* ——, *for his attendance here* —— *half day* —— *day and* —— *night*			
For travelling: mileage —— *miles at* —— *per mile* ——; *fares* .			
To the same for fees payable by him to the Justice's Clerk, as per authorized table			
To E.F. —— [state profession, trade, or occupation], *a witness, residing at* ——, *for his attendance here* —— *half day* —— *night*			
For travelling: mileage —— *miles at* —— *per mile* ——; *fares* .			

Dated this —— *day of* ——, *one thousand nine hundred and* ——.

J.P.
Justice of the Peace for the [*County*] *aforesaid.*

Appendix B. (*a*)

CERTIFICATE OF COSTS OF PROSECUTION OF INDICTABLE OFFENCE DEALT WITH SUMMARILY.

In the [*County of* —— *Petty Sessional Division of* ——].

Before the Court of Summary Jurisdiction sitting at ——.

A.B. [*an adult, young person, or child*] *having been charged for that he did* [state substance of charge], *and the above court, having, in pursuance of its statutory jurisdiction, dealt with the case summarily, on the* —— *day of* ——,

(*a*) This is the form prescribed in the *Summary Jurisdiction Rules*, 1886, with the variations rendered necessary by the present regulations.

and convicted the said A.B. [*or dismissed the said charge*]; *it is hereby certified that the under-mentioned persons are, for their expenses, trouble, and loss of time in connection with the said charge, entitled to compensation as follows:—*

	£	s.	d.
To C.D. —— [state profession, trade, or occupation], *the prosecutor, residing at* ——, *for his attendance here* —— *half day,* —— *day, and* —— *night*			
For travelling: mileage —— *miles at* —— *per mile* ——; *fares.*			
To the same for fees payable to the Justices' Clerk . . .			
To the same for fees payable to the Clerk of the Peace . . .			
To E.F. —— [state profession, trade, or occupation], *a witness residing at* ——, *for his attendance here* —— *half day* —— *day, and* —— *night*			
For travelling: mileage —— *miles at* —— *per mile* ——; *fares.*			

Dated this —— *day of* ——, *one thousand nine hundred and* ——.

J.P.

Justice of the Peace for the [*County*] *aforesaid.*

Counsel and Solicitors.]—The regulations above printed do not make any provision for the fees to be paid to counsel or solicitors, and these fees stand in a somewhat anomalous position. Under *s.* 26 of 7 *G.* 4, *c.* 64 county and borough quarter sessions had power to make and alter regulations as to the rate of costs. That section was repealed by 14 *&* 15 *Vict. c.* 55, *s.* 4, with a provision that the regulations in force on August 1, 1851, should remain in force until revoked, or until regulations in relation to the matter thereof were made by the secretary of state. The secretary of state has never made any regulations as to the fees of solicitors and counsel, and county and borough justices have from time to time varied their rules as to such fees. A return of the practice of county sessions is printed in *Parl. Pap.*, 1903, *c.* 1651, at p. 154. As to borough sessions and assizes, no returns are available. The result is that counsels' and solicitors' fees are still regulated by scales framed in the different jurisdictions under the Act of 1826 (*Parl. Pap.*, 1903, *c.* 1650, p. 8, *c.* 1651, p. 154. Under the system in force before the *Local Government Act*, 1888 (*post*, p. 256), directions were issued by the Treasury in 1869 in the form of Rules, which indicated the view of the Treasury as to the amount of the allowances in cases not covered by the *Home Office Regulations* then in force. The Treasury directions of 1869 are still used as a guide in those counties and boroughs where a definite scale of county allowance has not been settled. In the matter of allowances to counsel and solicitors the taxing-officer exercises his discretion subject to the direction of the court. *See R.* v. *Jones*, 63 *J. P.* 139, and *Parl. Pap.*, 1903, *c.* 1651, p. 154.

Costs of the defence, witnesses.]—In all cases of felony and misdemeanor the court of trial may allow the costs of witnesses for the defence who have been examined at the preliminary inquiry and bound over to appear at the court. This power arises under *s.* 5 of the *Criminal Law Amendment Act*, 1867 (30 *&* 31 *Vict. c.* 35), which provides that "The court before which any accused person shall be prosecuted or tried, or for trial before which he may be committed or bailed to appear for any felony or misdemeanor, is hereby authorized and empowered, in its discretion at the request of any person who shall appear before such court on recognizance to give evidence on behalf of the person accused, to order payment unto such witness so appearing such sum of money as to the court shall seem

reasonable and sufficient to compensate such witness for the expenses, trouble, and loss of time he shall have incurred or sustained in attending before the examining magistrate, and at or before such court; and the amount of such expenses of attending before the examining magistrate, and compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate, granted before the attendance in court (*ante*, p. 253); and the amount of all other expenses and compensation shall be ascertained by the proper officer of the court, who shall, upon receipt of the sum of sixpence for each witness" (*not payable where the officer is paid by salary*, 32 & 33 *Vict.* c. 89, *s.* 10), "make out and deliver to the person entitled thereto an order for such expenses and compensation, together with the said fee of sixpence, upon such and the same treasurers and officers as would now by law be liable to payment of an order for the expenses of the prosecutor or witnesses against such accused person; and if the accusation be of such kind that the court shall have no power to order the expenses of the prosecutor, then upon the treasurer or other officer in the capacity of a treasurer of the county, riding, division, city, borough, or place where the offence of such accused person may be alleged to have been committed, which treasurer or other officer is hereby required to pay the same orders upon sight thereof, and shall be allowed the same in his accounts: provided always, that in no case shall any such allowances or compensation exceed the amount now by law permitted to be made to prosecutors and witnesses for the prosecution; and provided always, that such allowances and compensation shall be allowed and paid as part of the expenses of the prosecution."

Poor prisoners.]—Where a certificate for legal aid has been obtained by a poor prisoner under *s.* 1 (1) of the *Poor Prisoners' Defence Act*, 1903 (3 *Edw.* 7, *c.* 38), "The expenses of the defence, including the cost of a copy of the depositions, the fees of solicitor and counsel, and the expenses of any witnesses, shall be allowed and paid in the same manner as the expenses of a prosecutor in cases of an indictment for felony, subject nevertheless to any Rules under this Act, and to any regulations as to rates or scales of payment which may be made by one of his Majesty's principal secretaries of state."

For the Rules, *see ante*, p. 249.

The rates and scales of payment in force are as follows:—

REGULATIONS OF THE SECRETARY OF STATE, DATED DECEMBER 30, 1903, AS TO THE ALLOWANCES WHICH MAY BE MADE UNDER SECTION 1 (2) OF THE POOR PRISONERS' DEFENCE ACT, 1903 (STATUTORY RULES AND ORDERS, 1903, No. 1150).

In pursuance of section 1 (2) of the *Poor Prisoners' Defence Act*, 1903 (3 *Edw.* 7, *c.* 38), I hereby make the following regulations as to the rates and scales of payment which may be made for the expenses of the defence:—

1. There may be allowed to the solicitor a fee not exceeding £2 2*s.* 0*d.*, provided that the presiding judge, after the conclusion of the trial, may, if he think fit, certify that the case was one of exceptional length or difficulty, and thereupon the fee may be increased to such sum as he may direct, but not in any case exceed £5.

In addition to such fee the solicitor may be allowed travelling expenses actually and necessarily incurred by himself and his clerk on the scale applicable to the travelling expenses of ordinary witnesses for a prosecution.

2. There may be allowed to counsel a fee of £1 3*s.* 6*d.*; provided that the presiding judge, after the conclusion of the trial, may, if he think fit, certify that the case was one of exceptional length or difficulty, and thereupon the fee may be increased to such sum as he may direct, but not in any case exceeding £3 5*s.* 6*d.*

3. There may be allowed to the clerk to the justices or other person by whom a copy of the depositions is supplied to the prisoner's solicitors payment for the same at the rate of twopence per folio of 90 words.

4. There may be allowed to witnesses giving professional evidence and to expert witnesses the same expenses as might be allowed to witnesses for a prosecution (*ante*, p. 250), provided that the said sum shall not in any case exceed one guinea a day, except in pursuance of a special order made by the presiding judge.

5. There may be allowed to other witnesses the same expenses as may be allowed to witnesses for a prosecution (*ante*, p. 251).

6. The travelling expenses of witnesses may be allowed as in the case of a prosecution (*ante*, p. 252).

7. In these regulations the term "presiding judge" includes a recorder and a chairman of quarter sessions or their deputies.

Given under my hand at Whitehall, this 30th day of December, 1903.

A. Akers Douglas,
One of his Majesty's Principal
Secretaries of State.

Local taxation grant.]—For some time prior to the passing of the *Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), a parliamentary grant was made in aid of the repayment of the costs in those criminal cases falling within 7 *G.* 4, *c.* 64, and the other Acts already mentioned. *S.* 24 of the Act of 1888 substituted for a grant or aid a system of local taxation grants under which the Treasury has no direct concern in the amounts allowed at assizes and sessions, except in the case of offences within the Admiralty jurisdiction. *See Parl. Pap.* 1903, *c.* 1650, *pp. vi.–viii.*

Taxation and payment.]—Where the court orders the payment of costs the amount must be ascertained by the proper officer of the court according to the Home Office regulations so far as applicable, and to the regulations or practice of the court. The costs of the preliminary inquiry are certified by the examining magistrate, but the certificate is not conclusive on the taxing officer at assizes or sessions. 14 & 15 *Vict. c.* 55, *s.* 6. When the amount is ascertained an order for payment is forthwith made out and delivered by the proper officer to the prosecutor or other person in whose favour it is made, on payment of a fee of one shilling for the prosecutor, and sixpence for each other person. 7 *G.* 4, *c.* 64, *s.* 24. The extra cost of subpœnaing an infant will be allowed, as his recognizances cannot be estreated. *R.* v. *Ernest Smith*, 17 *Cox*, 601, *Day*, J. The order is made on the treasurer of the county, riding, or division in which the offence was committed, or is supposed to have been committed, and the treasurer must pay upon sight, and is allowed the amount in his account. 7 *G.* 4, *c.* 64, *s.* 24. Where a borough does not contribute to the county rate, the costs of offences committed, or supposed to have been committed, in the town, are payable out of the borough fund by the borough treasurer. 7 *G.* 4, *c.* 64, *s.* 25. This power is irrespective of the place of trial. *See R.* v. *Brown*, 19 *Cox*, 33. In that case it was held where the offence is actually committed in one jurisdiction and the trial takes place in another jurisdiction under

7 *G.* 4, *c.* 64, *s.* 12 (*ante*, p. 43), the court may order payment of the costs by the treasurer of the county in which the offence was in fact committed; and an order was made on a county treasurer to pay the costs of a trial for murder in which the felonious act was done in a borough but the death took place in the county. In *R.* v. *McKeever* (114 *L. T. Jo.* 318; 37 *L. J. Newsp.* 621), the defendant was accused of murdering Mr. Kensit. The deceased was assassinated in Birkenhead and died in Liverpool. A controversy arose whether the borough or the city was liable for the costs of prosecution, but the matter, on the suggestion of *Jelf*, J., was settled by each district paying half. And *see R.* v. *Treasurer of Oswestry*, 12 *Q. B.* 239. The entire order of the court must be served on the treasurer, including all details or particulars. *R.* v. *Jones*, 2 *Mood. C. C.* 171; 9 *C. & P.* 401. If the treasurer refuses to pay, the remedy seems to be by indictment, and not by *mandamus*. *R.* v. *Jeyes*, 3 *A. & E.* 416: *R.* v. *Bristow*, 6 *T. R.* 168: 3 *R. R.* 144: *R.* v. *Johnson*, 4 *M. & Sel.* 515 (and *see ante*, p. 5). But *see R.* v. *Treasurer of Oswestry*, 12 *Q. B.* 239; 17 *L. J.* (*Q. B.*) 223: *R.* v. *Treasurer of Exeter*, 5 *Man. & Ry.* 167. The allowances are made to the Director of Public Prosecutions in Treasury and Mint cases, and to the Post Office Solicitor in Post Office cases falling within the lists given *ante*, p. 246.

The incidence of the costs has been somewhat changed by the *Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), which has merged (*s.* 88) in the administrative county most of the liberties and franchises formerly existing (*see* 7 *G.* 4, *c.* 64, *s.* 25), and has made special provisions as to boroughs. The result is that in each administrative county the costs are paid out of the county fund by the treasurer, and that the treasurer of the county, or some person on his behalf, must attend at the assizes and quarter sessions to pay the sums ordered by the court to be paid. 51 & 52 *Vict. c.* 41, *s.* 67. In the case of quarter sessions boroughs having a population of 10,000 (excepting county boroughs, but including counties of cities), the costs of assizes and sessions, including the above costs and allowances, and the costs of rewards ordered to be paid by the court (*see post*, p. 261), are paid by the county treasurer, and the borough contributes to the county rate. 45 & 46 *Vict. c.* 50, *s.* 169; 51 & 52 *Vict. c.* 41, *s.* 35 (5) (8): *Re Kent County Council* [1891] 1 *Q. B.* 389; 60 *L. J.* (*Q. B.*) 314. In quarter sessions boroughs having a less population than 10,000, the costs of quarter sessions fall on the borough fund. 45 & 46 *Vict. c.* 50, *s.* 169; 51 & 52 *Vict. c.* 41, *s.* 38: *Mayor, etc., of Thetford* v. *Norfolk County Council* [1898] 2 *Q. B.* 468. These costs, if allowed at assizes in respect of offences committed, or supposed to have been committed, in county boroughs, are paid by the treasurer of the county in which the borough lies, unless separate assizes are held for the borough (*see ante*, p. 45); but the county borough must contribute its proper share to the county assizes. 51 & 52 *Vict. c.* 41, *s.* 32 (3) (*a*). The costs at quarter sessions are paid out of the borough fund (45 & 46 *Vict. c.* 50, *s.* 169) if the county borough has a court of quarter sessions; otherwise by the county treasurer, subject to contribution by the county borough. 51 & 52 *Vict. c.* 41, *s.* 32 (1) (*b*).

At the Central Criminal Court the costs of prosecutors and witnesses are paid under order of two commissioners of the court by the treasurer of the county in which the offence would have been tried but for the *Central Criminal Court Act*, 1834, and the treasurer or some known agent must attend the sessions to pay the orders. 4 & 5 *Will.* 4, *c.* 36, *s.* 12.

Costs of removed indictments.]—7 *G.* 4, *c.* 64 and 14 & 15 *Vict. c.* 55 do not apply to indictments removed by *certiorari* into the *K. B. D.*

R. v. *Johnson*, 1 *Mood. C. C.* 173: *R.* v. *Richards*, 8 *B. & C.* 420; 2 *Man. & Ry.* 405: *R.* v. *Treasurer of Exeter*, 5 *Man. & Ry.* 167: *R.* v. *Kelsey*, 2 *Dowl.* 481: *R.* v. *Oates*, 1 *Mood. C. C.* 175, *cit.* But there is some ground for saying that these authorities only apply to cases where the prosecutor has himself removed the indictment by *certiorari*. See the report of *R.* v. *Richards* in 1 *Archbold's Peels Acts* (3rd ed.) 214; and *Anon.* 8 *A. & E.* 589, 591. As to indictments transmitted from sessions to assizes, *see ante*, p. 128.

Where an indictment or inquisition is sent to the Central Criminal Court for trial under "*Palmer's Act*" (19 & 20 *Vict. c.* 16), the court may order the costs of the prosecutor and witnesses to be paid by the same persons and in the same manner as if the court were held in the county or place where the indictment or inquisition was found or taken. 19 & 20 *Vict. c.* 16, *s.* 13. And where the removal was at the instance of the crown, and the defendant is acquitted, the court may order the Treasury to reimburse to him the amount properly expended for the removal of the trial, less any amount advanced to him by the Treasury under certificate of the High Court granted on ordering the removal. 19 & 20 *Vict. c.* 16, *ss.* 25, 26.

Where an offence committed in a county of a city is tried at the assizes in the next adjoining county, the costs of prosecution are payable by and to the same persons and in the same manner as if the indictment had been tried in a court of oyer and terminer, or general gaol delivery, in the county of the city. 38 *G.* 3, *c.* 52, *s.* 8; 51 *G.* 3, *c.* 100, *s.* 2; 14 & 15 *Vict. c.* 55, *ss.* 19, 23; 45 & 46 *Vict. c.* 50, *s.* 169.

Offences in admiralty jurisdiction.]—"Such costs and expenses of and incidental to any prosecution for a felony or misdemeanor as are by law payable out of any county or other local rate, shall, where the felony or misdemeanor was committed within the jurisdiction of the admiralty of England, be paid in the same manner and subject to the same regulations as if the felony or misdemeanor had been committed in the county in which the same is heard and determined, or, where the same is heard and determined at the Central Criminal Court as if the same had been committed in the county of London: and all sums properly paid out of any county or other local rate in respect of the said costs and expenses shall be repaid out of money provided by parliament." 57 & 58 *Vict. c.* 60, *s.* 701.

Prosecutions by guardians of the poor.]—Guardians of a poor-law union may charge to the common fund of the union their reasonable costs of prosecutions at their instance, and so far as not defrayed by the offender, or (*ut supra*) out of the county or other local rate, in respect of the following offences; (*a*) obstructing or assaulting any officer engaged in the administration of the poor law; (*b*) neglect or breach of duty in his office by an officer employed in the administration of the poor laws, or maltreatment or abuse by such officer of any poor person; (*c*) fraudulently obtaining, stealing, purloining, embezzling, wasting, injuring, or wilfully misapplying property applicable to or connected with the relief of the poor; (*d*) any offence directly affecting the administration of the poor laws, 7 & 8 *Vict. c.* 101, *s.* 59; 28 & 29 *Vict. c.* 79, *s.* 9; (*e*) ill-treatment of servants or apprentices or bodily injury to persons under sixteen where two justices certify that the prosecution ought in the interests of justice to be conducted by the guardians, 24 & 25 *Vict. c.* 100, *s.* 73; (*f*) assault, ill-treatment, neglect, abandonment, or exposure of a child. 4 *Edw.* 7, *c.* 15, *s.* 21.

SECT. 2.

COSTS PAYABLE BY THE PROSECUTOR.

Corrupt practices.]—On private prosecutions for corrupt and illegal practices at elections, if the defendant is acquitted, he is entitled to recover from the prosecutor the costs sustained by reason of the indictment. *R. v. Law* [1900] 1 *Q. B.* 605; 19 *Cox*, 452; 17 & 18 *Vict. c.* 102, *ss.* 12, 13.

Defamatory libel.]—"In any case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information, . . . such costs to be taxed by the proper officer of the court before which the said indictment or information is tried." 6 & 7 *Vict. c.* 96, *s.* 8.

Merchandise marks.]—On a prosecution under the *Merchandise Marks Act*, 1887, the court may order costs to be paid to the defendant by the prosecutor, having regard to the information given by and the conduct of the defendant and prosecutor respectively. 50 & 51 *Vict. c.* 28, *s.* 14.

Removed indictments.]—As to the liability of the Treasury to pay defendant's costs under 19 & 20 *Vict. c.* 16, *see ante*, p. 136. As to costs on removed indictments, *see ante*, p. 258.

Road indictments.]—As to the liability of the prosecutor to pay costs on indictments as to highways, *see post*, *tit.* "*Nuisance.*"

Vexatious indictments.]—Where the prosecutor, after refusal by the magistrate to commit for trial, has been bound over to prosecute under the *Vexatious Indictments Act* (*ante*, p. 7), if the defendant is acquitted, the court may, in its discretion, order the prosecutor to pay the just and reasonable costs of the defendant and his witnesses to be taxed by the proper officer of the court. The taxed amount, if not paid within one month of the order, is recoverable by the same process as a judgment of the High Court: 30 & 31 *Vict. c.* 35, *s.* 2. This section does not extend to the Director of Public Prosecutions. *Stubbs* v. *Director of Public Prosecutions*, 24 *Q. B. D.* 577.

SECT. 3.

COSTS PAYABLE BY THE DEFENDANT.

(*a*) *In Treason and Felony.*

Persons convicted of treason or felony may be condemned in costs.]—"It shall be lawful for any court by which judgment shall be pronounced or recorded, upon the conviction of any person for *treason* or *felony*, in addition to such sentence as may otherwise by law be passed, to condemn such person to the payment of the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he shall be convicted, if to such court it shall seem fit so to do; and the payment of such costs and expenses, or any part thereof, may be ordered by the court to be made out of any moneys taken from

such person on his apprehension, or may be enforced at the instance of any person liable to pay, or who may have paid the same, in such and the same manner (subject to the provisions of this Act) as the payment of any costs ordered to be paid by the judgment or order of any court of competent jurisdiction in any civil action or proceeding, may for the time being be enforced; provided, that in the meantime and until the recovery of such costs and expenses from the person so convicted as aforesaid, or from his estate, the same shall be paid and provided for in the same manner as if this Act had not passed; and any money which may be recovered in respect thereof from the person so convicted, or from his estate, shall be applicable to the reimbursement of any person or fund by whom or out of which such costs and expenses may have been paid or defrayed." 33 & 34 *Vict. c.* 23, *s.* 3. The right of the court to make such an order is not affected by the bankruptcy of the offender after apprehension but before trial. *R.* v. *Roberts*, *L. R.* 9 *Q. B.* 77; 43 *L. J.* (*M. C.*) 17. Where local solicitors conducted a prosecution under the *Debtors Act*, 1869, on behalf of the Treasury, and an arrangement was made by which the defendant paid certain costs, the solicitors were held accountable to the Treasury for the costs so received. *Re Parkinson*, 76 *L. T.* (*N. S.*) 715.

It has been suggested that where a statute passed since 1870 contains a provision that the costs of a prosecution for misdemeanor shall be payable as in cases of felony, the court may make an order for costs against the defendant under 33 & 34 *Vict. c.* 23, *s.* 3. Such an order was made in *R.* v. *Abrahams*, *Cent. Cr. Ct.*, Sept. 1897; 126 *C. C. C. Sess. Pap.* 827, on an indictment for keeping a betting house preferred in consequence of the election of the accused under 42 & 43 *Vict. c.* 49, *s.* 17 (1). But it is submitted that this is erroneous. *See R.* v. *Manchester Clerk of the Peace* (1889), noted in *Stone's Justices of the Peace* (35th ed.), 42.

First offenders.]—*See ante*, p. 243.

(*b*) *In Misdemeanors.*

Assaults.]—On conviction on indictment of any assault, whether with or without battery and wounding or either of them, the court, if it think fit, in addition to any sentence which it deems proper for the offence, may adjudge the offender to pay the prosecutor his actual and necessary costs and expenses of the prosecution and such moderate allowance for loss of time as the court shall by affidavit or other inquiry or examination, have ascertained to be reasonable. Unless the sum is sooner paid the offender may be imprisoned for not more than three months in addition to any term of imprisonment imposed for the offence itself. The court may also issue a warrant to levy the amount by distress and sale of the offender's goods. 24 & 25 *Vict. c.* 100, *ss.* 74, 75.

Corrupt practices at elections.]—On prosecutions for corrupt practices at elections the court may order the defendant to pay the costs reasonably incurred in and about the prosecution. *See* 17 & 18 *Vict. c.* 102, *s.* 10; 46 & 47 *Vict. c.* 51, *ss.* 53, *sub-s.* 1, 57, *sub-s.* 2, and the Acts incorporating them enumerated *ante*, p. 247.

Defamatory libel.]—Where a defendant justifies a defamatory libel and the justification fails, the prosecutor is entitled to recover the costs sustained by reason of the plea of justification, subject to taxation by the proper officer of the court of trial. 6 & 7 *Vict. c.* 96, *s.* 8.

First offenders.]—*See ante*, p. 243.

Merchandise marks.]—On a prosecution under the *Merchandise Marks Act*, 1887, the court may order the defendant to pay costs to the prosecutor, having regard to the conduct of the parties. 50 & 51 *Vict. c.* 28, *s.* 14.

Sexual offences.]—On conviction of a misdemeanor indictable under the *Criminal Law Amendment Act*, 1885, or of indecent assault, the court may order the defendant to pay the costs, as in cases of felony; and every order for the allowance and payment of such costs shall be made out, and the sum of money mentioned therein shall be paid and repaid upon the same terms and in the same manner in all respects as in cases of felony. 48 & 49 *Vict. c.* 69, *s.* 18.

Sect. 4.

REWARDS.

Any court of oyer and terminer or gaol delivery may, if any person shall appear to have been active in or towards the apprehension of any person charged with any of the following offences, order payment to such person of such a sum of money as shall seem reasonable and sufficient to compensate for his expenses, exertions, and loss of time:—viz., in cases of "Murder"—(*see R.* v. *Durkin*, 2 *Lewin*, 163)—"Feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire-arms at any other person"—"Stabbing"—"Cutting"—"Poisoning"—"Administering anything to procure the miscarriage of any woman"—"Rape"—"Burglary" (*R.* v. *Dunning*, 5 *Cox*, 142)—"Felonious housebreaking"—"Robbery on the person" (but not stealing from the person: *R.* v. *Thompson*, 1 *Cox*, 43)—"Arson"—"Horse stealing"—"Bullock stealing" (which includes all cases of cattle stealing of that particular description, *e.g.*, ox, cow, heifer, etc.: *R.* v. *Gilbrass*, 7 *C. & P.* 444)—"Sheep stealing"—"Being accessory before the fact to any of the offences aforesaid"—"Receiving stolen property, knowing it to have been stolen." 7 *G.* 4, *c.* 64, *s.* 28. The amount of these rewards is in addition to any costs, etc., as witness, and is unaffected by the regulations as to costs. 7 *G.* 4, *c.* 64, *s.* 28; 14 & 15 *Vict. c.* 55, *s.* 7; and *see ante*, p. 246. The like power is extended, by 14 & 15 *Vict. c.* 55, *s.* 8, to courts of sessions of the peace, with respect to such of the above offences as they have jurisdiction to try, but the compensation is limited to the sum of £5.

Such rewards are not confined to cases where the person apprehending has had an actual loss of time, or been at an expense. *R.* v. *Barnes*, 7 *C. & P.* 166. They are said not to extend to cases where the offender has escaped from England. *R.* v. *Barrett*, 6 *Cox*, 78. But they have been given for display of courage; *R.* v. *Womersley*, 2 *Lewin*, 162; and for locking burglars in a room till help arrived. *R.* v. *Dunning*, 5 *Cox*, 142.

The order is made out by the clerk of the court on the sheriff of the county in which the offence was committed, who must pay the amount at sight to the person named or his authorized representative, and is entitled to immediate recoupment by the Treasury. 7 *G.* 4, *c.* 64, *s.* 29. Under the *Local Government Act*, 1888 (51 & 52 *Vict. c.* 41, *s.* 100), the rewards appear to be payable from the same funds as the costs of assizes and sessions. If the facts, whether as to expense, exertion, or loss of time, on which the application is grounded have not appeared in evidence, the judge will require them to be laid before him on affidavit. The power of a secretary of state (which has not yet been exercised)

to make regulations as to the scale of costs, extends to the amount of rewards to be paid, except where the court consider that extraordinary courage and diligence towards apprehension was shown, in which case the court may adjudge any reward which it deems reasonable, subject to the limit of £5 imposed on courts of quarter sessions. 14 & 15 *Vict.* c. 55, *ss.* 6, 7, 8. *See R.* v. *Jones*, 7 *C. & P.* 167: *R.* v. *Haines*, 5 *Cox*, 114.

A person who discovers and prosecutes to conviction a person at large without licence during a term of penal servitude is entitled to a reward of £20, payable by order of the court before whom the conviction is made, out of the county funds. 5 *G.* 4, *c.* 84, *s.* 22: *R.* v. *Emmons*, 2 *M. & Rob.* 279: *R.* v. *Ambury*, 6 *Cox*, 79.

7 *G.* 4, *c.* 64, *s.* 30. *Compensation to relatives of persons killed in arresting felons.*]—If any man shall happen to be killed in endeavouring to apprehend any person charged with any of the offences before mentioned, the court may order the sheriff of the county to pay a sum of money to his widow, if he were married; or to his children, in case his wife be dead; or to his father or mother, in case he shall have left neither wife nor child. Under the Act the sheriff is entitled to immediate recoupment from the Treasury.

In *R.* v. *Platel* (*C. C. C.*, May, 1903) an order was made by *Grantham*, J., for the payment of £233 to the widow and family of a man who was shot and killed in endeavouring to arrest a man who had shot a police constable. *See* 38 *L. J. Newsp.* 278.

CHAPTER VII.

COMPENSATION AND RESTITUTION OF PROPERTY.

SECT. 1. *Compensation*, p. 263.
2. *Restitution of property*, p. 265.

SECT. 1.

COMPENSATION.

Relation of civil and criminal remedies.]—As a general rule, the remedies for civil injuries and crimes cannot be enforced in the same proceeding.

In a few cases the court which tries an indictable offence is authorized by statute to award compensation to persons injured by it. Compensation to the relatives of persons killed in arresting certain offenders is dealt with *ante*, p. 262.

The Forfeitures Act, 1870 (33 & 34 *Vict. c.* 23), provides (*s.* 4), that "it shall be lawful for any such court as aforesaid (*i.e., for any court by which judgment shall be pronounced or recorded, see s.* 3), if it shall think fit, upon the application of any person aggrieved, and immediately after the conviction of any person for *felony*, to award any sum of money not exceeding one hundred pounds, by way of satisfaction or compensation for any *loss of property* suffered by the applicant through or by means of the said felony, and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs ordered by the court to be paid under the last preceding section of this Act." The discretionary power given by this section is not confined to cases of larceny or cognate offences, as to which *see post*, p. 265, but does not extend to personal injuries. As to its exercise, *see R.* v. *Lovett*, 11 *Cox*, 602. The cases in which it is most easily applied are to the compensation of persons who are required under a restitution order to give up property obtained by larceny and transferred to them before conviction. But the courts usually act under 30 & 31 *Vict. c.* 35, *s.* 9 (*post*, p. 266). Compensation for injuries to property may be awarded in lieu of a conviction on summary prosecution for a first offence against the *Larceny Act*, 1861 (24 & 25 *Vict. c.* 96, *s.* 108), or the *Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97, *s.* 66).

And occasionally, where proper compensation is made to a person injured, the court refrains from imposing punishment for an offence.

Except in the cases above referred to, it is not usual to allow civil and criminal proceedings in respect of the same act or omission to be carried on concurrently. In the case of misdemeanors, there never seems to have been ruling that concurrent proceedings might not be taken. But until a comparatively recent date, it was considered that the civil remedy in cases of injury by a felonious act could not be pursued until the completion of the prosecution of the alleged felon. In *Crosby* v. *Leng*,

12 *East*, 413; 11 *R. R.* 437, Lord *Ellenborough* says, "The policy of the law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the county may be first satisfied in respect of the public offence; and after the verdict, either of conviction or acquittal, the judgment is so far conclusive in any particular matter, that the objection is thereby removed of bringing that *sub judice* in a civil action which was the proper subject of a criminal prosecution." Similar views are expressed in *Stone* v. *Marsh*, 6 *B. & C.* 551; 5 *L. J., K. B. (O. S.)* 201: *Marsh* v. *Keating*, 1 *Mont. & A.* 662; 8 *Bligh, N. S.* 651; 2 *Cl. & F.* 250; 37 *R. R.* 175: *ex parte Bolland, Mont. & Mac.* 397; *and ex parte Elliott, re Jermyn*, 3 *Mont. & A.* 110.

Another mode of stating this rule is that the King's rights to the forfeitures of felons would be defeated by a failure to prosecute the offender effectively, and an acquittal by collusion of the prosecutor would debar him from his civil remedy. *Crosby* v. *Leng*, *ubi supra*. The rule was also explained on the ground that it was the duty of the person injured by a felony to prosecute before suing. But this has been questioned in *Ward* v. *Lloyd*, 7 *Scott, N. R.* 499, 507, *Maule*, J.; and *Wells* v. *Abrahams*, *L. R.* 7 *Q. B.* 554, 663, *Lush*, J. The rule barred proof in bankruptcy as well as suits at law or in equity: *ex parte Elliott*, *ubi supra*; but did not bar an action where the felon had been convicted and executed for another felony; *ex parte Bolland*, *ubi supra*: nor actions against persons other than the felon in possession of the proceeds of the felony, unless it were larceny and the stolen goods had been sold in market overt: *White* v. *Spettigue*, 11 *M. & W.* 603: *Lee* v. *Bayes*, 18 *C. B.* 599: nor to an action by A.'s master against B. for loss of servant caused by felonious act of B.'s servant: *Osborn* v. *Gillett*, *L. R.* 8 *Ex.* 88.

A distinction seems to have once been drawn between actions of trespass or other tort and actions of debt: *see Master* v. *Miller*, 4 *T. R.* 322, *Buller*, J.; but it has now evaporated, and the authorities now lay down as follows:—

(1) Money obtained by theft or forgery is a debt due to the loser of it, which is sufficient consideration for the assignment of the offender's property to the injured person. *Chowne* v. *Baylis*, 31 *L. J. (Ch.)* 757; 31 *Beav.* 351: *Ex parte Ball*, 10 *Ch. D.* 667, where all the cases are collected: but where a debt arises out of a felonious act by the debtor the civil remedy may have to be postponed until public justice is satisfied. Where the plaintiff, who claimed to be a creditor for the amount paid by him on a forged cheque had commenced a prosecution for the forgery upon which a bill was found and the prisoner arraigned, abstained from bringing on the trial by the direction of the judge, who thought the ends of justice were satisfied by sentencing the prisoner on an indictment for another forgery to which he pleaded guilty, it was held that the plaintiff had done enough to satisfy the rule of law, and that his civil remedy revived. *Dudley, etc., Banking Co.* v. *Spittle*, 1 *J. & H.* 14: *Ex parte Ball*, 10 *Ch. D.* 667: *Ex parte Leslie, Re Guerrier*, 20 *Ch. D.* 131; 51 *L. J. (Ch.)* 689. The acquittal of the accused on an indictment for felony is no bar to an action for civil injury arising out of the incriminated acts, unless the plaintiff colluded with the defendant in procuring the acquittal. *Crosby* v. *Leng*, 12 *East*, 409.

(2) Where the felonious act also constitutes a trespass it used to be considered that the trespass merged in the felony. *Markham* v. *Cobb*, *Sir W. Jones*, 147; *Noy*, 82: *Higgins* v. *Butcher*, *Yelv.* 89: *Lutterell* v. *Reynell*, 1 *Mod.* 282: *White* v. *Spettigue*, 13 *M. & W.* 603. But it is now held that the criminal remedy merely, suspends, or must precede, the civil remedy.

Most of the authorities with reference to the basis and extent of the rule are discussed in *Wells* v. *Abrahams, ubi supra:* in *Midland Insurance Co.* v. *Smith*, 6 *Q. B. D.* 561; 50 *L. J.* (*Q. B.*) 329: *A.* v. *B.* 24 *L. R. Ir.* 235, reported also as *S.* v. *S.* 16 *Cox*, 566 (*a*), and in *Ex parte Ball*, 10 *Ch. D.* 667. In the last case, *Bramwell*, L.J., suggested four theories to support the supposed rule. 1. That no cause of action arises at all out of the felony. 2. That it does not arise till prosecution. 3. That it arises on the act, but is suspended till prosecution. 4. That there is neither defence nor suspension of the claim by or at the instance of the felon debtor, but that the court, of its own motion or on the suggestion of the crown, should stay proceedings till public justice is satisfied. He indicates the difficulties of each theory, but accepts *Wellock* v. *Constantine*, 2 *H. & C.* 146, as establishing the existence of the rule, *and see also per Baggallay*, L.J., at p. 673.

Whatever be the true theory, the rule is now in a state of suspended animation because of the decisions above cited. Apparently, it can only be enforced, if at all, by application to stay proceedings in such cases as suggested by *Blackburn*, J., in *Wells* v. *Abrahams*, *L. R.* 7 *Q. B.* at p. 559. The objection cannot be taken by plea, and is not a ground for non-suit, *id.*, nor for demurrer. *Roope* v. *D'Avigdor*, 10 *Q. B. D.* 412. The question, however, only indirectly affects the subject of the present work. As to the illegality of compromises or arrangements to settle criminal proceedings, *see post, tit.* "*Compounding Offences.*"

Sect. 2.

Restitution of Property.

Common Law.

At common law the court of King's Bench could award a writ of restitution as part of its judgment on an appeal of larceny; but this power ceased on the abolition of these appeals by 59 *G.* 3, *c.* 46 (*rep.*). *R.* v. *Mayor, etc., of London*, *L. R.* 4 *Q. B.* 371; *S. C.* 38 *L. J.* (*M. C.*) 107; 11 *Cox*, 280; *sub nom. Walker* v. *Mayor, etc., of London.* 21 *H.* 8, *c.* 11 (which is now repealed and is replaced by 24 *&* 25 *Vict. c.* 96, *s.* 100, below), empowered the court of trial to award restitution on conviction on indictment (*see* 2 *Hawk. c.* 23, *ss.* 49–57), but gave no authority to the court of King's Bench. *Id.*

Statutes.

2 *&* 3 *Ph. & M. c.* 7; 31 *Eliz. c.* 12 (*restitution of horses*). These Acts are not repealed by the *Sale of Goods Act*, 1893, *see* 56 *&* 57 *Vict. c.* 71, *s.* 22 (2); but are now rarely used: *see Moran* v. *Pitt*, 42 *L. J.* (*Q. B.*) 47: *Josephs* v. *Adkins*, 2 *Stark.* (*N. P.*) 76; 19 *R. R.* 677. *Chalmers, Sale of Goods* (5th ed.), p. 147, *n.*

24 *&* 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 100—*Restitution of Property.*] —If any person guilty of any such felony or misdemeanor as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property

(*a*) As to colonial law, *see White* v. *McKiel*, 28 *New Brunswick*, 39.

shall be restored to the owner or his representative; and in every case in this section aforesaid, the court before whom any person shall be tried for any such felony or misdemeanor, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner:

Provided that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bonâ fide* taken or received, by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any felony or misdemeanor, been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the court shall not award or order the restitution of such security:

Provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods, for any misdemeanor against this Act. [*See* 24 *&* 25 *Vict. c.* 96, *ss.* 77–86, *and* 1 *Edw.* 7, *c.* 10. *S.* 100 *appears also to apply to the Larceny Acts of* 1868 (31 *&* 32 *Vict. c.* 116), *and* 1896 (59 *&* 60 *Vict. c.* 52].

42 *&* 43 *Vict. c.* 22 (*Prosecution of Offences Act*, 1879), *s.* 7—*Restitution where the director of public prosecutions intervenes.*]—The prosecution of an offender by the director of public prosecutions shall, for the purpose of enabling a person to obtain a restitution of property, or obtaining, exercising, or enforcing any right, claim, or advantage whatsoever, have the same effect as if such person had been bound over to prosecute, and had prosecuted the offender, subject to this proviso, that such person shall give all reasonable information and assistance to the said director in relation to the prosecution.

56 *&* 57 *Vict. c.* 71 (*Sale of Goods Act*, 1893), *s.* 24.]—(1) "Where goods have been stolen, and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise." [*Sub-s.* 1 does not alter the law. *See R.* v. *Horan*, *Ir. Rep.* 6 *C. L.* 293.] (2) Notwithstanding any enactment to the contrary (*v. supra*), where goods have been obtained by fraud or other wrongful means not amounting in law to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender." [*Sub-s.* 2 *alters the law as laid down in Bentley* v. *Vilmont*, 12 *App. Cas.* 471; 57 *L. J.* (*Q. B.*) 18, *where the history of the law as to restitution is stated. As to present practice with respect to restitution orders, see post, p.* 268.

Sect. 62.]—(1) In this Act unless the context or subject-matter otherwise requires, . . . "goods" include all chattels personal other than things in action and money.

30 *&* 31 *Vict. c.* 35 (*Criminal Law Amendment Act*, 1867), *s.* 9—*Money found on prisoner to be given to purchaser of property not known to be stolen, on restitution of property.*]—"Where any prisoner shall be convicted, either summarily or otherwise, of larceny or other offence, which includes

the stealing of any property, and it shall appear to the court by the evidence that the prisoner has sold the stolen property to any person, and that such person has had no knowledge that the same was stolen, and that any moneys have been taken from the prisoner on his apprehension, it shall be lawful for the court, on the application of such purchaser, and on the restitution of the stolen property to the prosecutor, to order that out of such moneys a sum not exceeding the amount of the proceeds of the said sale be delivered to the said purchaser." (*See also* 33 & 34 *Vict.* c. 23, *s.* 4, *ante*, p. 263.

35 & 36 *Vict.* c. 93 (*Pawnbrokers Act*, 1872), *s.* 30—*Restitution of property where it has been pawned with a pawnbroker.*]— . . . If any person is convicted in any court of feloniously taking or fraudulently obtaining any goods or chattels, and it appears to the court that the same have been pawned with a pawnbroker . . . the court, on proof of the ownership of the goods and chattels, may, if it thinks fit, order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan or of any part thereof, or without payment thereof or of any part thereof, as to the court, according to the conduct of the owner and the other circumstances of the case, seems just and fitting." [*S.* 30 *applies only to pledges of* 10*l. or under* (*s.* 10). *The Metropolitan Police Court Act*, 1839 (2 & 3 *Vict.* c. 71), *also contains provisions for summary restitution by pawnbrokers of stolen goods pledged with them, and provides that a pawnbroker in the metropolitan police district, who parts with goods after notice that they have been stolen, shall forfeit the full value:* (*ss.* 27, 28:) *and s.* 40, *which gives a summary remedy for illegal detention of goods under the value of* 15*l., has been held to enable a magistrate to award restitution of stolen goods, even after the court of trial has refused a writ of restitution. Ex parte Davison*, 60 *J. P.* 808.]

42 & 43 *Vict.* c. 49 (*Summary Jurisdiction Act*, 1879), *s.* 27].—" Where an indictable offence is under circumstances in this Act mentioned authorized to be dealt with summarily:— . . . (3) The conviction for any such offence shall be of the same effect as a conviction or indictment, and the court may make the like order for the restitution of property as might have been made by the court before whom the person convicted would have been tried if he had been tried on indictment. . . ."

60 & 61 *Vict.* c. 30—*Police Property Act*, 1897.]—*The Act provides for the making by a court of summary jurisdiction of orders as to property coming into the possession of the police in connexion with any criminal charge, or under the Metropolitan or City of London Police Acts* (2 & 3 *Vict.* c. 47, *s.* 66; 2 & 3 *Vict.* c. xciv.), *or under a search warrant* (24 & 25 *Vict.* c. 96, *s.* 103), *or under s.* 34 *of the Pawnbrokers Act*, 1872 (35 & 36 *Vict.* c. 93).

As to the position of property which comes *in custodiam legis* by the action of the police, *see ex parte Otto* [1894] 1 *Q. B.* 420; *Bessell* v. *Wilson* 20 *L. T. Rep.* (*O. S.*) 233; *Campbell*, L.C.J.; *Peel* v. *Jervis*, 49 J.P. 264, and *Dillon* v. *O'Brien*, 20 *L. R. Ir.* 316: 16 *Cox*, 345; and the discussion of these authorities in *Barnett* v. *Campbell*, 21 *N. Z. L. R.* 484. In *Winter* v. *Banks*, 19 *Cox*, 687; 65 *J. P.* 468, a constable who after B.'s acquittal delivered to B. the goods which he was charged with stealing, was held liable to A., the true owner, for conversion of the goods. As to protection from such actions see *Bullock* v. *Dunlap*, 2 *Ex. D.* 43.

Until the enactment of *s.* 24, *sub-s.* 2 (*ante*, p. 266) of the *Sale of Goods Act*, 1893, *s.* 100 of the *Larceny Act*, 1861 (24 & 25 *Vict.* c. 96), had a wider scope than 21 *H.* 8, c. 11 (*R.* v. *de Veaux*, 2 *Leach*, 585; 2 *East*, *P. C.* 789,

839: *Bentley* v. *Vilmont*, 12 *App. Cas.* 471; 57 *L. J.* (*Q. B.*) 18; and extended to all offences under the *Larceny Act*, 1861 (except under *ss.* 75–86, as amended by 1 *Edw.* 7, *c.* 10, *post*, *tit.* "*Embezzlement*"), such as obtaining goods by false pretences (*Bentley* v. *Vilmont*, *ubi supra*), or receiving goods so obtained. *R.* v. *Goldsmith*, 12 *Cox*, 594. But it seems not to apply to larcenies prosecuted under other Acts. In *R.* v. *Jones*, 14 *Cox*, 528, restitution was refused on a conviction of larceny under the *Post Office Acts*.

The operation of *s.* 100 is now restricted by *s.* 24 (2) of the *Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ante*, p. 266, in the case of "goods" as defined in *s.* 62 of that Act (*ante*, p. 266). But the section still applies in cases where on an indictment for obtaining goods by false pretences where no property has passed, the defendant is convicted on evidence proving larceny, by a trick or otherwise (*see* 24 & 25 *Vict. c.* 96, *s.* 88), and in such cases the court may make a restitution under *R.* v. *Walker*, 65 *J. P.* 729, *Fulton*, Recorder. In *R.* v. *Bianci*, 67 *J. P. Rep.* 443, where a defendant pleaded guilty to two indictments with respect to the same goods, the first for obtaining them by false pretences, the second for stealing them, it was held that a restitution order could be made on a pawnbroker with whom the defendant had pledged the goods.

In *R.* v. *George* (*C. C. C.*), 65 *J. P.* 729, the question arose before *Bosanquet*, Common Serjeant, whether the court could make an order in any case of restitution where property had been obtained by false pretences. The common serjeant, after consulting *Bigham*, J. and *Fulton*, Recorder, said they were all of opinion that the 24th section of the *Sale of Goods Act*, 1893, prevented property obtained by fraud being revested by the mere fact of the conviction, and therefore restitution could not be ordered against a *bonâ fide* purchaser who had a good title at law. He quoted the law as stated by *Lord Watson* in *Bentley* v. *Vilmont*, 12 *App. Cas.* 471, "it now appears that the sale was induced by fraud, a circumstance which gives the seller the option either of adhering to his bargain or of rescinding it in a question with the fraudulent purchaser," and held that where, as in the case under consideration, the goods were found in the possession of the person who had obtained them by fraud, the former owner might disaffirm the transaction, and was then entitled to recover the property; and in that case an order of restitution should be made.

The first proviso to 24 & 25 *Vict. c.* 96, *s.* 100, protects from restitution *bonâ fide* holders for value of negotiable instruments, including bank-notes. *Chichester* v. *Hill*, 52 *L. J.* (*Q. B.*) 160: 15 *Cox*, 258; *Miller* v. *Race*, 1 *Smith*, *L. C.* (11th ed.), 463; 1 *Burr.* 452. An order cannot be made for the restitution of current coin stolen and passed as currency to innocent persons; but can be made where the money is found on the thief or under his control. *Moss* v. *Hancock* [1899] 2 *Q. B.* 111, 120, *Channell*, J.; *cf. Holiday* v. *Hicks*, *Cro. Eliz.* 638, 661; 1 *Hale*, 542. And where a 5*l.* piece was stolen, and though a current coin was sold as a curiosity, it was held that a restitution order could be made against the buyer. *Moss* v. *Hancock*, *ubi supra*.

Certain difficulties in applying the enactment arise from *ss.* 8, 9 of the *Factors Act*, 1889 (52 & 53 *Vict. c.* 45), and *s.* 25 of the *Sale of Goods Act*, 1893, under which mercantile agents, bailees or factors, and certain other persons can give a better title to goods to purchasers from them. *See Helby* v. *Matthews* [1895] *App. Cas.* 471: *Payne* v. *Wilson* [1895] 1 *Q. B.* 653; 2 *Q. B.* 537: *Kirkham* v. *Gill* [1897] 1 *Q. B.* 201: *Farquharson* v. *King* [1902] *App. Cas.* 325; 71 *L. J. K. B.* 667; and as to factors, *R.* v. *Wollez*, 8 *Cox*, 337, and it is doubtful how far restitution can be made in cases where a bailee under a hire purchase agreement misappropriates

the goods hired. *See Payne* v. *Wilson* [1893] 1 *Q. B.* 653: *Helby* v. *Matthews, ubi supra: Lee* v. *Butler* [1893] 2 *Q. B.* 318.

Revesting on conviction.]—On a conviction for larceny of goods as defined by the *Sale of Goods Act*, 1893 (*s.* 62, *ante*, p. 266), the property in the goods stolen revests in the person who was the owner of the goods or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise. This merely expresses the rule laid down in *Horwood* v. *Smith*, 2 *T. R.* 750; 1 *R. R.* 613: *Scattergood* v. *Sylvester*, 15 *Q. B.* 506; 19 *L. J.* (*Q. B.*) 447: *White* v. *Spettigue*, 13 *M. & W.* 603; *Moss* v. *Hancock* [1899] 2 *Q. B.* 111, 118: *R.* v. *Horan, Ir. Rep.* 6 *C. L.* 293, and makes good the title of the original owner even against an innocent purchaser. This rule only applies to "goods" as defined in the Act of 1893 (*s.* 62, *ante*, p. 266), and does not apply to negotiable instruments. *Chichester* v. *Hill*, 52 *L. J.* (*Q. B.*) 160; 15 *Cox*, 258; 47 *J. P.* 324. But restitution orders cannot be made as to such instruments if not paid or negotiated in good faith (*ante*, p. 266). Until conviction of the thief "goods" innocently bought in market overt are the property of the purchaser. *Sale of Goods Act*, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 22: *Walker* v. *Matthews*, 8 *Q. B. D.* 109: *Hargreave* v. *Spink* [1892] 1 *Q. B.* 25. And therefore, if he sells them again before the conviction, even if previously to selling them he has had notice of the theft, no order for restitution can be made against him. *Horwood* v. *Smith*, 2 *T. R.* 750. There is a special remedy against pawnbrokers in London who sell stolen goods after notice: *see* 2 *&* 3 *Vict. c.* 71, *s.* 27, *ante*, p. 267: *ex parte Davison*, 60 *J. P.* 808.

By whom and how made.]—An order of restitution can be made only by the court before which the offender is convicted, and the High Court has no summary power to award restitution. *R.* v. *Mayor, etc., of London*, *L. R.* 4 *Q. B.* 371: *S. C. sub nom. Walker* v. *Mayor, etc., of London*, 38 *L. J.* (*M. C.*) 107; 11 *Cox*, 280.

The order is discretionary. *See Vilmont* v. *Bentley*, 18 *Q. B. D.* 327. Its refusal is no bar to a civil action or summary proceedings to recover the goods. *Ex parte Davison*, 60 *J. P.* 808: *Scattergood* v. *Sylvester*, 15 *Q. B.* 506; 19 *L. J.* (*Q. B.*) 447: and in cases of difficulty or complications it is usual to refuse an order and leave the prosecutor to his other legal remedies for recovery of his property. The Recorder of London, upon the trial and conviction at the Central Criminal Court of a prisoner charged with larceny, having refused to order (under 24 *&* 25 *Vict. c.* 96, *s.* 100) the person with whom the stolen property was pledged to restore it to the prosecutor, the Queen's Bench Division refused to grant a mandamus directed to "the judges and justices of the Central Criminal Court," to compel the recorder to make such order, on the ground that the Central Criminal Court being a Superior Court, no mandamus would lie against it. *R.* v. *Justices of Central Criminal Court*, 11 *Q. B. D.* 479; 52 *L. J.* (*M. C.*) 121: and *see ante*, p. 220. Before making the order the court may hear counsel on behalf of persons in possession of the goods. *R.* v. *Macklin*, 5 *Cox*, 216. The order if made by a Court of Assize or the Central Criminal Court is enforceable by attachment. *R.* v. *Wollez*, 8 *Cox*, 337; *and see L. J. Newsp.* 486.

On whom made.]—The order may be made on the offender or on his agent or on his trustee in bankruptcy or on any pledgee or sub-purchaser or possessor of the goods, even though he innocently bought in market overt. *Cundy* v. *Lindsay*, 3 *App. Cas.* 459; 47 *L. J.* (*Q. B.*) 481; 13 *Cox*,

162, 588: *Horwood* v. *Smith*, 2 *T. R.* 750; 1 *R. R.* 618; but it cannot be made on a purchaser who has resold before conviction. *Cundy* v. *Lindsay* (*ubi sup.*); *and see R.* v. *Stancliffe*, 11 *Cox*, 318: *R.* v. *Goldsmith*, 12 *Cox*, 594. As to the law when the offender has become bankrupt, *see Re Vautin* [1899] 2 *Q. B.* 549.

As to what made.]—The power to award restitution seems to be limited to property produced and identified at the time (or more probably to property specified in the indictment) as being the subject of the offence. *R.* v. *Goldsmith*, 12 *Cox*, 594: *R.* v. *Smith*, *Id.* 597. The power does not extend to property found on the prisoner, but not connected with the offence: *R.* v. *Mayor, etc., of London*, *E. B. & E.* 509; 27 *L. J.* (*M. C.*) 231: *S. C. sub nom. R.* v. *Pierce*, *Bell*, 235; 8 *Cox*, 344; and an order made in such a case was quashed by the High Court. *Id.* The power to award restitution extends to the proceeds of the property as well as the property itself if in the hands of the prisoner or of an agent holding for him. *R.* v. *Justices of Central Criminal Court*, 18 *Q. B. D.* 314; 56 *L. J.* (*M. C.*) 25; 16 *Cox*, 196, *C. A.* But it does not authorize delivery to the prosecutor of pawntickets supposed to represent the stolen goods. *R.* v. *Rolfe*, 53 *J. P.* 823.

CHAPTER VIII.

CRIMINAL APPEAL.

SECT. 1. *Crown cases reserved*, p. 271.
2. *Writ of error*, p. 278.
3. *Bill of Exceptions*, p. 290.
4. *New trial*, p. 291.
5. *Venire de novo*, p. 294.

SECT. 1.

CROWN CASES RESERVED.

Former practice.]—A practice had long existed, where any objection was taken on the part of a defendant, on a trial for treason or felony, before any court of oyer and terminer and gaol delivery, either to the indictment or the evidence, which the court considered worthy of more mature consideration, to take the opinion of the jury upon the facts proved, and to reserve the objection for the consideration of all the judges of the superior courts of common law upon a case stated by the judge who presided at the trial: and if the judges, or a majority of them, were of opinion that the objection was well founded, the defendant was recommended to the crown for a pardon. Upon a case so reserved, the judges, although they heard counsel for the defendant, whenever he thought fit to employ counsel to argue the objection before them, and in that case heard counsel for the prosecution also, did not sit strictly as a *court*, but rather as assessors to the judge who tried the case, and the judgment ultimately pronounced was considered in law as his judgment: the reasons on which it was founded not being publicly declared by the judges, though the results of their conferences are preserved in the reports. Courts of quarter sessions had no power to reserve cases on indictments tried before them for the opinions of the judges. But *see ante*, p. 128.

Present law and practice.]—The *Crown Cases Act*, 1848 (11 & 12 *Vict. c.* 78), was passed to remedy this defect in the law. Below are stated the provisions of the Act and the modifications effected by the *Judicature Acts*.

11 & 12 *Vict. c.* 78, *s.* 1.]—"When any person shall have been convicted of any treason, felony, or misdemeanor, before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge or commissioner or justice of the peace before whom the case shall have been tried, *may, in his or their discretion*, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the Exchequer; and thereupon shall have authority to respite execution of the judgment on such conviction, or

postpone the judgment, until such question shall have been considered and decided, as he or they may think fit; and in either case the court in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution, as the case may be."

The section extends to special commissioners of oyer and terminer, etc.; *R.* v. *Bernard*, 8 *St. Tr.* (*N. S.*) 887, 1001; 1 *F. & F.* 240; *and to recorders of boroughs. R.* v. *Masters*, 1 *Den.* 332; 18 *L. J.* (*M. C.*) 2; *but apparently not to trial on a record of the K. B. D. See New Trial, post, sect.* 4. *As to granting bail, see R.* v. *Harris*, 4 *Cox*, 21; *R.* v. *Bird*, 5 *Cox*, 11.

36 & 37 *Vict. c.* 66 (*Supreme Court of Judicature Act*, 1873), *s.* 47.]—"The jurisdiction and authorities in relation to question of law arising in criminal trials which are now vested in the justices of either bench and the barons of the Exchequer by the *Crown Cases Act*, 1848, or any Act amending the same, shall and may be exercised by the judges of the high court. . . . The determination of any such question by the judges of the high court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said high court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved for the consideration of the said judges under the *Crown Cases Act*, 1848" (36 & 37 *Vict. c.* 66, *s.* 47).

Sect. 100.]—"In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned shall have, or include, the meanings following (that is to say): . . .

"*Rules of court* shall include forms.

"*Cause* shall include . . . any criminal proceeding by the crown. . . .

"*Matter* shall include every proceeding in the court not in a cause. . . .

"*Crown cases reserved* shall mean such questions of law reserved in criminal trials as are mentioned in the *Crown Cases Act*, 1848."

38 & 39 *Vict. c.* 77 (*Supreme Court of Judicature Act*, 1875), *s.* 19.]—"Subject . . . any rules of court to be made under this Act, the practice and procedure in all criminal causes and matters whatsoever in the high court . . . and in the court of appeal respectively, including the practice and procedure with respect to crown cases reserved, shall be the same as the practice and procedure in similar causes and matters before the commencement of this Act." [*The first schedule referred to in that section contained rules of court, which rules were superseded by the Rules of the Supreme Court*, 1883, *criminal proceedings, see Order LXVIII. The Act is to be construed as one with* 36 & 37 *Vict. c.* 66; *see s.* 1.]

42 & 43 *Vict. c.* 22 (*Prosecution of Offences Act*, 1879), *s.* 2.]—"It shall be the duty of the director of public prosecutions under the superintendence of the attorney-general to institute, undertake, or carry on such criminal proceedings, whether in the Court for Crown Cases Reserved . . . as may be for the time being prescribed by regulations under this Act, or may be directed in a special case by the attorney-general. . . ." [For regulations *see post*, p. 278.]

44 & 45 *Vict. c.* 68 (*Supreme Court of Judicature Act*, 1881), *s.* 15.]—

"The jurisdiction and authority in relation to questions of law arising in criminal trials, which under s. 47 of the *Supreme Court of Judicature Act*, 1873 (*supra*), is now vested in the judges of the high court of justice, may be exercised by any five or more of such judges . . . provided that the lord chief justice of England shall always be one of such judges, unless, by writing under his hand or by the certificate in writing of his medical attendant, it shall appear that he is prevented, by illness or otherwise, from being present at any court duly appointed to be held for the purpose aforesaid, in which case the presence of the said lord chief justice at such court shall not be necessary."

11 & 12 *Vict.* c. 78, s. 2. *Statement and hearing of the case.*]—"The judge or commissioner or court of quarter sessions shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen (*see post*, p. 275); and such case shall be transmitted to the said justices and barons; and the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons, the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require; and such judgment and order, if any, of the said justices and barons shall be certified, under the hand of the presiding chief justice or chief baron, to the clerk of assize, or his deputy, or the clerk of the peace, or his deputy, as the case may be, who shall enter the same on the original record in proper form; and a certificate of such entry, under the hand of the clerk of assize, or his deputy, or the clerk of the peace, or his deputy, as the case may be, in the form as near as may be or to the effect mentioned in the schedule annexed to this Act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment, as the same shall be so certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and, in that case, such sheriff or gaoler shall forthwith discharge him, and, also, the next court of oyer and terminer and gaol delivery, or sessions of the peace, shall vacate the recognizance of bail, if any; and, if the court of oyer and terminer and gaol delivery, or court of quarter sessions, shall be directed to give judgment, the said court shall proceed to give judgment at the next session."

Form of certificates.]—The forms used for the certificate of the court for crown cases reserved are as follows:—

Court for the consideration of the Court for Crown Cases Reserved pursuant to the statute 11 & 12 *Vict.* c. 78.

At a sitting of the said court holden at the Royal Courts of Justice, in

the city of Westminster, on the — day of —— in the year of our Lord 18—, *before the judges of the High Court of Justice, the undersigned the Lord Chief Justice of England presiding, assembled for the purpose of hearing and determining questions of law reserved for their consideration under and by virtue of the Statute above mentioned.*

The King against. *A case having been transmitted from ——, to the said judges, pursuant to the Statute in such case made, setting forth that at —— the said —— had been tried and convicted before ——, on an indictment in the said case mentioned, also stating certain questions of law which had arisen upon the said trial, and which had been reserved for the consideration of the said judges. Now the said judges having duly proceeded to the hearing and determining of the said questions.*

It was thereupon considered and determined by the said judges that the said —— [ought not to have been found guilty, or to be convicted on the said indictment. Wherefore, it was ordered that judgment which stands postponed on the said indictment, be altogether stayed and arrested, and that no judgment whatever be passed on the said —— for or by reason of the premises of which —— so been found guilty. And that —— be forthwith discharged from —— commitment to prison on the said indictment (b), (c), (d).] In witness whereof, I, the presiding chief ——, have hereunto set my hand according to the Statute in that behalf.

(b) [Or] was properly convicted on the said indictment, wherefore the judgment given on the said indictment against the said —— is affirmed.

(c) [Or] was properly found guilty, and ought to be convicted on the said indictment, wherefore it was ordered that the judgment which stands postponed on the said indictment be given thereupon against the said ——, and that such judgment be given at the next ——, at which the said —— shall personally appear, and at which —— may be lawfully sentenced on the said indictment.

(d) [Or] ought not to have been convicted on the said indictment, wherefore it was ordered that an entry to that effect be forthwith made on the record of the said indictment, and that the judgment given upon the same be altogether reversed, avoided, and altogether held for nothing, and that the said —— be forthwith discharged from —— imprisonment under and by virtue, and in execution of the said judgment.

The form of certificate by the clerk of the court from which the case is reserved is as follows (11 & 12 *Vict.* 78, sched.):—

Whereas at the sessions of the peace for the county of ——, held on ——, before ——, and other their fellows, [or *at the session of oyer and terminer and gaol delivery held for the county of ——, on ——,*] *before, among others, Sir S. M., knight, one of the justices of the High Court of Justice (in England), and ——,* [here name the quorum commissioners, justices of oyer and terminer, and gaol delivery] A.B., *late of ——, labourer, having been found guilty of felony, and judgment thereupon given, that* [state the substance] *the court before whom he was tried reserved a certain question of law for the consideration of the justices, and execution was thereupon respited in the meantime:*

This is to certify, that the said justices having met in the Royal Courts of Justice, London, [or *Dublin,* as the case may be], *on the —— day of ——, it was considered by the said justices and barons there that the judgment aforesaid should be annulled, and an entry made on the record that the said* A. B. *ought not, in the judgment of the said justices and barons, to have been convicted of the felony aforesaid; and you are therefore hereby required forthwith to discharge the said* A. B. *from your custody.*

To the gaoler of ——, and the sheriff of ——, and all others whom it may concern.

Clerk of the peace of the county of ——,
[or *clerk of assize for* ——, as the case may be.]

11 & 12 *Vict. c.* 78, *s.* 3. *Judgment to be delivered in open court.*]—. . . The judgment or judgments of the said justices and barons shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the superior courts of common law at Westminster or Dublin, as the case may be, are now delivered." [*The rest of the section was repealed in* 1875: 38 & 39 *Vict. c.* 66, *S. L. R.*]

Sect. 4. *Amendment of case.*]—"The said justices and barons, when a case has been reserved for their opinion, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended." [*See post*, p. 277.]

Sect. 6. *Penalty for forgery of documents.*]—"Every person who shall forge or alter, or shall offer, utter, or dispose of, or put off, knowing the same to be forged or altered, any certificate of, or copy certified by a chief justice, or any certificate of or copy certified by a clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, with intent to cause any person to be discharged from custody, or otherwise to prevent the due course of justice, shall be guilty of felony, and being convicted thereof shall be liable . . . to be *transported beyond the seas* for any term not exceeding ten years." [*Now penal servitude for not more than ten nor less than three years, or imprisonment with or without hard labour for not more than two years. See* 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235), *and* 57 & 58 *Vict. c.* 56 (*S. L. R.*); and *see post, tit.* "*Forgery.*"]

Questions of law which may be reserved.]—Under the Act the court of trial has authority to reserve, and the court for Crown Cases Reserved to entertain, not only questions of law which are raised by the evidence, but also questions of law which arise on a motion in arrest of judgment; *R.* v. *Martin*, 1 *Den.* 398; 18 *L. J.* (*M. C.*) 137; or as to the sufficiency of the indictment: *R.* v. *Webb*, 1 *Den.* 338; 18 *L. J.* (*M. C.*) 39: *R.* v. *Craddock*, 2 *Den.* 31; 20 *L. J.* (*M. C.*) 31: *R.* v. *Garland*, 11 *Cox*, 224 (*Ir.*); *Ir. Rep.* 3 *C. L.* 383; or as to the legality of the sentence. *R.* v. *Summers*, *L. R.* 1 *C. C. R.* 182; 38 *L. J.* (*M. C.*) 62: *R.* v. *Garland* (*ubi supra*): *R.* v. *Horn*, 15 *Cox*, 205. But a case cannot be reserved on questions which arise on *demurrer*; for as this court is empowered to hear and finally determine, to entertain a question of demurrer would be to take away the right of a prisoner to review the decision by writ of error, and ultimately in Parliament. *R.* v. *Fadermann*, 1 *Den.* 565; 19 *L. J.* (*M. C.*) 147. [*And see Orders of Court, infra*, p. 277.] Where a prisoner pleaded guilty to an indictment and after the judge left the assize town his attention was called to an unreported case (*R.* v. *Dodd*, 1877), which, if law, showed that the indictment was bad on its face, and he thereupon stated a case, requesting the opinion of the court for Crown Cases Reserved whether the conviction was good, it was held that the objection to the indictment was a question which had arisen at the trial so as to give the court for Crown Cases Reserved jurisdiction. *R.* v. *Brown*, 24 *Q. B. D.* 357; 59 *L. J.* (*M. C.*) 47; 16 *Cox*,

715. In this case the court distinguished a prior case to the contrary effect, *R.* v. *Clark*, *L. R.* 1 *C. C. R.* 54; 36 *L. J.* (*M. C.*) 16; 10 *Cox*, 338, but were prepared to overrule it had it been directly in point, and it was disapproved in *R.* v. *Plummer* [1902] 2 *K. B.* 339. Where it was discovered, on the day after the conviction of a prisoner for felony, that one of the jurors who tried the case had by mistake answered to the name of another juror on the panel when called, and so had served on the jury without objection, whereby it was suggested that there had been a mistrial, this was held not to be "a question of law which arose on the trial," and therefore that the court for Crown Cases Reserved had not jurisdiction to set aside the verdict and judgment, or to award a *venire de novo*. *R.* v. *Mellor*, *Dears. & B.* 468; 27 *L. J.* (*M. C.*) 121; 7 *Cox*, 454. It seems to have been thought that this court has in no case authority to award a *venire de novo*, or to order a new trial. *Id.* *See also* *R.* v. *Martin*, *L. R.* 1 *C. C. R.* 378; 41 *L. J.* (*M. C.*) 113; 12 *Cox*, 204. It did, however, award a *venire de novo* in *R.* v. *Yeadon*, *L. & C.* 81; 31 *L. J.* (*M. C.*) 70; 9 *Cox*, 91, in a case in which a court of quarter sessions had declined to receive a verdict of common assault on an indictment under 14 *& 15 Vict. c.* 100, *s.* 29, and the jury had therefore returned a general verdict of guilty. In *R.* v. *Saunders* [1899] 1 *Q. B.* 490, the court directed the reversal of judgment against one of three prisoners who had not joined in an objection to the admissibility of evidence which had been taken on behalf of another prisoner, and was held to be a valid objection on a case reserved on the latter's behalf. They purported to act on the words "make such other order as justice may require," in *s.* 3 (*ante*, p. 275). In recent cases on a colonial Act in the same terms it was suggested that these words would authorize the grant of a new trial in misdemeanor. *R.* v. *O'Keefe* [1893] 15 *N. S. W. Rep.* (*Law*), 1; *R.* v. *Smith* [1896] 17 *N. S. W. Rep.* (*Law*), 104. This course, if ever possible, cannot, it would seem, be taken where the accused has been in jeopardy on the first trial. *R.* v. *Gibson*, 18 *Q. B. D.* 537; 56 *L. J.* (*M. C.*) 49; 16 *Cox*, 181: *R.* v. *Saunders*, *ubi supra*. It is uncertain whether, if a view is allowed during the trial, and if any evidence is given irregularly to the jury at such view, that fact is ground for a case for the consideration of the court for Crown Cases Reserved, or is matter to be placed upon the record, and the subject of a writ of error, or merely furnishes ground for an application to the home secretary for remission of the sentence. *R.* v. *Martin*, *L. R.* 1 *C. C. R.* 378; 41 *L. J.* (*M. C.*) 113. The court for Crown Cases Reserved cannot amend the indictment, *R.* v. *Garland*, 11 *Cox*, 224 (*Ir.*); *Ir. Rep.* 8 *C. L.* 383, but it can consider its sufficiency, even if no question is reserved upon it; *R.* v. *Webb*, 1 *Den.* 338; 18 *L. J.* (*M. C.*) 39; and may look at it even if it is not set out in the case. *R.* v. *Williams*, 2 *Den.* 61; 20 *L. J.* (*M. C.*) 106; 4 *Cox*, 356. The court cannot entertain questions of mere *practice*, such as whether a case was properly left to the jury on the unconfirmed testimony of an accomplice. *R.* v. *Stubbs*, *Dears*, 555; 25 *L. J.* (*M. C.*) 16; 7 *Cox*, 48. And it can only decide those points which are reserved for its opinion, although other points in the prisoner's favour appear on the face of the case, which are not reserved for the opinion of the court. *R.* v. *Tyree*, *L. R.* 1 *C. C. R.* 177; 38 *L. J.* (*M. C.*) 58; 6 *Cox*, 377.

Where an amendment, without which the indictment was bad, had been improperly made at the trial, after verdict, this court ordered the record to be restored to its original state, and a verdict of not guilty to be entered. *R.* v. *Larkin*, *Dears.* 365; 23 *L. J.* (*M. C.*) 125.

Counsel who appeared at the trial for the prisoner, but is not instructed to argue the case reserved, may cite authorities as *amicus curiæ*: *R.* v.

Thomas, L. & C. 313; 33 *L. J.* (*M. C.*) 22; 9 *Cox*, 376, 382, and has been allowed to argue the case. *R.* v. *Moore*, 61 *L. J.* (*M. C.*) 80; 17 *Cox*, 458. Prisoners jointly defended below are not entitled to appear separately on the argument of a case reserved. *R.* v. *Bird*, 5 *Cox*, 20 (*C. C. R.*).

Preparation and argument of case.]—By rules of court made 1st June, 1850, signed by all the judges, it is ordered, (1) "That when any case shall be transmitted by a court of oyer and terminer, or gaol delivery, or court of quarter sessions, for the consideration of this court, the original case signed by the judge or commissioner, or chairman of sessions, reserving the question of law, and seventeen copies of such case, one for each judge, and one for each party shall be delivered to the clerk of this court, at the Exchequer Chamber, Westminster, at least four days before the day appointed for the sitting of the said court."

(2) "That every case transmitted for the consideration of this court shall briefly state the question or questions of law reserved (*R.* v. *Gray*, 68 *J. P. Rep.* 40), and such facts only as raise the question or questions submitted; if the question turn upon the indictment, or upon any count thereof, then the case must set forth the indictment, or the particular count."

(3) "That no case be heard upon any demurrer to the pleadings."

(4) "That every case state whether judgment on the conviction was passed or postponed, or the execution of the judgment respited, and whether the person convicted be in prison, or has been discharged on recognizance of bail to appear and receive judgment, or to render himself in execution."

(5) "That when any case is intended to be argued by counsel, or by the parties, notice thereof be given to the clerk of this court at least two days previously to the sitting of the said court." *See R.* v. *Gray*, 68 *J. P. Rep.* 40 (*C. C. R.*).

(6) "That with every case delivered to the judges of this court (except such cases as shall be reserved by such judges) the fee payable to the clerks of the said judges shall not exceed the fee payable on "Demurrer and other paper books," as contained in the table of fees allowed and sanctioned by the judges pursuant to the statute, 7 *W.* 4, *&* 1 *Vict. c.* 30 (*rep.*)." [*This table appears to have been superseded by the Crown Office Fees Order*, 1886. *See Short & Mellor, Cr. Off. Practice*, 676.]

The case should not contain hypothetical questions for the guidance of the court below on future occasions. *R.* v. *Whitehead*, *L. R.* 1 *C. C. R.* 33; 35 *L. J.* (*M. C.*) 186; 10 *Cox*, 234; nor statements of a jury which are not part of the verdict. *R.* v. *Trebilcock*, *Dears. & B.* 453, 457; 27 *L. J.* (*M. C.*) 103; 7 *Cox*, 408. It should state the facts briefly. *R.* v. *Steer*, 18 *L. J.* (*M. C.*) 30; 1 *Den.* 349; and be submitted in a complete form. *R.* v. *Holloway*, 1 *Den.* 370; 2 *C. & K.* 942; 18 *L. J.* (*M. C.*) 60; 3 *Cox*, 241. The judge stating the case may not adopt shorthand notes. *R.* v. *Gray*, *ubi supra*. If the case appears to omit a material point, counsel may properly communicate with the judge and ask for any amendment which appears necessary. *R.* v. *Smith*, 1 *Den.* 510, 512; 2 *C. & K.* 882; 4 *Cox*, 42. As to signing a case where the judge who tried the indictment dies, *see R.* v. *Featherstone*, *Dears.* 369; 23 *L. J.* (*M. C.*) 127. If material facts are omitted the case may be returned for amendment. 11 *&* 12 *Vict. c.* 78, *s.* 4 (*ante*, p. 275); *R.* v. *Hey*, 1 *Den.* 602, 604: *R.* v. *Perkins*, 2 *Den.* 459, 460. This will be done where the case is imperfectly stated, *R.* v. *Gray*, *ubi supra*, but not on the mere application of counsel. *R.* v. *Hilton*, *Bell*, 20, 24; 28 *L. J.* (*M. C.*) 28. And if, after being so sent back, it is returned substantially unaltered, the court will not interfere, nor receive affidavits to supplement its defects. *R.* v. *Studd*, 10 *Cox*, 258.

The cases are now (1904) lodged in the Crown Office, the King's coroner acting as the special officer of the court.

By the regulations made on Jan. 25, 1886, under the *Prosecution of Offences Act*, 1879 (*St. R. & O. Revised* (ed. 1904), *vol.* 4, *tit.* "*Criminal Procedure, E.*")—

"(4) Where it is brought to the notice of the director of public prosecutions that a case has been reserved for the opinion of the High Court of Justice under the *Crown Cases Reserved Act*, 1848 (*ante*, p. 271), and that counsel has not been instructed for the prosecution, he shall, if he thinks the case of sufficient importance or is so directed by the attorney-general, instruct counsel to appear for the prosecution."

Counsel, in arguing the case, must confine themselves to the facts as they appear on the case stated to the court. *R.* v. *Smith*, 1 *Den.* 510: *R.* v. *Blakemore*, 2 *Den.* 410; 21 *L. J.* (*M. C.*) 60. The counsel for the prisoner begins, and has a reply. *R.* v. *Gate Fulford*, *Dears. & B.* 74, 94; 7 *Cox*, 280. The court, however, will hear counsel for the prisoner, or for the prosecution, although no counsel appear on the other side. *R.* v. *Garner*, 1 *Den.* 329; 18 *L. J.* (*M. C.*) 1; *R.* v. *Masters* (*ante*, p. 272): *R.* v. *Martin* (*ante*, p. 276). Where no counsel appear, the lord chief justice or other judge presiding reads the case, and then judgment is pronounced as in other cases.

If the five judges differ on a question of law it is usual to have the case re-argued before all the judges. *R.* v. *Burrell*, *L. & C.* 354; 33 *L. J.* (*M. C.*) 54; 9 *Cox*, 368.

Costs of argument.]—The court which reserves a question of law for the consideration of this court has the power under 7 *G.* 4, *c.* 64, *s.* 22 (*ante*, p. 249) to make an order for payment out of the local rate of the costs of the argument on the part of the prosecution. *R.* v. *Cluderoy*, 3 *C. & K.* 205: *R.* v. *Woolley*, 452. In the first of these cases the order seems to have been made before, in the second after, the argument in the C. C. R.

The C. C. R. itself rarely makes an order for costs. In *R.* v. *Hornsea*, *Dears.* 291; 23 *L. J.* (*M. C.*) 59, 62, *n.*; 6 *Cox*, 299, 302, *n.*, which was an indictment for non-repair of a highway, the court refused to entertain a question of costs, as not being within their jurisdiction, although it was specially agreed that the court should have the same power with respect to such costs as the judge could legally have exercised at the trial. In *R.* v. *Dolan* [1855] *Dears.* 436, 445; 24 *L. J.* (*M. C.*) 59, 61, *n.*; 6 *Cox*, 449, 453, *n.*, Lord *Campbell*, C.J., said that the court had no jurisdiction to tax costs and no taxing officer. In *R.* v. *Lewis* [1857] *Dears. & B.* 326, 328, *n.*; 7 *Cox*, 406, *Cockburn*, C.J., said that the C. C. R. had no power to order payment of the costs in the C. C. R., and that that power rested with the court reserving the case. But he said that it would be convenient that the officer of the court should certify the proper amount of costs to be allowed for the proceedings in the C. C. R., and that if necessary the court would make a rule for establishing this course of practice. No such rule has yet been made. Where an order for costs is made they are now taxable in the Central Office.

Sect. 2.

WRIT OF ERROR.

What.]—A writ of error is an original writ, formerly issued from the Petty Bag Office (the common law side of the Court of Chancery), but

now issued (by virtue of R. S. C. of 31st January, 1889) from the Crown Office Department of the King's Bench Division. It is directed to the judge or judges of a court of record, requiring him or them to send the record and proceedings of the indictment, inquisition or information on which judgment has been pronounced, and in which error is alleged, to the court authorized to review the same, and is in the nature of a commission from the King to the judges of the superior court, by which they are authorized to examine the record upon which judgment was given in the inferior court, and, on such examination and a consideration of the errors assigned, to affirm or reverse the judgment according to law. (*a*) *Finch, L.* 484; *F. N. B. Error*; *Termes de la Ley, Error*; *Bac. Abr., Error*; 3 *Bl. Com.* 49.

To what courts.]—A writ of error does not lie on a summary conviction, but only on judgments of courts of record acting according to the common law. 1 *Ld. Raym.* 469; *cas. temp. Holt*, 184; *Com. Dig. Pleader*, 3 *B.* 7. It does not lie till after judgment, *R.* v. *Seton*, 7 *T. R.* 378; 4 *R. R.* 466; and is the only means of removing the record in a criminal case to a higher court after judgment. *R.* v. *Seton, ubi supra*: *R.* v. *Yorkshire, West Riding JJ.*, 7 *T. R.* 467. It lies at the suit either of the subject, or of the crown. *See Sanger* v. *U. S.* [1891] 144 *U. S.* 310 (where the English cases are collected): *Fox* v. *R.*, 10 *Cox*, 502 (*Ir.*): *R.* v. *Levy*, 6 *Cox*, 482 (*Ir.*). It is not now the practice for the High Court in England to issue a writ of error to a colonial court. *See R.* v. *Lees*, *E. B. & E.* 828; 27 *L. J.* (*Q. B.*) 403; and its authority to do so is doubtful. *See ex parte Anderson*, 3 *E. & E.* 487; 30 *L. J.* (*Q. B.*) 129; 25 & 26 *Vict. c.* 20. The remedy in such cases is by petition to the King in Council. *See R.* v. *Bertrand*, *L. R.* 1 *P. C.* 520: *Re Dillett*, 12 *App. Cas.* 459: *Ex parte Carew* [1897] *App. Cas.* 719: *Wheeler, Privy Council Practice*, 755.

On what grounds.]—It lies for every *substantial defect appearing on the face of the record*, for which the indictment might have been quashed, or which would have been fatal on demurrer, or in arrest of judgment, provided such defect is not cured by verdict. Until 1826 writs of error were frequently brought for trivial and purely formal errors. But 7 *G.* 4, *c.* 64, *s.* 21, declared certain defects in the indictment to be cured by verdict (*ante*, pp. 78, 84), and provided also that "judgment after verdict on indictments or informations shall not be stayed or reversed for want of a *similiter* (*ante*, p. 169), nor by reason that the jury process has been awarded to the wrong officer upon an insufficient suggestion (*ante*, p. 196), nor for any misnomer or wrong description of the officer returning the process, or of any of the jurors, nor because any person has served upon the jury who has not been returned by the sheriff or other officer" (*ante*, pp. 214, 226). And since 1851 (14 & 15 *Vict. c.* 100, *s.* 25, *ante*, p. 55) every objection for any *formal defect* apparent on the face of an indictment shall be taken by demurrer or motion to quash before the jury are sworn and not afterwards, and the court may order the indictment forthwith to be amended. And, independently of those statutes, it is a general rule of pleading at common law that, where an averment which is *necessary* for the support of the pleading is made but is *imperfectly stated*, and the verdict on an issue involving that averment is found, if it appears to the court after verdict that the verdict could not have been found on this issue without proof of *this*

(*a*) In *O'Brien* v. *R.*, 26, *L. R.* (*Ir.*) 451, 523, *Palles*, C.B., raised the question whether, since the Judicature Acts the High Court could reverse, on writ of error, a decision of one of its judges sitting in a court of assize. The point has not been mooted in England.

averment, then, after verdict, the *defective averment*, which might have been bad on demurrer, is cured by verdict. *Heymann* v. *R.*, *L. R.* 8 *Q. B.* 102, 105. In pursuance of this rule, and independently of 7 *G.* 4, *c.* 64, *s.* 21, it was held that, assuming that an indictment for receiving goods obtained by false pretences might have been quashed or was bad on demurrer for not setting out the false pretences, the defect, if any, was cured by verdict. *R.* v. *Goldsmith*, *L. R.*, 2 *C. C. R.* 74; 42 *L. J.* (*M. C.*) 94: *Taylor* v. *R.* [1895] 1 *Q. B.* 25; 61 *L. J.* (*M. C.*) 11 (*see ante*, p. 165). The rule does not apply to the case of the total *omission* of an essential averment, and such total omission is not cured by verdict. When it is said in the rule that the verdict could not have been found without proof of the averment, the meaning is, that the verdict could not have been found without finding this imperfect averment to have been proved in a sense adverse to the accused. See judgment of *Brett*, J.A., in *Aspinall* v. *R.*, 2 *Q. B. D.* 48, 58; 46 *L. J.* (*M. C.*), 149, 150. But a writ of error is still the proper remedy in the case of every defect in substance in an indictment not cured by verdict, where a question of law has not been reserved for the judges of the court for Crown Cases Reserved (*see ante*, p. 271), *e.g.*, for irregularity in awarding the jury process, for any material defect in the caption, for irregularity in the verdict or judgment, or any manifest error on the face of the record: 4 *Bl. Com.* 391; 1 *Chit. Cr. L.* 747. And if a question of law has been raised by demurrer, a writ of error is the only remedy, the court for Crown Cases Reserved in such a case having no jurisdiction. *R.* v. *Fadermann*, 1 *Den.* 565; 19 *L. J.* (*M. C.*) 147 (*ante*, p. 275).

Where the court appears by the indictment to have jurisdiction over the offence, it cannot be assigned as error that the offence was committed out of the jurisdiction of the court. *Ex parte Newton*, 4 *E. & B.* 869; 24 *L. J.* (*Q. B.*) 246; and failure to comply with the *Vexatious Indictments Act*, 1859, is not ground for a writ of error. *Knowlden* v. *R.*, 5 *B. & S.* 532; 33 *L. J.* (*M. C.*) 219; 9 *Cox*, 483; *Boaler* v. *R.*, 57 *L. J.* (*M. C.*) 85; 16 *Cox*, 488.

But a writ of error may be brought on an indictment for perjury on which judgment has been given, if it does not appear that the oath upon which the perjury is assigned has been taken in a judicial proceeding; *Overton* v. *R.*, 4 *Q. B.* 83, 90; 12 *L. J.* (*M. C.*) 61; or that the court had authority to administer the oath; *Lavey* v. *R.*, 2 *Den.* 504; 17 *Q. B.* 496; 21 *L. J.* (*M. C.*) 10 (*Ex. Ch.*); *and see R.* v. *Hallett*, 2 *Den.* 237; 20 *L. J.* (*M. C.*) 197 (*C. C. R.*): *R.* v. *Chapman*, 1 *Den.* 432; 18 *L. J.* (*M. C.*) 152 (*C. C. R.*); or that the defendant swore "falsely"; *R.* v. *Oxley*, 3 *C. & K.* 317. So, if an indictment be preferred for libellous words which are not indictable, and judgment be given thereon (as in *R.* v. *Penny*, 1 *Ld. Raym.* 153). In *R.* v. *Mason*, 2 *T. R.* 581; 1 *R. R.* 545, an indictment charging the defendant with obtaining money by false pretences without showing what the pretences were, was held to be insufficient, and such a defect was held to be ground for reversing the judgment. But this decision was disapproved in *Heymann* v. *R.*, *supra*; *and see R.* v. *Goldsmith*, and *Taylor* v. *R.*, *supra*. It would appear from those cases that the omission to set forth the false pretences, in an indictment for obtaining money by false pretences, is a defect which would be cured by verdict at common law, as well as under 7 *G.* 4, *c.* 64, *s.* 21 (*ante*, p. 78). If in an indictment for burglary it appeared that the prisoner broke and entered the dwelling-house with intent to commit a trespass or misdemeanor, and not a felony, error would lie. *R.* v. *Powell*, 2 *Den.* 403 (*C. C. R.*). And where value is of the *essence* of the offence, the omission of a statement of the value would render the indictment bad on error. In the same way, where local description is necessary (*see ante*, p. 67), its omission would be ground for a

writ of error unless an amendment were allowed during the trial. So, also, where time is of the essence of the offence, as in burglary; *see ante*, p. 67.

An indictment charging a conspiracy to cheat and defraud certain tradesmen of divers quantities of their goods and chattels, was held insufficient on error, for not setting out the names or designating the class of persons intended to be defrauded. *King* v. *R.*, 7 *Q. B.* 795; 14 *L. J.* (*M. C.*) 172; *and see Lord Hale's Com. F. N. B.*, *tit.* "*Error.*" The defect on which the court of Exchequer Chamber acted in the above case of *King* v. *R.* was, that the indictment charged a conspiracy to cheat and defraud *certain liege subjects being tradesmen*. It was held that such an allegation in such form in pleading meant *certain definite tradesmen alleged to be known to the defendants at the time of the criminal agreement*, and, therefore, that such definite tradesmen ought, in describing the conspiracy, to be named, or an excuse be averred for not naming them. If there had been added after the words *being tradesmen* the phrase, *who should thereafter deal with the defendants*, the indictment would have been sufficient according to *R.* v. *Gill*, 2 *B. & Ald.* 204; 20 *R. R.* 407; *R.* v. *Gompertz*, 9 *Q. B.* 824; *Sydserff* v. *R.*, 11 *Q. B.* 245: *R.* v. *Silverlock* [1894] 2 *Q. B.* 766. *See Aspinall* v. *R.*, 2 *Q. B. D.* 48, 62, 63; 46 *L. J.* (*M. C.*) 152, *Brett*, J. A. Where the defendant challenges a juror peremptorily, and the crown demurs, and judgment is wrongly given by the court in which the trial is proceeding against the defendant's right to a peremptory challenge, a court of error will reverse the whole proceedings. *Gray* v. *R.*, 6 *St. Tr., N. S.* 117; 11 *Cl. & F.* 427; 8 *Eng. Rep.* 1164. But *semble*, there must be a regular *judgment* on an issue joined in law or in fact, on which to found the writ of error, and a mere order by the court that a juror challenged by the crown shall stand by, though irregular, is not ground of error. *Id.*; *Mansell* v. *R.*, 8 *St. Tr., N. S.* 831; 8 *E. & B.* 54; *Dears. & B.* 375; 27 *L. J.* (*M. C.*) 4. So, also, where a challenge to the array is improperly overruled, it is error. *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1; 11 *Cl. & F.* 155; 8 *Eng. Rep.* 1061. If the verdict of the jury were returned during the absence of one of the jurors, it would be error. So, also, where it does not appear upon the record that the jurors were *boni et legales homines*. But where the record set out an award of *venire* to the sheriff, which required him to impanel and return a jury of good and lawful men of the county, and then proceeded to state that the sheriff, for the purpose aforesaid, impanelled and returned certain persons named, and arrayed them in one panel; it was held that by reasonable intendment the record showed that the persons named in the panel were good and lawful men of the county. *Mansell* v. *R.*, 8 *St. Tr., N. S.* 831; 8 *E. & B.* 54; *Dears. & B.* 375; 27 *L. J.* (*M. C.*) 4. Error also may be assigned on a special verdict, where judgment has been passed on the defendant; *R.* v. *Chadwick*, 11 *Q. B.* 205; 17 *L. J.* (*M. C.*) 33; and on the omission of the *allocutus*, or demand of the defendant what he has to say why judgment shall not proceed against him. *See O'Brien* v. *R.*, 7 *St. Tr., N. S.* 1, 361; 2 *H. L. C.* 465; 9 *Eng. Rep.* 1169. So, also, if judgment for corporal punishment be passed against a prisoner not present in court: 1 *Ld. Raym.* 267. It is not ground of error that the verdict is not entered of record when given: *R.* v. *Richard Carlile*, 2 *St. Tr., N. S.* 459; nor that entry of a partial acquittal is not made: *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1, 795; nor that continuances were not entered: *Id.* pp. 753, 791; but *see* 6 *St. Tr., N. S.* 552, *n.* If a general judgment be given on the whole of an indictment containing several counts, any one of which is bad in substance, the judgment will be reversed on error. *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1; 11 *Cl. & F.* 155; 8 *Eng. Rep.* 1061; *Gregory* v. *R.*, 15 *Q. B.* 957. But where verdict and judgment have been entered on all counts, and one is good,

error will lie as to the judgment severally entered on the bad counts. *Holloway* v. *R.*, 2 *Den.* 287; 17 *Q. B.* 317. If an indictment be preferred at the quarter sessions for an offence not cognizable by justices of the peace, and the defendant be convicted and judgment passed upon him, the proceedings will be reversed on error: such as an indictment on a penal statute, where jurisdiction is not given to the sessions; 4 *Mod.* 379; 3 *Salk.* 188; or for a conspiracy, not within the exceptions of 5 & 6 *Vict. c.* 38, *s.* 1; or for larceny of documents of a court of law or equity. *King* v. *R.*, 61 *J. P.* 663 (*see ante*, p. 126).

Duplicity in pleading is not ground of error. *Nash* v. *R.*, 4 *B. & S.* 935; 33 *L. J.* (*M. C.*) 94.

If the judge in the exercise of his discretion discharge the jury on the ground of necessity, such exercise of his discretion cannot be reviewed in a court of error. *Winsor* v. *R.*, *L. R.* 1 *Q. B.* 289, 390; 35 *L. J.* (*M. C.*) 121, 161 (*Ex. Ch.*); *and see ante*, p. 224.

Where evidence is given irregularly to the jury at a view permitted by the judge in the course of the trial (*see ante*, p. 212) it is not settled whether it is matter to be placed upon the record, and the subject of a writ of error, or is ground for a case for the consideration of the court for Crown Cases Reserved, or for an application to the Home Secretary for remission of the sentence. *R.* v. *Martin*, *L. R.*, 1 *C. C. R.* 378; 41 *L. J.* (*M. C.*) 113. Error lies where an illegal judgment is given, or the prisoner is not properly arraigned. *Fox* v. *R.*, 10 *Cox*, 502 (*Ir.*); 15 *W. R.* 106; and *cf. R.* v. *Levy*, 6 *Cox*, 482 (*Ir.*).

A writ of error also lies to reverse an outlawry; *R.* v. *Wilkes*, 19 *St. Tr.* 2527; 4 *Burr.* 2537; *Wright* v. *R.*, 14 *Q. B.* 148; 16 *L. J.* (*Q. B.*) 10; 2 *Cox*, 91; 2 *Hawk*, *c.* 50, *s.* 11; *Hand's Cr. Prac.* 487, *n.* But if the outlawry is after conviction the reversal does not affect the conviction. *Wright* v. *R.* (*ubi supra*).

Fiat of attorney-general.]—By the *Crown Office Rules*, 1886, *r.* 184, "no writ of error shall lie without the *fiat* of the attorney-general having been first obtained." This expresses the practice as established by the cases below cited. Until the reign of Queen Anne, a writ of error was grantable in any criminal case only *ex gratiâ regis*, upon the law officers of the crown certifying that there was cause of error; *Crawle* v. *Crawle*, 1 *Vern.* 170; *R.* v. *Wilkes*, 4 *Burr.* 2527, 2550. But in the Aylesbury case, *R.* v. *Patey*, [1704], 2 *Salk.* 503; 14 *East*, 92, *n.*; 14 *St. Tr.* 862, *n.*, ten of the judges declared their opinion that, in all cases under treason and felony, a writ of error was not merely of grace, but ought *ex debito justitiæ* to be granted; not meaning thereby that it was a writ of course, but that where there was probable error it ought not to be denied. In cases of treason or felony it was always in strict law, entirely in the breast of the crown whether the writ should be granted or refused. *See* 4 *Bl. Com.* 392; 2 *Hawk. c.* 50, *s.* 11; *R.* v. *Wilkes*, 4 *Burr.* 2527, 2551. In misdemeanors, also, the writ does not issue as a matter of course, but under the like *fiat* (*R.* v. *Lees*, 27 *L. J.* (*Q. B.*) 403), which however in these cases the attorney-general ought to grant whenever probable grounds are laid. It was said that the Court of King's Bench would order him to do so if he refuse; 4 *Burr.* 2551; but it has since been held that this is not so, and that the court will not interfere after he has exercised his discretion, and refused to grant a *fiat*. *Ex parte Newton*, 4 *E. & B.* 869; 16 *C. B.* 97; 24 *L. J.* (*Q. B.*) 246. In fact, it may now be treated as settled law that "no court in the kingdom has any controlling jurisdiction over the attorney-general as to the issue of his *fiat*." *R.* v. *Comptroller of Patents* [1899] 1 *Q. B.* 906, 914, *Smith, L.J.*; *R.* v. *Clark*, 7 *W. R.* 601; *Re Pigott*, 11 *Cox*,

311; 19 *L. T.* (*N. S.*) 114 (*Ir.*). But *see R.* v. *Rowe*, 2 *Mol. Ir. Ch.* 27. The clerk of the Crown Office (formerly of the Petty Bag) is not bound to issue the writ until the *fiat* is produced: *Castro* v. *Murray*, *L. R.*, 10 *Ex.* 213; 44 *L. J.* (*M. C.*) 70. Where, therefore, it is intended to sue out a writ of error in a criminal case, the first step is to apply to the attorney-general for his *fiat*, and for this purpose a certificate signed by the prisoner's counsel, accompanied by an affidavit, or statutory declaration, if error in fact be alleged, should be submitted to the attorney-general. *R.* v. *Wilkes*, 4 *Burr.* 2550. It is uncertain whether a writ of error can be sued out in *formâ pauperis*, *R.* v. *Stokes*, 3 *C. & K.* 185, 189; *and see ante*, p. 190. One of several persons jointly convicted even of conspiracy may sue out error without the other. *Wright* v. *R.*, 14 *Q. B.* 148; 16 *L. J.* (*Q. B.*) 10; 2 *Cox*, 91.

No fee seems ever to have been charged in England by the attorney-general for considering a writ of error for the purpose of deciding whether to issue his *fiat*. At one time a fee of 15 guineas was demanded by the attorney-general for Ireland; but the fee was held to be illegal. *Ex parte Costello*, *Ir. Rep.* 2 *C. L.* 380.

Procedure.]—The procedure on writs of error is now regulated by *Cr. Off. Rules*, 1886, *rr.* 183–215, and the forms in the Appendix to those rules.

Error from inferior court to King's Bench Division.]—"Error upon a judgment shall lie to the King's Bench Division." *Cr. Off. Rules*, 1886, *r.* 183. A *præcipe*, together with the attorney-general's *fiat*, must be taken to the Crown Office before the writ of error can be issued. A form of the attorney-general's *fiat* for writ of error on indictment at sessions is given in *App. to Cr. Off. Rules*, 1886, *Form* 125.

Issuing writ, and form of writ of error.]—On the filing of a *præcipe* and the production of the attorney-general's *fiat*, the writ of error, which must be prepared by the party or his solicitor, on parchment, is sealed and issued by the officers of the Crown Office. The form of a writ of error to an inferior court is given in *App. to Cr. Off. Rules*, 1886, *Form* 126. 12 *& 13 Vict. c.* 109, *s.* 38, which formerly regulated the matter, is repealed by 56 *& 57 Vict. c.* 54 (*S. L. R.*).

Upon delivering the writ of error to the clerk of the peace or other officer of the court to which it is directed, who has the custody of the indictment, he allows it and he makes up the record, and makes out the return to the Court. "The writ of error upon judgment given in inferior courts, with the return thereto, shall be filed at the Crown Office." *Cr. Off. Rules*, 1886, *r.* 185. The return is made by annexing the engrossment of the record of the judgment (the original need not be returned), and by indorsing the writ of error thus:—"*The answer of* A. B., *one of the justices within mentioned.*"

(*Signed*) A. B. (L. S.)

Diminution of record.]—If the whole record be not certified, or not truly certified, by the inferior court to which the writ of error is directed, the plaintiff in error may allege a diminution of the record, showing that part of the record has been omitted and remains in the inferior court not certified, and if this be proved a *certiorari* will be awarded. *King* v. *R.*, 7 *Q. B.* 795; 14 *L. J.* (*M. C.*) 172: *Termes de la Ley*, 249: *Co. Ent.* 232, 242: 4 *Bl. Com.* 390. Thus, where it was objected, on argument of a writ of error from the King's Bench to the Exchequer Chamber, that

mention of a motion in arrest of judgment in the court below did not appear on the face of the record; it was held that it was then too late to take the objection, and *Parke*, B., said that in order to raise the question, the plaintiff in error should have alleged a diminution of the record. *Dunn* v. *R.*, 12 *Q. B.* 1031, 1035, *n.*; 18 *L. J.* (*M. C.*) 14, 43. The court below can on motion amend its record. *Gregory* v. *R.*, 15 *Q. B.* 957; *and see Short & Mellor, Cr. Off. Pr.* 332.

Assignment of errors.]—When the writ has been duly returned, the next proceeding is the assignment of errors. But a motion may previously be made to quash the writ *quia improvide emanavit, etc. See Alleyne* v. *R.*, 5 *E. & B.* 399; *Dears.* 505, 512; 24 *L. J.* (*Q. B.*) 282: *R.* v. *Broome*, 17 *L. J.* (*Q. B.*) 208; 2 *Bail. C. C.* 259; *Cr. Off. Rules*, 1886, *r.* 204. On a charge of felony, the party suing out the writ must formerly have appeared in person to assign errors: 8 *Rep. Crim. Law*, 173: *Mansell* v. *R.*, 8 *St. Tr., N. S.* 831; 8 *E. & B.* 54; *Dears. & B.* 375; 27 *L. J.* (*M. C.*) 4. But under *Cr. Off. Rules*, 1886, "The plaintiff in error shall assign errors in person *or* by his solicitor, and if in person and in custody shall be brought up into court for that purpose upon a writ of *habeas corpus*." *R.* 187. The expenses of the *habeas corpus*, and the gaolers' travelling charges, are borne by the plaintiff in error. "If the plaintiff in error assigns errors by his solicitor or in person and is not in custody, he may do so by delivering the assignment of errors in writing to be filed at the crown office." *Id. r.* 188. "If the plaintiff in error assigns errors in person and is in custody, he shall be brought into court and assign errors, and move that counsel may be assigned to him, and shall then deliver to the officer of the court in writing the assignment of errors to be filed at the crown office." *Id. r.* 189. "Upon delivery of the assignment of errors under the preceding rule an order of court shall be drawn up to commit the plaintiff in error to the King's prison, until the decision of the court upon the writ." *Id. r.* 190. "In misdemeanor the plaintiff in error need not assign errors in person, or have counsel assigned to him, or if in custody, be present at the hearing of the case or when judgment is given, unless the court shall otherwise order." *Id. r.* 191. The plaintiff in error can assign error in fact if matters which took place at the trial are omitted from the record; but the cases do not clearly indicate how far, if at all, the record can be contradicted. *See R.* v. *Richard Carlile*, 2 *B. & Ad.* 362, 971; 2 *St. Tr., N. S.* 459, 618.

A form of assignment of errors in the King's Bench Division is given in *Appendix to Cr. Off. Rules*, 1886, *Form* 129. If the plaintiff in error does not assign errors in proper time, the defendant may sign judgment of *non pros. R.* v. *King*, 14 *L. J.* (*Q. B.*) 86; 9 *Jur.* 551.

Joinder in error.]—"An order for the attorney-general or King's coroner and attorney to join in error within eight days after service may be drawn up at the crown office and be served, with a copy of the assignment of errors, on the prosecutor or his solicitor. *Cr. Off. Rules*, 1886, *r.* 192. "If no joinder be filed within eight days, the plaintiff in error being personally present in court, upon a certificate of notice having been given to the attorney or solicitor-general, signed by him, or on his behalf, of such intended application, may move the court for an order *nisi* for judgment; and upon an affidavit of service of the order *nisi* upon the officer of the court from whence error is brought, the court may examine the record and give judgment of reversal, or such judgment as the court from which error is brought ought to have done." *Id. r.* 193. "If no joinder be filed within eight days, and the plaintiff in error be in custody,

he may be brought into court by order if he be in the King's prison, or by *habeas corpus* if elsewhere, and the plaintiff in error, or his counsel may then move on an affidavit of service of the order to join in error, and that on search made at the crown office that it appears there is no joinder filed, for judgment for the plaintiff in error, and for the prisoner's discharge." *Id. r.* 194. When error is brought on a judgment for felony, and the crown does not join in error, the defendant will be discharged. *R.* v. *Howes*, 7 *A. & E.* 60 *n.*; 3 *N. & M.* 462; *and see Alleyne* v. *R.*, 5 *E. & B.* 399; *Dears.* 505; 24 *L. J.* (*Q. B.*) 282, *Ex. Ch.* As to misdemeanor, *see r.* 202 (*post*, p. 288). "Joinder in error shall be filed at the crown office by the prosecutor, and a copy served on the plaintiff in error or his solicitor. *Id. r.* 195.

The *Appendix to the Crown Office Rules* contains a form of joinder in error (*Form* 130), and a form of entry of judgment for want of joinder in error (*Form* 133).

Entry of case for argument.]—"At any time after filing of the joinder in error the case may be put into the crown paper for argument upon the application of either party." *Cr. Off. Rules*, 1886, *r.* 196. A rule of court for a *concilium* is no longer necessary.

Paper books.]—"Two paper books for the use of the judges shall be delivered by the plaintiff in error at the crown office two days before the day appointed for hearing" (*Cr. Off. Rules*, 1886, *r.* 197); and "shall be marked 'for the use of the judges in the King's Bench Division,' and not with the name of any particular judge." *Id. r.* 144. The paper books should contain copies of the writ of error, of the record, of the assignment of errors, and of the joinder in error. It was formerly necessary to state in the margin of the paper books the points intended to be argued, but this is no longer required. *Short & Mellor, Cr. Off. Pr.* 325. "If paper books are not delivered the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies or deposited at the crown office a sufficient sum to pay for the same. In default of both parties the case shall be struck out, unless otherwise ordered." *Cr. Off. Rules*, 1886, *r.* 146, which alters the old practice as stated in *Sill* v. *R.*, 17 *Jur.* 208, *n.*; 16 *L. T.* (*O. S.*) 494.

Bail in error.]—"Where a writ of error has been brought by the defendant and not by the attorney-general, the defendant on the indictment on obtaining his writ of error, or consent for an appeal to the House of Lords, shall have the execution of the judgment stayed, and receive back the amount of any fine levied upon him upon the judgment, and further if in custody shall be entitled to be discharged from imprisonment on entering into a recognizance with two sufficient sureties to prosecute the writ of error in the *Form No.* 127, in the *Appendix to the Crown Office Rules*, 1886, before a judge of the High Court, or justice of the peace of the county, borough, or place where the defendant may be in custody. The bail to be justified in the usual manner, on twenty-four hours' notice to the prosecutor, or on such other notice as the judge, or justice of the peace, may order. Provided that in the case of any defendant under legal disability, it shall be sufficient if two persons to be appointed to be approved of by such judge or justice shall become bound by such recognizance on behalf of such defendant." *Cr. Off. Rules*, 1886, *r.* 199. This

rule embodies, with some alterations, the provisions of 8 & 9 *Vict. c.* 68, *s.* 1 (*rep.*).

"Every such recognizance shall be filed at the crown office, and the King's coroner and attorney, or the master of the crown office, shall make out and deliver a certificate sealed with the seal of the office that such recognizance is duly filed of record, which certificate shall be a sufficient warrant to the gaoler having the custody of the plaintiff in error, to discharge him out of custody, and for the repayment of any fine which may have been imposed by the court by the person having in his possession the whole or any part of the fine levied in execution of such judgment. Provided that no person who shall have received any such money and have paid it over to any other person according to the course of the Exchequer shall be liable to repay to the defendant any part of the money so paid over." *Cr. Off. Rules*, 1886, *r.* 200.

Where the defendant has been discharged from prison without a proper recognizance being filed and certified, the court in which the conviction was had will order fresh process to issue for his apprehension and recommitment. *Dugdale* v. *R.*, *Dears.* 254; 2 *E. & B.* 129; 6 *Cox*, 161; 24 *L. J.* (*M. C.*) 55. "If the plaintiff in error shall make default in prosecuting the writ of error with effect or in any other way break the conditions of his recognizance, the court may estreat the recognizance in a summary way without issuing a writ of *scire facias*, and order the writ of error to be quashed without any argument thereon, and in every such case the plaintiff in error shall forthwith be liable to execution upon the judgment." *Cr. Off. Rules*, 1886, *r.* 201. This rule embodies the provisions of 8 & 9 *Vict. c.* 68, *s.* 5, and 16 & 17 *Vict. c.* 32, *s.* 2, both now *repealed.*

Hearing.]—The presence in court of the plaintiff in error used to be necessary in all criminal cases (*Howard* v. *R.*, 10 *Cox*, 54; 13 *W. R.* 316), unless dispensed with by leave of the court. *Murray* v. *R.*, 7 *Q. B.* 700; 14 *L. J.* (*Q. B.*) 357. No provision is made by the *Cr. Off. Rules* as to the case where the plaintiff in error is in prison for felony, but the court can dispense with his presence. *Richards* v. *R.* [1897] 1 *Q. B.* 574; 66 *L. J.* (*Q. B.*) 459. Where the plaintiff in error is in prison for misdemeanor he need not if in custody be present in court at the argument or judgment "unless the court so order." *Cr. Off. Rules*, 1886, *r.* 191. As to the right of reply for the crown where the crown is defendant in error, *see O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1; 11 *Cl. & F.* 155; 1 *Cox*, 413, and *ante*, p. 212.

Remand or discharge on judgment.]—"On judgment being given, an order, either for remanding the prisoners to undergo the remainder of their sentence, or for their discharge, shall be drawn up and lodged with the gaoler by the prosecutor." *Cr. Off. Rules*, 1886, *r.* 198.

Judgment of affirmance.]—If the judgment of the court below be affirmed, the following is the form of the entry of judgment of the King's Bench Division given in *Appendix to Cr. Off. Rules*, 1886, *Form* 131:—

Whereupon the King's Bench Division of his majesty's High Court of Justice, before the King himself, now here having seen and fully understood all and singular the premises aforesaid, and having examined and inspected as well the record and proceedings aforesaid, and the judgment thereon given as aforesaid, as the matter above assigned and alleged for error, it appears

to the court here, but neither in the record and proceedings aforesaid, nor in giving the judgment aforesaid, is there any error. Therefore it is considered and adjudged by the said court here, that the said judgment be in all things affirmed.

16 & 17 *Vict. c.* 32, *s.* 4, which provided for the committal of a plaintiff in error who had personally appeared on proceedings on the writ, if the writ were quashed or the judgment affirmed, was *repealed* in 1892 (*S. L. R.*). Its place is taken by *Cr. Off. Rules*, 1886, *rr.* 203–206, *infra*. "Whenever the judgment against a plaintiff in error shall have been for the payment of a fine, and imprisonment until such fine be paid, either with or without imprisonment for a certain time, and the plaintiff in error shall have paid the fine, or the same or any part thereof shall have been levied and shall have been received back under the provisions of *rr.* 199 and 200 (*ante*, pp. 285, 286), and the judgment upon writ of error brought shall be affirmed, the plaintiff in error shall not be entitled, by reason of such payment as aforesaid, to be discharged from imprisonment, notwithstanding the expiration of any certain time of imprisonment for which the original judgment shall have been given until the fine shall be again paid." *Cr. Off. Rules*, 1886, *r.* 203. "When a recognizance on bail in error shall have been estreated, or judgment been affirmed, or writ of error been quashed on an affidavit or a certificate of the proper officer of the court to any such effect, and that default has been made for the space of four days in rendering the plaintiff in error to prison, a judge at chambers may issue his warrant to cause the defendant to be apprehended and imprisoned pursuant to and in execution of the judgment on an *ex parte* application by the prosecutor." *Id. r.* 204. "Whenever a plaintiff in error shall be committed by the court in execution, of the judgment given against such plaintiff in error, and whenever a plaintiff in error shall, by virtue of any warrant or in other manner, be rendered to prison in execution of such judgment, the imprisonment (if imprisonment shall not have commenced under such execution) shall be reckoned to begin from the day when such plaintiff in error shall be in actual custody in the prison in which he may have been adjudged to be imprisoned under such judgment; and if the plaintiff in error shall have been discharged from imprisonment on giving bail in error, as is in these rules before mentioned, such plaintiff in error shall be imprisoned for such further period in the same prison as with the time during which such plaintiff in error may already have been imprisoned under such execution shall be equal to the period for which he was adjudged to be imprisoned as aforesaid." *Id. r.* 205. "Whenever default shall have been made in rendering a plaintiff in error to prison in execution of a judgment for misdemeanor, and a warrant shall have been issued against such plaintiff in error to enforce such render to prison, according to the provisions of these rules, such plaintiff in error shall be liable to pay the costs and charges of such render; and if the prosecutor shall, before the expiration of the plaintiff in error's imprisonment, have caused the amount of such costs and charges to be ascertained by one of the masters at the crown office (now *by the Central Taxing Office*), and shall have left with the said plaintiff in error, and with the keeper of the prison or his deputy, a certificate under the hand of such master, of the amount of such costs so ascertained, then the said plaintiff in error shall not be discharged out of custody until such costs and charges shall have been paid, or until an order for such discharge has been made by a court exercising bankruptcy jurisdiction." *Id. r.* 206.

By *Cr. Off. Rules*, 1866, *r.* 179, which is applied by *r.* 186 to all judgments

upon writs of error:—"The court on giving final judgment or the Court of Appeal on affirmance (*see post*, p. 289), may, if they shall so think fit, on the application of the defendant then present, respite the execution of the judgment for such time as may be necessary for the defendant to obtain the attorney-general's *fiat* for a writ of error, or consent for an appeal to the House of Lords (*see post*, p. 290), upon the defendant entering into a recognizance with two sufficient sureties, upon such terms as the court may order, to render himself into custody or to prosecute his writ of error or appeal with effect, and may order the period of imprisonment, if that be part of the sentence, to commence on the day on which the party shall be actually taken to and confined in prison."

Judgment of reversal.]—If the judgment of the court below be reversed, the following is the form of the entry of judgment of the King's Bench Division, given in *Appendix to Cr. Off. Rules*, 1886, *Form* 132:—

[As in *Form* 131 (*ante*, p. 286) to the words "*it appears*"] *to the said court here, that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error. Therefore, it is considered and adjudged by the said court here, that the judgment aforesaid for the errors aforesaid, and for other errors, appearing on the record and proceedings aforesaid, be reversed, annulled, and altogether held for nothing. And that the said T. B. be restored to all things which by reason of the judgment and proceedings aforesaid he has lost, and that he depart hence without day in this behalf.* [When the judgment of the court below is amended, vary this form accordingly.]

"Whenever any writ of error shall be brought for the reversal of any judgment in misdemeanor and error shall be assigned thereon, no judgment of reversal shall be entered either for want of a joinder, or otherwise, without the order of the court in which such writ of error shall be pending, pronounced in open court; and upon a certificate, signed by or on behalf of the attorney or solicitor-general, that notice has been given to one of them of such intended application, and if there be no joinder in error such court may proceed to examine the record in error, and give such judgment thereon as the court from which error is brought ought to have done, although no joinder in error may have been filed." *Cr. Off. Rules*, 1886, *r.* 202.

Upon the reversal of a judgment against any person convicted of any offence, the judgment, execution and all former proceedings become thereby absolutely null and void. If living he (or if dead, his heir or personal representative, as the case may be) will be entitled to be restored to all things which he may have lost by such erroneous judgment and proceedings, and shall stand in every respect as if he had never been charged with the offence in respect of which judgment was pronounced against him. But a judgment reversed is no bar to a second indictment. *R.* v. *Drury*, 3 *C. & K.* 193, 196; 18 *L. J.* (*M. C.*) 189 (and *see ante*, p. 172).

Amending of judgment below.]—By 11 & 12 *Vict. c.* 78, *s.* 5, "whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition, in any criminal case, and the court of error shall reverse the judgment, it shall be competent for such court of error either to pronounce the proper judgment, or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition." *See* the observations of Lord *Campbell*, C.J., on this enactment,

in *Holloway* v. *R.*, 2 *Den.* 287; 17 *Q. B.* 317. Prior to this enactment, if the court below had pronounced an erroneous judgment, the court of error had no power to pronounce the proper judgment, or to remit the record to the court below, but were bound to reverse the judgment and discharge the defendant. *Bourne* v. *R.*, 7 *A. & E.* 58; 6 *L. J.* (*M. C.*) 129: *R.* v. *Drury*, 3 *C. & K.* 193; 18 *L. J.* (*M. C.*) 189.

Error from the King's Bench Division to the Court of Appeal.]—"No appeal shall lie from any judgment of the High Court of Justice in any criminal cause or matter save for some error of law apparent on the record, as to which no question shall have been reserved for the consideration of the judges under 11 & 12 *Vict. c.* 78." 36 & 37 *Vict. c.* 66, *s.* 47 (*ante*, p. 272). Such appeal in England is by writ of error only. *R.* v. *Steel*, 2 *Q. B. D.* 37; 46 *L. J.* (*M. C.*) 1: *R.* v. *Fletcher*, 2 *Q. B. D.* 43; 46 *L. J.* (*M. C.*) 4: *R.* v. *Foote*, 10 *Q. B. D.* 378: *Ex parte Woodhall*, 20 *Q. B. D.* 832: *R.* v. *Rudge*, 16 *Q. B. D.* 459; 55 *L. J.* (*M. C.*) 112. In Ireland the proceedings are by way of appeal. *O'Brien* v. *R.*, 26 *L. R.* (*Ir.*), 451. The powers of the court of Exchequer Chamber in England to correct errors in judgments of the court of King's Bench under 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 8 (*see Wright* v. *R.*, 1 *A. & E.* 434; 3 *N. & M.* 192), have not passed to the Court of Appeal, and the section was *repealed* in 1873 (36 & 37 *Vict. c.* 91, *S. L. R.*). The practice in England is now regulated by the *Cr. Off. Rules*, 1886, and not by the practice of the Exchequer Chamber, as to which *see Mansell* v. *R.*, 8 *St. Tr., N. S.* 831; 8 *E. & B.* 54; *Dears. & B.* 375; 27 *L. J.* (*M. C.*) 4.

The rules affecting the practice are as follows:—*Cr. Off. Rules*, 1886: "Every writ of error from a judgment of the King's Bench Division of the High Court shall be made returnable before the Court of Appeal, and served by delivery at the crown office" (*r.* 207). "Upon delivery of the writ of error the prosecutor shall enter the proceedings up to judgment on the roll, and carry it into the crown office, and if the prosecutor does not, within a reasonable time, carry in the roll, the plaintiff in error may obtain a judge's order upon a summons to compel him to do so" (*r.* 208). "When the roll has been carried in, the plaintiff in error, on application to the King's coroner and attorney or the master of the crown office, may obtain a memorandum or certificate of the allowance of the writ of error for service upon the defendant in error or his solicitor" (*r.* 209). "The plaintiff in error, within twenty days after the allowance of the writ of error, shall make a transcript of the record on parchment and lodge it at the crown office, and if the record be not transcribed within such time the defendant in error may move the Court of Appeal for leave to sign judgment of *non prosequitur* at the crown office" (*r.* 210). "When the transcript has been lodged it shall be annexed to the writ of error, and (on a return made and signed by the Lord Chief Justice of England) delivered into the Court of Appeal by the proper officer at the crown office" (*r.* 211). "The plaintiff in error shall, within eight days after delivery of the record into the Court of Appeal, assign errors thereon" (*r.* 212). "Upon filing of the joinder in error the case shall be put into the list of appeals for argument, upon application of either party" (*r.* 213). "The rules as to assigning errors and subsequent proceedings up to judgment in the King's Bench Division shall apply to the Court of Appeal" (*r.* 214). "Upon the judgment of the Court of Appeal being pronounced in favour of the plaintiff in error, the court may either pronounce the proper judgment and order his discharge, if in custody, or remit the record to the King's Bench Division, to be dealt with according to law" (*r.* 215): *see ante*, p. 288.

For form of attorney-general's *fiat* for writ of error from King's Bench Division to Court of Appeal, *see App. to Cr. Off. Rules*, 1886, *Form* 134; for form of writ of error from King's Bench Division to Court of Appeal, *Id., Form* 135; for form of roll, *Id., Form* 112; for form of memorandum of allowance of writ of error, *Id., Form* 136; for form of statement of grounds of error to be engrossed on copy memorandum of allowance, *Id., Form* 137; for instances of writs of error in the C. A., *see Aspinall* v. *R.*, 2 *Q. B. D.* 48: *Bradlaugh* v. *R.*, 3 *Q. B. D.* 607: *Castro* v. *R.*, 5 *Q. B. D.* 490.

Appeal to the House of Lords.]—By the *Appellate Jurisdiction Act*, 1876 (39 & 40 *Vict. c.* 59), *s.* 3, an appeal lies to the House of Lords from the judgment of the Court of Appeal on a writ of error. By *s.* 4, "Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before his majesty the King in his court of parliament, in order that the said court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject-matter of such appeal." And by *s.* 10, "An appeal shall not be entertained by the House of Lords without the consent of the attorney-general or other law officer of the crown in any case where proceedings in error or on appeal could not hitherto have been had in the House of Lords without the *fiat* and consent of such officer." The only instance in which this procedure has been used on a writ of error is *Castro* v. *Reg.*, 6 *App. Cas.* 229. As to form of *præcipe* and petition and *fiat* under the old H. L. practice, *see R.* v. *Lavey*, 2 *Den.* 512 *n.*

Costs.]—The High Court and Court of Appeal have no jurisdiction to give costs on a writ of error except in cases where the unsuccessful party is under recognizance. *See Short & Mellor, Cr. Off. Pr.* 324. The jurisdiction of the House of Lords as to costs is stated in *West Ham Guardians* v. *Bethnal Green Churchwardens* [1896] *App. Cas.* 477; 65 *L. J.* (*M. C.*) 201.

Sect. 8.

Bill of Exceptions.

It was long considered clear law that a bill of exceptions would not lie in any criminal case, and in cases of *treason* and *felony* a bill of exceptions has never been allowed. *Bac. Abr., Bill of Exceptions.* In a case of *felony*, *In re Haynes and Rice* [1846] 3 *Jones & Latouche*, 568, *Sir E. Sugden*, Lord Chancellor of Ireland, refused a writ for a bill of exceptions; saying, "having regard to the terms of the 13 *Edw.* 1 (*stat. West. sec. c.* 31) and of the Irish Act, 28 *G.* 3, *c.* 31, and to the authorities, that a bill of exceptions cannot be taken in a case like this, particularly *Sir Harry Vane's case* (6 *St. Tr.* 119, 130; 1 *Sid.* 85; 1 *Keble*, 324; 1 *Lev.* 68; *Kelyng* (J.), 15 (5)), and *R.* v. *McDonnell* (1 *Hud. & Br.* (*Ir.*) 439), and having regard to the circumstance that there is no authority in favour of the *Statute of Westminster* applying to a criminal case like this, I am of opinion, on a review of all the authorities, that upon this application there should be no rule." It was at one time considered that a bill of exceptions would lie in cases of misdemeanor. *R.* v. *Bishop of Coventry*, 1 *Leon.* 5: *R.* v. *Higgins*, 1 *Vent.* 366: *R.* v. *Nutt*, 1 *Barnard* (*K. B.*), 307: *R.* v. *Preston-on-the-Hill*, *Cas.* (*K.B.*) *temp. Hardw.* 249; 2 *Str.* 1040. In *R.* v. *Alleyne*, *Q. B., Dec.* 1, 1851, where the

defendants were indicted for obtaining money by false pretences, and for a conspiracy to defraud, a bill of exceptions was tendered to the admissibility of certain documents in evidence, Lord *Campbell*, C.J., stated that it was the first time he had ever known a bill of exceptions in a criminal case; but after hearing arguments at chambers, his lordship sealed the bill of exceptions, leaving the question whether it would lie to be argued in the court of error. *MS.* But his lordship subsequently stated that, having further considered the matter, and conferred with other judges, he was of opinion that no bill of exceptions lies in any criminal case, not even in misdemeanor. *R.* v. *Brown*, *Q. B.*, *Feb.* 1858. The same point had been decided in *R.* v. *Edmonds*, 1 *St. Tr., N. S.* 785, 883. *See also* *R.* v. *Alleyne*, *Dears.* 505: *Mansell* v. *R.*, 8 *St. Tr., N. S.* 831: 8 *E. & B.* 54; *Dears. & B.* 375; 27 *L. J.* (*M. C.*) 4: *R.* v. *Jelly*, 10 *Cox*, 553.

These rulings appear to dispose of the opinion once entertained that if a challenge, whether to the array or to the polls, be overruled without demurrer, the ruling of the judge might be made the subject of a bill of exceptions. *Bac. Abr.*, *Juries* (*E.*) 12; 2 *Co. Inst.* 427; *R.* v. *Worcester* [1683] *Skin.* 101.

Sect. 4.

new trial.

1. A writ of *certiorari* will not go to bring up any indictment from an inferior court after verdict, for the purpose of granting a new trial. *R.* v. *Oxfordshire*, 13 *East*, 411, 416: 12 *R. R.* 486, *Ellenborough*, L.C.J. *And see ante*, p. 132.

2. It appears to be now settled that a *new trial* cannot be granted in felony, even where the felony is tried in the High Court. *R.* v. *Bertrand*, *L. R.* 1 *P. C.* 520; 36 *L. J.* (*P. C.*) 51: *R.* v. *Murphy*, *L. R.* 2 *P. C.* 535; 38 *L. J.* (*P. C.*) 53. These decisions dissent from *R.* v. *Scaife*, 17 *Q. B.* 238; 2 *Den.* 281; 20 *L. J.* (*M. C.*) 229, so far as that case dealt with new trials as distinct from *venire de novo* (*post*, p. 294); and adopt the statement of the law in *R.* v. *Mawbey*, 6 *T. R.* 619, 638; 3 *R. R.* 282. *See also* 1 *Chit. Cr. L.* 658; *Corner*, *Cr. Pr.* 161: *R.* v. *Lea*, 2 *Mood. C. C.* 9: *R.* v. *Eduljee Byramjee*, 5 *Moore P. C.* 276, 289; 13 *Eng. Rep.* 496.

3. Where an indictment for misdemeanor has been preferred in the King's Bench Division, or removed into that court by *certiorari*, a new trial may, after *conviction*, be moved for, on the ground that the prosecutor has omitted to give due notice of trial, or that the verdict has been against the weight of the evidence, after allowing for presumptions in favour of innocence (*see* 1 *Taylor*, *Evidence* (9th ed.), 104: *Best*, *Evidence* (8th ed.), 390; *R.* v. *Stytche* [1901] 20 *N. Z. L. R.*, 744), or contrary to evidence, or to the direction of the judge, or on the ground that there was no evidence to warrant the conviction (*R.* v. *Sandoval*, 3 *Times R.* 411; 16 *Cox*, 206), or for the improper reception or rejection of evidence (*R.* v. *Berger* [1894] 1 *Q. B.* 823; 63 *L. J. Q. B.*, 529), or for any other mistake or misdirection of the judge, or for any gross misbehaviour of the jury among themselves, or for surprise, or for any other cause, where it shall appear to the court that a new trial will further the ends of justice (3 *Bl. Com.* 387; 1 *Chit. Cr. L.* 654: *Short & Mellor*, *Cr. Off. Pr.* 350: *R.* v. *Whitehouse*, *Dears.* 1). It is said that where there appears to be sufficient evidence to support the indictment, after rejecting any improper evidence which may have been received, the rule for a new trial will be refused. 1 *East*, *P. C.* 354. But on this point *see* *R.* v. *Gibson*, 18 *Q. B. D.* 537; 56 *L. J.* (*M. C.*) 49.

It would seem that a motion may also be made for judgment *non obstante veredicto*, as an alternative to a new trial. *See R.* v. *Platts*, 48 *L. J. Q. B.* 818; 28 *W. R.* 915, *per Lush*, J., and *Crown Office Rules*, 1886, *r.* 166, *post*, p. 293.

After *acquittal* of the defendant, in general, a new trial will not be granted. *R.* v. *Mann*, 4 *M. & Sel.* 337; 16 *R. R.* 480: *R.* v. *Wandsworth*, 1 *B. & Ald.* 63: *R.* v. *Sutton*, 5 *B. & Ad.* 52; 2 *L. J.* (*M. C.*) 75. But where the verdict has been obtained by fraud of the defendant, or in consequence of irregularity in his proceedings, as by keeping back witnesses for the prosecution, or neglecting to give due notice of trial, a new trial will be granted. A new trial has been granted, where after verdict it was discovered that an infant not returned on the panel, had served on the jury. *R.* v. *Tremearne*, 5 *B. & C.* 254; 29 *R. R.* 234. But it would seem that such an occurrence, if not discovered till after verdict, would not affect the judgment. *See* 7 *G.* 4, *c.* 64, *s.* 21 (*ante*, p. 279). In cases where the object of the proceeding substantially is to try a civil right, and the verdict would bind the right, as in cases of indictments for non-repair of a highway or bridge, it has been held that a new trial may be had after verdict for the defendant, if evidence have been improperly received, or there have been misdirection, or a verdict contrary to the evidence. *R.* v. *Yorkshire* (*West Riding*), 2 *East*, 353, *n.*; 6 *R. R.* 447, *n.*: *R.* v. *Chorley*, 12 *Q. B.* 515: *R.* v. *Cricklade*, 3 *E. & B.* 947, *n.* An indictment for obstructing a navigation, or a highway, was held not to be within this latter rule, inasmuch as in such a case the defendant is liable on conviction to fine and imprisonment, and the verdict of acquittal does not bind any right. *R.* v. *Russell*, 3 *E. & B.* 942; 23 *L. J.* (*M. C.*) 173: *R.* v. *Johnson*, 2 *E. & E.* 613; 29 *L. J.* (*M. C.*) 133: *R.* v. *Duncan*, 7 *Q. B. D.* 198; 50 *L. J.* (*M. C.*) 95. And even where the object of the proceeding is to try a civil right, and the verdict would bind the right, as in cases of indictments for non-repair of a highway or bridge, it has been held that after a verdict of not guilty has been returned a new trial will not be granted; but that under very special circumstances the court may order all proceedings upon the judgment to be suspended, so as to give an opportunity for the question to be again raised upon a fresh indictment. *R.* v. *Southampton* (*Inhabitants*), 19 *Q. B. D.* 590; 56 *L. J.* (*M. C.*) 112, 118. In *R.* v. *North Eastern Railway Co.*, 70 *L. J. K. B.* 584; 19 *Cox*, 682, the defendants were indicted for obstructing a highway. The judge at the trial directed the jury to acquit on the first count on the ground that the defendants were by their special Acts entitled to do the acts on which the count was framed, and the jury acquitted on the other counts. A motion to stay entry of judgment on the ground of misdirection was refused, on the ground that the entry of judgment would not prevent the prosecutors from indicting again if the obstruction continued.

A new trial is allowed only in cases where there has been a general verdict; where a special verdict has been returned, a *venire de novo* is awarded. 1 *Chit. Cr. L.* 654 (*post*, p. 294). If the jury find a verdict for a sum certain, according to a calculation which does not warrant the amount, it is a ground for a new trial. *R.* v. *Grimwood*, 1 *Price*, 369.

It has been said that, as a general rule, no motion for a new trial or for a *venire de novo* (*see post*, p. 294), in a criminal case, ought to be made after motion in arrest of judgment; but the court of King's Bench, in its discretion, heard motions in arrest of judgment before applications for a new trial. *R.* v. *Rowlands*, 2 *Den.* 364, *at* 386: *see R.* v. *Mawbey*, 6 *T. R.* 619, 627; 3 *R. R.* 282; *Bac. Abr.*, *Trial* (*L.*), 1. And a motion for judgment *non obstante veredicto*, may be coupled with the motion for a new trial

as an alternative remedy. *R.* v. *Platts*, 28 *W. R.* 915. No motion for a new trial is allowed, unless the defendant, or, if more than one, the defendants who have been convicted, be present in court when the motion is made. *R.* v. *Lord Cochrane*, 3 *M. & Sel.* 10, *n.*: *R.* v. *Caudwell*, 17 *Q. B.* 503; 1 *Den.* 372, *n.*; 21 *L. J.* (*M. C.*) 48. But this rule does not apply where the offence of which the defendant has been convicted is punishable by a fine only; *R.* v. *Parkinson*, 2 *Den.* 459; 21 *L. J.* (*M. C.*) 48, *n.* 2; or where the defendant is in custody on criminal process. *R.* v. *Hollingberry*, 4 *B. & C.* 329. Where one or more of several defendants have been convicted, and another or others acquitted, a new trial may be granted with respect to the former only. *R.* v. *Mawbey*, 6 *T. R.* 619. But in the case of an indictment for conspiracy if a new trial is granted as to one person convicted it must be granted as to all. *R.* v. *Gompertz*, 9 *Q. B.* 824, 842. Affidavits to jurors are not admissible to explain their verdict; but they may be read to repel charges of misconduct on the part of the jury; and where there is a doubt upon the judge's report as to what actually passed at the time of delivering the verdict, information may be received either from a juryman or any person present when it was delivered. *R.* v. *Woodfall*, 5 *Burr.* 2661, 2667.

The court of King's Bench would not grant a *certiorari* to remove an indictment and the proceedings thereon at the assizes, *after verdict* and before judgment, in order to found an application for a new trial upon the judge's report of the evidence, upon the ground that the verdict was against evidence, and against the direction of the judge. *R.* v. *Oxfordshire*, 13 *East*, 411; 12 *R. R.* 486. But when a special verdict had been found at the assizes, it could be removed by *certiorari* to be argued and decided in the King's Bench. *R.* v. *Hazel*, 1 *Leach*, 368, 370; *R.* v. *Huggins*, 2 *Ld. Raym.* 1574, 1578, 17 *St. Tr.* 309. Since the amalgamation of courts of assize with the High Court no *certiorari* is now needed, and the High Court (K. B. D.) will direct the officer to bring the proceedings before it. *R.* v. *Dudley*, 14 *Q. B. D.* 273, 560. In *R.* v. *Parke* [1903] 2 *K. B.* 432, 439, it was held that the Central Criminal Court had been made part of the High Court by *ss.* 16, 29, of the *Judicature Act*, 1873. But it has not yet been determined whether the amalgamation of these courts with the High Court gives any right to move for a new trial where such right did not previously exist. *R.* v. *Marshall* [1899] 34 *L. J. N.* 48.

On the transfer to the Court of Appeal of the power to grant new trials in civil cases in the King's Bench Division, the jurisdiction of the King's Bench Division as to new trials in criminal cases was specifically preserved. 53 & 54 *Vict. c.* 44, *ss.* 1, 4.

The procedure on motions for new trials in criminal cases is regulated by the *Cr. Off. Rules*, 1886:—"Applications for a new trial, or to enter judgment *non obstante veredicto*, or to arrest judgment where such applications may by law be made, shall be by motion for an order *nisi*. Such motion shall be made to a divisional court of the King's Bench Division, and in cases tried in London or Middlesex within eight days after the trial, or on the first subsequent day on which a divisional court shall sit to hear motions on the crown side, or if the trial has been had at the assizes, within the first seven days after the last day of the sittings on the circuits for England and Wales; the time of the vacations shall not be reckoned in the computation of time for moving" (*r.* 166). "The time in either case may be extended by the court or a judge. The grounds upon which the order was granted shall be stated in the order" (*r.* 167). "A copy of such order shall be served on the opposite party within four days from the time of the same being granted" (*r.* 168). "On moving for a new trial on indictment, information, or inquisition,

all the defendants, if more than one, who are not either in custody, or who are only liable to a fine, must be present in court, unless the court shall otherwise order" (*r.* 169).

The procedure was not affected by the *Common Law Procedure Acts* (*R.* v. *Stephens*, 7 *B. & S.* 710, 724), nor by the Rules of the Supreme Court (38 *&* 39 *Vict. c.* 77, *s.* 19: *R. S. C. O.* 68).

The motion is made either upon the judge's notes of the trial, or upon affidavit. The judge's notes are bespoken of the judge's clerk, as in civil cases. If a rule *nisi* be granted, it is drawn up as upon any other motion; *Short & Mellor, Cr. Off. Pract.* 253; and is served on the solicitor for the prosecution; or if it be a case where a new trial can be granted on the motion of the prosecutor, on the solicitor for the defendant, and the associate of the circuit on which the case was tried, in order that he may return the *postea*. It is then put into the crown paper, and is called on in its turn. If the motion has been made on affidavits, they are filed, and the opposite party must take office copies of them before he is allowed to show cause. When the case is called on for argument, the judge's notes and the affidavits are read, and where there is a printed copy or a shorthand writer's notes of the trial, the general accuracy of which is spoken to by the counsel on both sides, copies of the report may, for convenience' sake, be referred to while the judge's notes are read. *R.* v. *Rowlands*, 2 *Den.* 264; 17 *Q. B.* 671, where each of the judges was furnished with a copy. The court then either makes the rule absolute or discharges it, with or without costs. The following is the form of a rule absolute for a new trial :—

Monday, 2 June,
Yorkshire,
The King against
M. S. and T. R.

Upon hearing counsel on both sides, it is ordered that the verdict of guilty obtained for the Crown at the last Spring Assizes holden in and for the county of York, in this prosecution, be set aside, and a new trial had.

Mr. —— *for the prosecution.*
Mr. —— *for the defendants.*

Where a new trial is ordered of an indictment removed by *certiorari* into the King's Bench Division, at the instance of the defendant, the court may, in its discretion, order that the costs shall abide the event of the new trial. *R.* v. *Whitehouse, Dears.* 1; *see R.* v. *Ford*, 1 *Nev. & M.* 776.

When the rule has been made absolute, fresh notice of trial must be given, and the case proceeds as if no trial had taken place. *See Short & Mellor, Cr. Off. Pr.* 253. Continuances are now abolished; *Cr. Off. Rules*, 1886, *r.* 155; and need no longer be entered on the record after an order for a new trial.

There is no appeal to the court of appeal from the judgment or order of the King's Bench division granting or refusing a new trial in a criminal case. The decision can be questioned, if at all, only by writ of error. 36 *&* 37 *Vict. c.* 66, *s.* 47; *see ante*, p. 289.

Sect. 5.

venire de novo.

It has already been stated that the court of trial during the course of the trial has power in certain events to discharge the jury, and direct a fresh jury to be sworn. *See ante*, pp. 213, 223. A like power is said to exist to award the writ of a *venire facias de novo juratores* after verdict, where there has been some irregularity in the proceedings not affecting

the merits, but amounting to a mistrial, *i.e.*, cases of defect of jurisdiction in respect of time, place, and person, or cases of verdicts so imperfect (1 *Wils.* 56), or so insufficiently worded, or so ambiguous or inconsistent that no judgment can be founded thereon. *Evans* v. *R.*, 7 *Cox*, 151 (*Ir.*): *R.* v. *Murphy*, *L. R.* 2 *P. C.* 535, 538. This has been held as to a defective special verdict. *R.* v. *Woodfall*, 5 *Burr.* 2661. *And see R.* v. *Oxfordshire*, 13 *East*, 411, 416, *n.* (*b*); 16 *R. R.* 336; 1 *Chit. Cr. L.* 651; 2 *Tidd's Prac.* 905; *Burn's J.* (30th ed.), *New Trial*: *R.* v. *Day*, *Sayer*, 202: *R.* v. *Peters*, 1 *Burr.* 568; *Bac. Abr.*, *Trial* (*L.*): *R.* v. *Mayor of Oxford*, 3 *Nev. & M.* 877.

A court of error has power to award a *venire de novo* (and it is said to go as matter of right and not to be discretionary like a new trial) on a writ of error in cases of *mistrial* of treason, felony, or misdemeanor; *e.g.*, where the defendant was denied his right of challenge; *R.* v. *Edmonds*, 1 *St. Tr.*, *N. S.* 785; 4 *B. & Ald.* 471; 23 *R. R.* 350: *Gray* v. *R.*, 6 *St. Tr.*, *N. S.* 117, 158; 11 *Cl. & F.* 427; 8 *Eng. Rep.* 1164, or the jury process has been misawarded; *Campbell* v. *R.*, 11 *Q. B.* 799; 17 *L. J.* (*M. C.*) 89; *but see* 7 *G.* 4, *c.* 64, *s.* 21; (*ante*, p. 279), or where the jury has been improperly chosen or irregularly returned, and perhaps in some cases of misconduct by the jury, discovered after judgment. *See* 2 *Tidd's Prac.* 922: *Witham* v. *Lewis*, 1 *Wils.* (*K. B.*) 48: *R.* v. *Yeadon*, *L. & C.* 81; 31 *L. J.* (*M. C.*) 70. It has, however, been held that in a case of felony, where the indictment is good, and the prisoner has been given in charge to a jury duly impanelled, chosen, and sworn, and a verdict has been returned, and judgment given, a *venire de novo* will not lie, although there may have been conduct on the part of the jury which the court considers unsatisfactory. *R.* v. *Murphy*, *L. R.*, 2 *P. C.* 535; 38 *L. J.* (*P. C.*) 53. *R.* v. *Fowler*, 4 *B. & Ald.* 273, which at first sight appears to be an authority to the contrary, was explained in *R.* v. *Murphy*, *supra*, to be in fact no decision on this point. The court of error can also, it seems, award a *venire de novo* in felony on an imperfect verdict: *per Blackburn*, J., in *Winsor* v. *R.*, 35 *L. J.* (*M. C.*) 121, 133, citing *Campbell* v. *R.*, 11 *Q. B.* 799; 17 *L. J.* (*M. C.*) 89. When a writ of *venire facias de novo* is awarded, the parties stand precisely as they did before the first trial, and the whole of the facts are to be reheard.

The following is the form of order by a court of error after prayer of judgment:—"*And because it appears to the said court here that the said verdict so given against* O. W. K. *as aforesaid was unduly given; therefore the said verdict is by the court here vacated and made void, and all other process ceasing against the jury before impanelled, the sheriff, of, etc., is commanded so that he cause a jury anew thereupon to come, etc., by whom the truth of the matter may be better known,*" *etc.* [*And see R.* v. *Mawbey*, 6 *T. R.* 619, 640; 3 *R. R.* 282.]

The following is the form of a *venire de novo* at quarter sessions, in a case of felony, where there has been a mistrial:—

Therefore let a new jury come before the justices at the next general quarter sessions of the peace, to be holden at Chichester, in and for the said county, to try whether the defendants or either of them are guilty of the premises in the indictment charged against them or not; because as well W. B. L., *who prosecutes for our lord the King, as the said defendants, have put themselves upon the jury: the same day, etc.; at which last-mentioned general quarter sessions, holden at Chichester aforesaid, on, etc., before, etc., justices of our said lord the King, assigned to keep the peace in the said county, also to hear and determine divers felonies, etc., committed in the county aforesaid, come as well the said* W. B. L., *who prosecutes for our lord the King, as the defendants in their proper persons, etc.*

PART II.

EVIDENCE GENERALLY.

CHAPTER I.

WHAT ALLEGATIONS MUST BE PROVED.

WHERE the defendant pleads the general issue, "not guilty" (*see ante*, p. 179), the prosecutor is obliged to prove at the trial every fact or circumstance stated in the indictment which is material and necessary to constitute the offence charged, *as to which see ante*, pp. 51–85.

Where the replication or other pleading on the part of the prosecution consists of a general traverse of the defendant's pleading, the defendant must prove the facts thus traversed and put in issue.

Caution is necessary as to the evidence adduced for the prosecution, because in criminal cases, if any evidence not legally admissible against the prisoner is left to the jury, and they find him guilty, the conviction is bad, notwithstanding that there was other evidence before them properly admitted, and sufficient of itself to warrant a conviction. *R.* v. *Gibson*, 18 *Q. B. D.* 537; 56 *L. J.* (*M. C.*) 49: *cf. Makin* v. *Att.-Gen. for N.S.W.* [1894] *App. Cas.* 57; 63 *L. J.* (*P. C.*) 41; 17 *Cox*, 704: *R.* v. *Saunders* [1899] 1 *Q. B.* 490; 68 *L. J.* (*Q. B.*) 298.

Variance between the indictment and evidence.]—The following statutes regulate the amendment of variances between the description of an offence in the indictment and the evidence given: 7 *G.* 4 *c.* 64, *s.* 19: 11 *&* 12 *Vict. c.* 46, *s.* 4; 12 *&* 13 *Vict. c.* 45, *s.* 10; 14 *&* 15 *Vict. c.* 100, *ss.* 1, 2, 3, 30. The text of the statutes is printed *ante*, pp. 51–55.

Amendment, when made.]—Under these statutes the amendment must be made before the case goes to the jury. *R.* v. *Frost*, *Dears.* 474; 24 *L. J.* (*M. C.*) 116: *R.* v. *Larkin*, *Dears.* 365; 23 *L. J.* (*M. C.*) 125. In *R.* v. *Fullarton*, 6 *Cox*, 194 (*Ir.*) amendment of a misnomer was allowed after defendant's counsel had addressed the jury; but in *R.* v. *Rymes*, 3 *C. & K.* 326, it was held that amendments ought to be made before defendant's counsel addressed the jury.

Where an amendment has once been made there is no power of amending the amendment, or of reverting to the indictment as it originally stood, and the case must be decided upon the indictment in its amended form. *R.* v. *Barnes*, *L. R.*, 1 *C. C. R.* 45; 35 *L. J.* (*M. C.*) 204: *R.* v. *Pritchard*, *L. & C.* 34; 30 *L. J.* (*M. C.*) 169: *R.* v. *Webster*, *L. & C.* 77. *See Greaves*, *Lord Campbell's Acts*, p. 9.

What amendments allowed.]—An indictment may be amended by striking out an erroneous and unnecessary statement of the time of the passing of an Act of Parliament referred to in it. *R.* v. *Westley*, *Bell*,

193; 29 *L. J.* (*M. C.*) 35 (*C. C. R.*). An indictment for the obstruction of a footway may be amended where one of the termini of the footway has been misdescribed; *R.* v. *Sturge*, 3 *E. & B.* 734; 23 *L. J.* (*M. C.*) 172; and an indictment under the *Night Poaching Act*, 1828 (9 *G.* 4, *c.* 69, *s.* 9) may be amended where the occupation of the field is misdescribed. *R.* v. *Sutton*, 13 *Cox*, 648, *Lindley*, J. An amendment may be made where the ownership of stolen property is wrongly described; *R.* v. *Vincent*, 2 *Den.* 464; 21 *L. J.* (*M. C.*) 109 (*C. C. R.*): *R.* v. *Marks*, 10 *Cox*, 367; or where the stolen property itself is wrongly described, as where the statement in the indictment is that the prisoner stole nineteen shillings and sixpence, whereas the proof is that she stole a sovereign. *R.* v. *Gumble*, *L. R.*, 2 *C. C. R.* 1; 42 *L. J.* (*M. C.*) (*ante*, p. 77). Where on an indictment for perjury it was alleged that the perjury was committed on a trial for burning a *barn*, whereas the proof was that the trial was for firing a *stack*, it was held that the indictment might be amended. *R.* v. *Neville*, 6 *Cox*, 69. And where in an indictment for perjury before justices they were described as being justices for the county, and the evidence was that they were borough justices only, this was held a proper subject for amendment. *R.* v. *Western L. R.*, 1 *C. C. R.* 122; 37 *L. J.* (*M. C.*) 81. Where an indictment charged the prisoner with the intent to kill and murder A. W., an infant, and the prosecution failed to prove that the child had ever borne such a name, the indictment was amended by striking out the name and describing the child as "a certain female child whose name is to the jurors unknown." *R.* v. *Welton*, 9 *Cox*, 297. An amendment which alters the nature or quality of the offence charged will not be made; therefore, where the defendant was indicted for a forgery charged as a statutable *felony*, but the offence turned out to be a forgery at common law, and therefore only a *misdemeanor*, the judge refused to order the word "feloniously" to be struck out of the indictment. *R.* v. *Wright*, 2 *F. & F.* 320. Where an indictment for false pretences alleged that the prisoner pretended that he had served an order of justices on J. B., and the evidence was that he had said that he had left the order with the landlady of the house where J. B. lodged, it was held that this variance was not amendable under the statute, as it was not a variance in the name or description of any matter or thing named or described in the indictment. *R.* v. *Bailey*, 6 *Cox*, 29. It was held by *Lush*, J., that in an indictment for obtaining money, etc., by false pretences, it is necessary to allege that the obtaining was "with intent to defraud," and where those words are omitted the indictment cannot be amended by inserting them. *R.* v. *James*, 12 *Cox*, 127.

Subject to the power of amending variances between pleading and proof given by the above statutes, the parts of a pleading required to be proved, may be considered under the following heads:—

Time.]—The day and year on which the facts are stated in the indictment or other pleading to have occurred are not in general material; and the facts may be proved to have occurred upon any other day previous to the preferring of the indictment. *See* 14 & 15 *Vict. c.* 100, *s.* 24 (*ante*, p. 54): *R.* v. *Charnock*, 12 *St. Tr.* 1379; *cas. temp. Holt*, 301; 1 *Salk.* 288; *see also Fost.* 8; *R.* v. *Payne* [1789] cited and approved in *Purcell* v. *Macnamara*, 9 *East*, 157, 160; 1 *Camp.* 199; 9 *R. R.* 578; 1 *Phil. Ev.* 203: *R.* v. *Levy*, 2 *Stark.* (*N. P.*) 450: *R.* v. *Treharne*, 1 *Mood. C. C.* 298. To this rule, however, there were at common law certain exceptions:—(1) Where bills of exchange, promissory notes, or other written instruments not under seal, are pleaded, the date, if stated, must correspond with the date of the instrument when produced in evidence at the trial. *Coxon* v. *Lyon*,

2 *Camp.* 307, *n.* *See Freeman* v. *Jacob*, 4 *Camp.* 209. (2) As deeds may be pleaded either according to the date which they bear, or to the day on which they were delivered, if a deed produced in evidence bear date on a day different from that stated in the pleading, the party producing it must prove that it was in fact delivered on the day alleged in the pleading. (3) If any material time stated in the pleading is to be proved by matter of record, it should be correctly stated. *See Purcell* v. *Macnamara, ubi supra*; *Woodford* v. *Ashley*, 2 *Camp.* 193; 11 *East*, 508: *Rastall* v. *Straton*, 1 *H. Bl.* 49; 2 *Saund.* 291 *b.* Any variance between the time so stated, and that appearing from the deed or record when produced, will be fatal, if not amended (*see above*). (4) When the precise date of any fact is necessary to ascertain and determine with precision the offence charged, or the matter alleged in excuse or justification, any variance between the pleading and evidence in that respect will be fatal unless amended. (5) Where time is of the essence of the offence, the offence must be proved to have been committed within the essential time, *e.g.*, in the night time in burglary; *R.* v. *Brown, M. & M.* 163; although the day on which the offence is charged to have been committed is immaterial, and it may be proved to have been committed on any other day previous to the preferring of the indictment. (6) In murder, the death must be proved to have taken place within a year and a day from the time at which the stroke is proved to have been given, counting the day on which the hurt was done as the first day. 1 *Hawk.* c. 31, *s.* 9; 4 *Bl. Com.* 197; 1 *East, P. C.* 343, 344. (7) Where a time is limited for prosecuting an offence, the offence must be proved to have been committed within that time before the prosecution began. *See ante*, p. 94. The almanack annexed to the Common Prayer Book has been held evidence that such a day of the year was Sunday, or the like. In *R.* v. *Dyer*, 6 *Mod.* 41, it was stated that the almanack was part of the law of England to be judicially noticed. *Cf. Page* v. *Faucet, Cro. Eliz.* 227: 1 *Leon.* 242: *Brough* v. *Perkins*, 6 *Mod.* 81. The original almanack was superseded in 1750, by that scheduled to the *Style Act* (24 *G.* 2, *c.* 23).

Place.]—It is not in general necessary to prove that the facts stated in the indictment or subsequent pleading occurred in the parish or place therein alleged (if any be alleged, which is now in general unnecessary); it is sufficient to prove that they occurred within the county or other extent of the court's jurisdiction. 2 *Hawk.* c. 25, *s.* 84 (*ante*, pp. 36, 37). But they must be proved to have been committed within the county, or other extent of the court's jurisdiction, otherwise the defendant must be acquitted. (*See ante*, p. 67). And where a forged bill of exchange was found upon J. S., who resided in Wiltshire, and had resided there about a year, under a false name, but which bill bore date more than two years previously to its being found upon him, and at a time when he lived in Somersetshire; on an indictment against him for a forgery of the bill in Wiltshire, this was held not to be sufficient evidence of the offence having been committed in that county. *R.* v. *Crocker*, 2 *B. & P.* (*N. R.*) 87; *R. & R.* 97, 99, *n.* But although the offence must be proved to have been committed in the county where the prisoner is tried, after such proof, the acts of the prisoner in any other county, tending to establish the charge against him, are properly admissible in evidence. Where the offence is not local, it is immaterial if there be no such place as that stated in the indictment. *R.* v. *Woodward*, 1 *Mood. C. C.* 323: *R.* v. *Dowling, Ry. & M.* 433.

To the above rule, as to the parish and place being immaterial, there are said to be several exceptions: (1) That if the statute upon which the

indictment is framed give the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish stated in the indictment. *R.* v. *Glossop*, 4 *B. & Ald.* 616. (2) Upon an indictment against a parish for not repairing a road, the part of the road out of repair must be proved to be within the parish; and the same in all other cases in which the place where the fact occurred is a necessary ingredient in the offence. *R.* v. *Steventon*, 1 *C. & K.* 55. (3) If a place mentioned in pleading be stated as part of the description of a written instrument, or is to be proved by matter of record, any variance between the place as stated, and that appearing from the written instrument or record when produced, would be fatal, unless amended at the trial (*see ante*, p. 296). *Pitt* v. *Green*, 9 *East*, 188: *Pool* v. *Court*, 4 *Taunt.* 700: *Goodtitle* v. *Walter*, *Id.* 671: *Morgan* v. *Edwards*, 6 *Taunt.* 394: *Goodtitle* v. *Lammiman*, 2 *Camp.* 274. (4) In the case of affray, the offence must be alleged and proved to have been committed in a public street or highway. *R.* v. *O'Neill* [1871] *Ir. Rep.* 6 *C. L.* 1. (5) Where the place is stated as matter of *local description*, and not as venue merely, any variance between the description of it in the indictment and the evidence will be fatal, unless amended, even though the injury be partly local, and partly transitory; for, the whole being one entire fact, the local description becomes descriptive of the transitory injury. *R.* v. *Cranage*, 1 *Salk.* 385; 1 *Russ. Cr.* (6th ed.), 436, *and see R.* v. *Owen*, 1 *Mood. C. C.* 118. Thus, for instance, on an indictment for stealing in the dwelling-house, etc. (*R.* v. *Jarrald*, *L. & C.* 301); for burglary (*R.* v. *St. John*, 9 *C. & P.* 40); or house-breaking (*R.* v. *Bullock*, 1 *Mood. C. C.* 324, *n.*); or for forcible entry, or the like, if there be a variance between the indictment and evidence in the name of the parish or place where the house is situate, or in any other description given of it, the defendant must be acquitted, unless the judge, in his discretion, think fit to amend the indictment. *See* 1 *Taylor, Evidence* (9th ed.), 209. Where premises were described as situate in the parish of *Lambeth*, the real name of the parish being *St. Mary, Lambeth*, though usually called *Lambeth*, there was held to be no variance. *R.* v. *Glossop*, 4 *B. & Ald.* 616: *Kirtland* v. *Pounsett*, 1 *Taunt.* 570; *cf. R.* v. *St. John*, 9 *C. & P.* 40.

Where a parish was situate in two counties, if the offence was of a local nature, it was held that it must be alleged to have been committed in *that part* of the parish which was within the county in which the defendant is tried. *R.* v. *Brookes*, *C. & Mar.* 543; *cf.* 24 & 25 *Vict. c.* 96, *ss.* 24, 26. Under *s.* 36 of the *Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), the whole of a parish must now be within the same administrative county.

The offence charged.]—Every offence consists of certain acts done or omitted, under certain circumstances, all of which must be stated in the indictment (*see ante*, pp. 68–72), and be proved as laid; subject to the powers of amending immaterial variances between statement and proof (*ante*, p. 52).

Thus, for instance, where, in an indictment for obtaining money by false pretences, the false pretence stated was that the defendant said that *he had paid* a sum of money into the bank, and the proof was, that he said that a sum of money had been paid into the bank, without saying by whom, the defendant was acquitted for the variance, *Lord Ellenborough* holding that there was a difference in substance between the two assertions. *R.* v. *Plestow*, 1 *Camp.* 494.

In an indictment for larceny, the evidence must correspond with the indictment as to the species of goods stolen; as, for instance, an indictment for

stealing a pair of shoes has been held not to be supported by evidence of a pair of boots. *See ante*, p. 76. Where an indictment (on 15 *G.* 2, *c.* 34 (*rep.*) and 14 *G.* 2, *c.* 6 (*rep.*), which made it felony without benefit of clergy to steal any cow, ox, heifer, &c.) charged the defendant with stealing a cow, and in evidence it was proved to be a heifer, this was held to be a fatal variance; for the statute having mentioned both cow and heifer, proved that the words were not considered by the legislature as synonymous. *R.* v. *Cook*, 2 *East, P. C.* 616; 1 *Leach*, 105. *See also R.* v. *Douglass*, 1 *Camp.* 212. In like manner it was held that, as the statute specified lambs and sheep, an indictment for stealing lambs was not proved by evidence of stealing sheep; *R.* v. *Loom*, 1 *Mood. C. C.* 160; and for the same reason it was held upon 7 & 8 *G.* 4, *c.* 29, *s.* 25 (*rep.*), that an indictment for stealing a sheep is not supported by proof of stealing an ewe. *R.* v. *Puddifoot*, 1 *Mood. C. C.* 247: *R.* v. *Birket*, 4 *C. & P.* 216: *R.* v. *Douglass*, 1 *Camp.* 212. But it is submitted that these cases are overruled by *R.* v. *Spicer*, 1 *Den.* 82; 1 *C. & K.* 699; and *R.* v. *McCulley*, 2 *Mood. C. C.* 34; and that a generic description in an indictment will be proved by evidence of a species which is clearly within the generic description. But it is sufficient if the evidence agree *in substance* with the allegation in the indictment. Thus a variance in the number of articles, or in their value, is immaterial, provided the value proved be sufficient to constitute the offence in law (*ante*, p. 76). And if there be ten different species of goods enumerated, and the prosecutor prove a larceny of any one or more, it will be sufficient, although he fail in his proof of the rest; except in a case where value is essential to constitute the offence, and the value is ascribed to all the articles *collectively*; for in that case the offence must be made out as to every one of the articles. *R.* v. *Forsyth*, *R. & R.* 274.

Money.]—Money or bank-notes may be described simply as money, without specifying any particular coin or bank-notes (*ante*, p. 54); and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin, or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved. 14 & 15 *Vict. c.* 100, *s.* 18 (*ante*, pp. 54, 77).

Persons.]—The party injured may, as we have seen (*ante*, p. 56), be described either by his real name, or by that by which he is usually known. *R.* v. *Norton*, *R. & R.* 510; *R.* v. *Williams*, 7 *C. & P.* 298. And immaterial variances between pleading and proof as to the names of persons may be amended (*see ante*, pp. 54, 56). At common law the names of the persons against whom the offence was committed, and of any party whose existence is legally essential to the charge, must be proved as laid. (*See ante*, p. 56; *R.* v. *Earl of Cardigan*, 4 *St. Tr., N. S.* 601; *R.* v. *Frost*, *Dears.* 474; 24 *L. J.* (*M. C.*) 116.) Thus, in an indictment for larceny, the property in the goods must be proved as laid; that is, the person whose goods they are alleged to be must be proved to be either the actual owner or the bailee of them. (*See ante*, p. 58). Even where an indictment for burglary charged the defendant with breaking and entering the house of J. D., with intent to steal the goods of J. W., and it appeared in evidence that no goods of any person of the name of J. W. were in the house, but that the name of J. W. had been inserted in the indictment by mistake, the judges held that the variance was fatal, and the defendant was accordingly acquitted. *R.* v. *Jenks*, 2 *East, P. C.* 514. At common law, if it appeared by the evidence that the alleged owner of the goods stolen was a *feme covert*, the defendant was entitled

to acquittal because the goods in law belonged to the husband, 1 *Hale*, 513; but under the *Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 12, the separate property of a married woman may be described as hers in an indictment for an offence affecting it (*see ante*, p. 59).

Additions.]—An indictment cannot now be held insufficient for want of or imperfection in the addition of any defendant; 14 & 15 *Vict. c.* 100, *s.* 24 (*ante*, pp. 54, 56); and immaterial misdescriptions of any person whatever on an indictment can be amended under 14 & 15 *Vict. c.* 100, *s.* 1 (*a*) (*ante*, p. 52).

Records.]—At common law, records produced in evidence must be strictly conformable with the statement in the pleading which they are intended to prove; and any variance in substance between the matter set out and the record produced in evidence was fatal. But the variance can now be amended at the trial (*see ante*, p. 51). The rule was the same as in civil actions under the old practice, *see Purcell* v. *Macnamara*, 9 *East*, 157; 9 *R. R.* 578; 1 *Camp.* 199: *Woodford* v. *Ashley*, 11 *East*, 508.

So, where an indictment for perjury, assigned on an affidavit made for the purpose of setting aside a judgment, alleged that the judgment was entered up "in or as of" Trinity Term, 5 *W.* 4, and, on an examined copy of the record being produced, it appeared that the day on which the judgment was signed was entered in the margin, June the 26th, 5 *W.* 4, according to the rules of practice of Hilary Term, 4 *W.* 4, this was held a fatal variance, and the judge refused to amend under 9 *G.* 4, *c.* 15 (*rep.*): *R.* v. *Cooke*, 7 *C.* & *P.* 559. And where, on a charge of perjury, alleged to have been committed before commissioners to examine witnesses in a chancery suit, the indictment stated that the four commissioners named in the commission were commanded to examine the witnesses, but the commission, when put in, appeared to authorize the commissioners, "or any two or three of them," to examine the witnesses, this was held a fatal variance, and the judge refused to amend. *R.* v. *Hewins*, 9 *C.* & *P.* 786. Cf. *R.* v. *Fellowes*, 1 *C.* & *K.* 115. But where an indictment for perjury stated that a certain cause (in which the perjury was alleged to have been committed) was tried at the assizes before E. W., one of the judges, etc., it was held to be proved in substance by the *Nisi Prius* record, which stated in the usual form that the cause was tried before the two justices of assize, one of whom was E. W. *R.* v. *Alford*, 14 *East*, 218, *n.* So, where an indictment for perjury alleged the trial of an issue before A. B., sheriff of D., by virtue of a writ of trial directed to the said sheriff, the writ was directed to the sheriff, and the return was of a trial before him, but it was proved that in fact the trial took place before a deputy, not the under-sheriff, this was held no variance. *R.* v. *Dunn*, 2 *Mood. C. C.* 297; 1 *C.* & *K.* 730. An indictment stated that, at the assizes held, etc., C. P., "together with one T. P., was"

(*a*) *Addition.*]—At common law, if a person necessarily named in the indictment were described with an addition, though unnecessary, it must be proved. *R.* v. *Deeley*, 1 *Mood. C. C.* 303; *but see R.* v. *Ogilvie*, 2 *C.* & *P.* 230; *R.* v. *Graham*, 2 *Leach*, 547, *contra, and see ante*, pp. 55 *et. seq.* Where any person was described as a person to the jurors unknown, and it appeared in evidence that his name was known, it was held a variance. *See R.* v. *Walker*, 3 *Camp.* 264; *R.* v. *Robinson*, *Holt* (*N. P.*) 595. So where, in an indictment for receiving stolen goods, the principal felon was described as a person to the jurors unknown, but it appeared in evidence that he was known, the receiver was acquitted for the variance. *R.* v. *Walker*, 3 *Camp.* 264. But a bill found by the same grand jury, imputing the principal felony to J. S., does not, sufficiently for this purpose, prove that J. S. committed the felony. *R.* v. *Bush*, *R.* & *R.* 372. But these variances are now immaterial. 14 & 15 *Vict. c.* 100, *s.* 24 (*ante*, p. 54).

in due form of law tried and convicted, on an indictment depending against them for uttering counterfeit coin, and thereupon it was considered by the court there that C. P. should be imprisoned for two years. The record of the previous conviction when put was found to state the conviction of C. P., and the acquittal of T. P. It was held that there was no variance, for that the allegation in the indictment did not import that T. P. was convicted. *R.* v. *Page*, 9 *C. & P.* 756; 2 *Mood, C. C.* 219, 221 *n.*

Other Documents.]—If the matter of a written instrument be introduced in a pleading (which, however, is now in general unnecessary in criminal cases, *see ante*, p. 74), by the words, "*according to the tenor following*," or "*of the tenor following*," or "*in the words and figures following*," or "*the words and matters following*," or, in fact, any other words which imply that a correct recital is intended, the instrument must be set out correctly; *R.* v. *Powell*, 1 *Leach*, 77, 2 *East, P. C.* 976; *see Id.* 962; even though the pleader need not have set out more than the substance of the instrument in the particular case. A mere literal variance, however (that is, where the omission or addition of a letter does not alter or change a word, so as to make it another word, *R.* v. *Drake*, 2 *Salk.* 668; 3 *Id.* 226), will not be material; as for instance, "reiceved" for "received," *R.* v. *Hart*, 1 *Leach*, 145; 2 *East, P. C.* 977; "undertood" for "understood," *R.* v. *Beach*, 1 *Cowp.* 229; "Messrs." for "Messrs.," *R.* v. *Oldfield*, 2 *Russ. Cr.* (6th ed.) 650, or the like. *See R.* v. *Pippett*, 1 *T. R.* 235, 237, 240. On the other hand, if the matter of a written instrument be introduced by words which imply that the substance only, and not the very words of the instrument, is set out; as, for instance, by the words, "in substance as follows," *Wright* v. *Clements*, 3 *B. & Ald.* 503, or "to the effect following," *R.* v. *Bear*, 3 *Salk.* 226, or, "in manner and form following," *R.* v. *May*, 1 *Doug.* 193; 1 *Leach*, 192, or the like, if the instrument produced in evidence be in substance the same with that set out, it will be sufficient. *See the old authorities collected, Stark. Crim. Pl., tit.* "*Variance.*"

If a written instrument be described in pleading, as *purporting to be* so and so (*see ante*, p. 75), the instrument when produced in evidence, must appear upon the face of it to be what it is described in the pleading as purporting to be, otherwise the variance may be taken advantage of at the trial. For instance, where the instrument was described in an indictment as "a certain paper writing purporting to be a bank-note," and the note produced, though made to resemble, varied materially in its form from a real bank-note, the defendant was acquitted. *R.* v. *Jones*, 1 *Doug.* 300. So where (before 14 & 15 *Vict. c.* 100, *s.* 5, *ante*, p. 54) a bill of exchange was described in an indictment as "purporting to be directed to one J. King, by the name and description of J. Ring," the judgment was arrested; for if it were really directed to J. Ring, it could not purport (that is, appear upon the face of it) to be directed to J. King. *R.* v. *Reading*, 1 *East*, 180, *n.*; 2 *Leach*, 590. *See R.* v. *Gilchrist*, 2 *Leach*, 657; *R.* v. *Edsall*, *Id.* 662, *n.*

Words.]—Where words are the gist of the offence, and consequently set out in the indictment (*see ante*, p. 75), they must be proved as laid: and if there be any material variance between the words proved and those laid—even if laid as spoken in the third person, and proved to have been spoken in the second. *R.* v. *Berry*, 4 *T. R.* 217, or laid as spoken affirmatively, and proved to have been spoken by way of interrogation, *Barnes* v. *Holloway*, 8 *T. R.* 150, or the like—the defendant must be acquitted, unless amendment if permissible is permitted. But if some of the words be proved as laid, and the words so proved be

sufficient to constitute the offence for which the defendant is indicted, failing to prove the remainder of the words will not be material. The rule is the same as in civil actions for defamation under the practice prior to the *Common Law Procedure Acts*. *See Compagnon* v. *Martin*, 2 *W. Bl.* 790: *Walters* v. *Mace*, 2 *B. & Ald.* 756: *Hancock* v. *Winter*, 7 *Taunt.* 205. Where words are laid as an overt act of treason, it is sufficient to prove that the words really used were the same in substance as those laid, for the reason mentioned, *ante*, p. 75, *and post, tit.* "*Treason.*"

Intent.]—The intention of the party at the time he commits an offence is often an essential ingredient in it: and, in such case, it is as necessary to be proved as any other fact or circumstance laid in the indictment, *ante*, pp. 78–80. As to mode of proof, *see post*, p. 308. Where an indictment alleged that the defendant cut the prosecutor, with intent to murder, to disable, and to do some grievous bodily harm, it was held not to be supported by proof of an intention to prevent lawful apprehension; *R.* v. *Duffin*, *R. & R.* 365: *R.* v. *Boyce*, 1 *Mood. C. C.* 29, unless for the purpose of effecting his escape, he also harboured the intent stated in the indictment. *R.* v. *Gillow*, 1 *Mood. C. C.* 85. The intention, however, is not capable of positive proof: it can only be implied from overt acts; and every man is supposed to intend the necessary and reasonable consequences of his own acts. *R.* v. *Dixon*, 3 *M. & Sel.* 11; 15 *R. R.* 381: *R.* v. *Farrington*, *R. & R.* 207. Therefore, if it cannot be implied from the facts and circumstances which, together with it, constitute the offence, other acts of the defendant, from which it can be implied to the satisfaction of the jury, must be proved at the trial. *See R.* v. *Philipps*, 6 *East*, 464. As to what other acts are admissible, *see post*, p. 308.

In some cases the intent is inferred as a necessary conclusion from the act done; as if a man knowingly uttered a forged instrument as a genuine one, the intent to defraud the party to whom he utters it is a necessary inference. *R.* v. *Hill*, 2 *Mood. C. C.* 30; 8 *C. & P.* 274; *R.* v. *Cooke*, *Id.* 582.

If a man be charged with an offence as principal in the first degree, evidence of his being principal in the second degree will support the indictment, and *e converso*; as, for instance, if A. and B. be indicted for murder, and the indictment charge that A. gave the mortal stroke, and that B. was present aiding and abetting, evidence that B. gave the mortal stroke and that A. was present, aiding and abetting, will support the indictment. *Fost.* 351; *R.* v. *Mackalley*, 9 *Co. Rep.* 67 *b*; *Plowd.* 98: *R.* v. *Crisham*, *C. & Mar.* 187 (*see ante*, p. 15).

Proof of exceptions, provisoes, etc.]—In indictments upon statutes where an exception or proviso is incorporated with the description of the offence, in the enacting clause of the statute, the indictment must show, negatively, that the party, or the matter pleaded, does not come within the meaning of such exception or proviso; but where the exception or proviso is separate from the enacting clause it is for the defendant to set it up. *R.* v. *James* [1902] 1 *K. B.* 540, 545, *C. C. R.*, where the authorities are fully considered. *And see ante*, p. 80. This rule differs somewhat from that established by statute as to offences punishable summarily, 42 & 43 *Vict. c.* 49, *s.* 39.

The negative averments, it seems must formerly have been proved in all cases by the prosecutor (*see Over* v. *Harwood* [1900] 1 *Q. B.* 803, 806, *Channell*, J.); but the present rule upon the subject appears to be, that, in cases where the subject of such averment relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to

be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant, as matter of defence; but, on the other hand, if the subject of the averment does not relate personally to the defendant, or is not peculiarly within his knowledge, but either, relates personally to the prosecutor, or is peculiarly within his knowledge or at least be as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative. *See* 1 *Taylor, Ev.* (9th ed.) 266: 1 *Hawk. c.* 89, *s.* 17; *Apothecaries Co.* v. *Bentley*, 1 *C. & P.* 538; *Ry. & M.* 159: *Elkin* v. *Janson*, 13 *M. & W.* 655, 662, *Alderson*, B. On an indictment under 43 *G.* 3, *c.* 107, *s.* 1 (*rep.*), which made it felony to course deer in an enclosed ground without the consent of the owner—that the deer were coursed *without the consent* of the owner was held necessary to be proved on the part of the prosecution. *R.* v. *Rogers*, 2 *Camp.* 654. But although it was once supposed that the negative, in such cases, could only be proved by the owner, it is now fully established that it may be presumed from circumstances, or be proved by the agent of the owner. *R.* v. *Allen*, *R.* v. *Argent*, *R.* v. *Chamberlain*, 1 *Mood. C. C.* 154: *R.* v. *Hazy*, 2 *C. & P.* 458.

Divisible averments.]—Where an indictment contains divisible averments laid conjunctively (*see ante*, p. 82), *e.g.*, that the defendant "forged *and* caused to be forged," proof of either averment will be sufficient. *R.* v. *Middlehurst*, 1 *Burr.* 399. So, a defendant may be convicted of printing and publishing a libel upon an indictment which charges him with "composing, printing, *and* publishing" it. *R.* v. *Hunt*, 2 *Camp.* 583; 31 *St. Tr.* 408: *R.* v. *Williams*, 2 *Camp.* 646. And where two intentions are ascribed to one act, as that a libel was published against magistrates with intent to defame them, *and* also to bring the administration of justice into contempt, *R.* v. *Evans*, 2 *Stark.* (*N. P.*) 35; 23 *R. R.* 754, *Bayley*, J., or that an assault was committed on a female, with intent to abuse *and* carnally know her, *R.* v. *Dawson*, 3 *Stark.* (*N. P.*) 62, *Holroyd*, J., the averments were held divisible and proof of either intention sufficient. So, where an indictment charged that the defendant was employed in two branches of the post-office (7 *G.* 3, *c.* 50, *s.* 1, *rep.*), proof of his employment in either was held sufficient. *R.* v. *Ellins*, *R. & R.* 188. And where an information for a libel charged that outrages had been committed in *and* near the neighbourhood of Nottingham, it was held that the averment was divisible, and that it was sufficient to prove that outrages had been committed in either place. *R.* v. *Sutton*, 4 *M. & Sel.* 532. In larceny, if any one of the articles enumerated in the indictment be proved to have been stolen by the defendant, it will be sufficient. 2 *Hale*, 302: *and cf. R.* v. *Ellins*, *R. & R.* 188. Upon an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling. *R.* v. *Burdett*, 1 *Ld. Raym.* 148. *See R.* v. *Carson*, *R. & R.* 303. And upon an indictment for obtaining money by false pretences, proof of part of the pretence alleged, if the money were obtained upon that part will be sufficient. *R.* v. *Hill*, *R. & R.* 190. As to cases in which rejection of a divisible averment involves a verdict for an offence less or other than the offence alleged in the indictment, *see ante*, p. 215.

Immaterial averments—surplusage.]—Allegations which are not essential to constitute the offence, and which may be omitted without affecting the charge, or vitiating the indictment, do not require proof, and may be rejected as surplusage. *R.* v. *Jones*, 2 *B. & Ad.* 611 (*and see ante*, p 71). Thus, for an indictment for wounding with intent, etc., stating the act

to have been done with a stick and kicking, the means were held mere surplusage. *R.* v. *Briggs*, 1 *Mood. C. C.* 318. In *R.* v. *Huntley*, *Bell*, 238 (*C. C. R.*) the prisoner was indicted for stealing certain goods, and in a second count was charged with feloniously receiving the chattels aforesaid "so as aforesaid" feloniously stolen. He was convicted on the second count, and it was held that the words "so as aforesaid" were immaterial. And where a defendant was charged in the indictment with having committed arson in the night-time, and it was proved that he committed it in the day-time, he was convicted, and the conviction was held good. *R.* v. *Minton*, 2 *East, P. C.* 1021. So, if a man be indicted for robbery near the highway, *R.* v. *Summers*, 2 *East, P. C.* 785; *R.* v. *Wardle*, *Id.*; *R. & R.* 9, or in a dwelling-house, *R.* v. *Pye*, *Id.* 9, *n.*; *R.* v. *Johnson*, *Id.* 10, and the prosecutor prove the robbery, but fail in proving it to have been committed near the highway, or in the dwelling-house, the defendant may nevertheless be convicted; for robbery is the same felony wherever committed. So, if an offence, not of a local nature, be described as having been committed in a certain parish; for the offence is the same wheresoever committed, and the county is the only thing material to give the court jurisdiction. *R.* v. *Woodward*, 1 *Mood. C. C.* 323. So, upon an indictment (under 8 & 9 *W.* 3, *c.* 26, *s.* 1, *rep.*) for having in possession a die made of iron *and* steel, it was held immaterial of what the die was made, and that proof of a die made of either or both would satisfy the charge. *R.* v. *Oxford*, *R. & R.* 382: *R.* v. *Phillips*, *Id.* 369. Upon the same principle, in *R.* v. *Holt*, 5 *T. R.* 436, 446; 2 *Leach*, 593, it was held, upon an information for a libel, with intent to bring a proclamation of the King into contempt, that an averment that divers addresses had been presented to his majesty on the occasion of such proclamation, was not connected with the charge, and therefore did not require proof. On an indictment for perjury committed before the Insolvent Debtors' Court, allegations that notice of the defendant's petition was inserted in the Gazette, that a day was appointed for his first examination, and that the sitting on that day was adjourned, were held not to require proof; for the sittings of a court of record are presumed to be lawfully and rightfully held. *R.* v. *Westley*, *Bell*, 193; 29 *L. J.* (*M. C.*) 35. Upon an indictment charging the defendant with taking a false oath in a non-judicial proceeding (which is ordinarily not perjury, but a common law misdemeanor), an allegation "that so the defendant did commit wilful and corrupt perjury," may be rejected as *surplusage*, and need not be proved, and the defendant may be convicted of the common law misdemeanor. *R.* v. *Hodgkiss*, *L. R.*, 1 *C. C. R.* 212; 39 *L. J.* (*M. C.*) 14; *but see* 52 & 53 *Vict. c.* 10, *s.* 7. And where an indictment charged the defendant with making a false declaration that he had lost a pawnbroker's ticket, "whereas in truth and in fact he had not lost the said ticket, but had sold, lent, *or* deposited it as a security," it was held that the allegation "but had sold, lent, *or* deposited it, etc.." was surplusage which might be rejected and need not be proved, and therefore did not render the indictment ambiguous or uncertain. *R.* v. *Parker*, *L. R.*, 1 *C. C. R.* 225; 39 *L. J.* (*M. C.*) 60. This rule is said not to extend to allegations (whether necessary or unnecessary), which are descriptive of the *identity* of that which is legally essential to the charge. Thus, it is said that an indictment for stealing a *black* horse will not be supported by proof that the horse was of some other colour: for the allegation of colour is descriptive of that which is legally essential to the offence, and cannot be rejected. 1 *Stark. Evid.* (3rd ed.) 434.

Matter not alleged, in what cases.]—Where the offence is stated in

general terms in the indictment, as for instance, where the defendant is indicted as a common barrator or common scold or for keeping a common gambling-house, or bawdy-house (*see ante*, pp. 68–70), the prosecutor is allowed to give evidence of all the particular facts which constitute the offence thus generally stated in the indictment.

General rule.]—The general rule in criminal (as in civil) cases is, that nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue. "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his conduct or character to have committed the offence for which he is being tried." *Makin* v. *Att.-Gen. for N. S. W.* [1894] *App. Cas.* 57; 63 *L. J.* (*P. C.*) 41; 17 *Cox*, 704. Such evidence, where admissible in chief for the prosecution, may now be obtained by cross-examination of the defendant if he elects to give evidence on his own behalf. 61 & 62 *Vict. c.* 36, *s.* 1 (*f*) (i). Upon an indictment for an infamous crime, an admission by the defendant that he had committed such an offence at any other time with another person, and had a tendency to such practices, ought not to be received. *R.* v. *Cole*, 1 *Phil Ev.* 181 (7th ed.); 3 *Russ. Cr.* (6th ed.), 251. And upon the trial of a prisoner for wounding a constable, who had arrested him on suspicion of felony, it was held that the prosecutor was not entitled to ask the constable what the prisoner's previous character had been, in order to assist in showing that there were reasonable grounds for the arrest. *R.* v. *Turberfield*, *L. & C.* 495; 34 *L. J.* (*M. C.*) 20.

Exceptions.]—To the general rule, as above stated, some exceptions have been admitted by statute, and there are also some apparent exceptions to it at common law.

Treason.]—In high treason, when tried under 7 & 8 *W.* 3, *c.* 3, *s.* 8, no evidence is admissible of any overt act not expressly laid in the indictment. But this does not prevent overt acts, not laid, from being given in evidence, if they be direct proof of any of the overt acts which are laid; *R.* v. *Rookwood*, 13 *St. Tr.* 139; *cas. temp. Holt*, 683; *and see R.* v. *Lowicke*, 13 *St. Tr.* 276, 296: *R.* v. *Layer*, 16 *St. Tr.* 211, 215, 232; 8 *Mod.* 82, 91; *R.* v. *Deacon*, 18 *St. Tr.* 365, *Fost.* 9: *R.* v. *Wedderburn*, *Id.*; *R.* v. *Watson*, 32 *St. Tr.* 1; 2 *Stark* (*N. P.*) 116, 134. And if any one overt act be proved against the defendant in the proper county, acts of treason tending to prove such overt act, though done in a foreign county, may be given in evidence. *Fost.* 9, 22: *R.* v. *Deacon*, *ubi supra*: *R.* v. *Parkyns*, 13 *St. Tr.* 63, 126, 127; *Lord Strafford's case*, 3 *St. Tr.* 138; *Lord Lovat's case*, 18 *St. Tr.* 529. Or, if the treason consist of a conspiracy, not only the acts of the defendant himself, but also any acts of the defendant's accomplices, no matter when committed, if done in furtherance of the common design, although not laid as an overt act in the indictment, may be given in evidence, provided it be direct proof of an overt act laid. *R.* v. *Hardy*, 24 *St. Tr.* 199; 1 *East*, *P. C.* 98, 99: *R.* v. *Horne Tooke*, 1 *East. P. C.* 98; 25 *St. Tr.* 1, 127: *R.* v. *Frost*, 4 *St. Tr.*, *N. S.* 85, 9 *C. & P.* 129, 149.

Conspiracy.]—In cases of conspiracy, acts done by some of the conspirators in the county in which the offence is laid being proved, acts done by others of the conspirators in other countries may be given

in evidence. *R.* v. *Bowes*, 4 *East*, 171, *cit.*; 7 *R. R.* 557. And in an indictment against persons for a conspiracy to carry on the business of common cheats, evidence was admitted of the defendants having made false representations to other tradesmen besides those named in the indictment. *R.* v. *Roberts*, 1 *Camp.* 399. As a foundation for such evidence, however, the existence of the conspiracy must be first proved; 2*ndly*, evidence must be given to connect the defendant with the conspirators; and 3*rdly*, it must be proved that the person whose acts are about to be given in evidence was connected with the defendant in the same conspiracy. The prosecutor may, however, either prove the conspiracy, which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different parties, and so prove the conspiracy. *R.* v. *Lord Lovat*, 18 *St. Tr.* 529. *See also R.* v. *Stone*, 6 *T. R.* 527; 25 *St. Tr.* 1155; 6 *R. R.* 527; *R.* v. *Standley*, *R. & R.* 305: *R.* v. *Gogerly*, *Id.* 343; *R.* v. *Bingley*, *Id.* 446: *R.* v. *Frost*, *ubi supra*: *R.* v. *Shellard*, 9 *C. & P.* 277; 4 *St. Tr.*, *N. S.* 1386: *R.* v. *Burdett*, 1 *St. Tr.*, *N. S.* 1, 171, *Bayley*, J.; *Redford* v. *Birley*, 1 *St. Tr.*, *N. S.* 1071. In *R.* v. *Hunt*, 3 *B. & Ald.* 566; 1 *St. Tr.*, *N. S.* 171, upon an indictment for conspiring and unlawfully meeting for the purpose of exciting disaffection and discontent among his Majesty's subjects at Manchester, it was held that the previous conduct of a portion of the assembly, in training, etc., and in assaulting persons whom they called spies, was competent evidence as to the general character and intention of the meeting, although the effect of it, as to each particular defendant, was a distinct matter for the consideration of the jury. It was also held, that it was competent to show, as against Hunt (who though a stranger, except by political connection, had been invited to preside as chairman at the meeting), that at a similar meeting in another place, holden for an object professedly similar, certain resolutions had been proposed by that person; it being in its nature a declaration of his sentiments and views on the particular subject of such meetings and of the topics there discussed. But the court held, that evidence of the misconduct of the military and others in the subsequent dispersion of the meeting, was properly refused by the judge at the trial, as irrelevant and having no bearing upon the intention and objects of the meeting, which intention and objects obviously existed previously to the alleged misconduct of the military attempted to be given in evidence.

Evidence tending to prove other offences not charged in the indictment.]—"The mere fact that evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears on the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would be otherwise opened to the accused." *Makin* v. *Att.-Gen. for N. S. W.* [1894]; *App. Cas.* 57; 63 *L. J.* (*P. C.*) 41; 17 *Cox*, 704. In this, the leading case on the subject, most of the prior cases are collected; and see *R.* v. *Wyatt* [1904] 1 *K. B.* 188: *R.* v. *Mean* [1904, Dec. 21], (*C. C. R.*).

1. *Offences connected with the transaction on which the indictment is based.*]—Where several offences are connected together, and form one entire transaction, upon an indictment for one, the others may be proved to show the character of the transaction. *R.* v. *Ellis*, 6 *B. & C.* 145: *R.* v. *Egerton*, *R. & R.* 375; *R.* v. *Rooney*, 7 *C. & P.* 517; *R.* v. *Mansfield*, *C. & Mar.* 140: *R.* v. *Bleasdale*, 2 *C. & K.* 765; *R.* v. *Firth*, *L. R.*, 1 *C. C. R.* 172; 38 *L. J.* (*M. C.*) 54. Thus with a view to prove the identity of the

defendant, it may be shown that other goods not included in the indictment, which were stolen from the premises at the same time, were found in his possession. So, it may be shown, upon an indictment for arson, that property taken out of the house at the time of the firing was afterwards found secreted in the possession of the prisoner. *R.* v. *Rickman*, 2 *East, P. C.* 1035. And upon the trial of four men for a burglary at W., evidence of three other burglaries by the same men on the same night was admitted in order to explain why none of the property taken from W. was found upon one of the prisoners as his share of the booty. *R.* v. *Cobden*, 3 *F. & F.* 833. On a trial for feloniously abusing and carnally knowing a female child under the age of ten years, evidence was admitted of subsequent perpetrations of the same offence on different days, previous to the complaint of the mother, it appearing that the prisoner had threatened the child on the first occasion—on the ground that, virtually, in such a case it was all part of one and the same transaction. *R.* v. *Rearden*, 4 *F. & F.* 76. But if the offences be distinct, and not part of one scheme or transaction (subject to what is stated below), evidence of one offence is, in general, inadmissible on the trial of the prisoner for another offence; *R.* v. *Birdseye*, 4 *C. & P.* 386: *R.* v. *Holt, Bell*, 280; 30 *L. J.* (*M. C.*) 11: *R.* v. *Fuidge, L. & C.* 390; 33 *L. J.* (*M. C.*) 74: *R.* v. *Rhodes* [1899] 1 *Q. B.* 77, 82 (*C. C. R.*); even where it is derived from the admission of the defendant himself. *R.* v. *Butler*, 2 *C. & K.* 221. To prove the defendant to be the author of a libel, evidence of other libels written by the same person and concerning the same subject may be received. *R.* v. *Pearce*, 1 *Peake*, 106 (3rd ed.). But it is said that they must expressly refer to the libel in the indictment or at least to the same subject matter. *Finnerty* v. *Tipper*, 2 *Camp.* 72.

Where on cross-examination of the witnesses for the prosecution evidence is given that persons previously convicted of an offence, which is now charged by the prosecution to have been committed by the prisoners at the bar, were in fact the guilty parties, and that the prisoners at the bar were not,—the evidence of such convicted persons, though establishing only their own *alibi*, is admissible, apparently on the ground that if the convicts were the guilty parties, the prisoners on trial could not be, and therefore the question of the guilt or innocence of the convicts became relevant to the question of the guilt or innocence of the prisoners. *R.* v. *Dytche*, 17 *Cox*, 39, *Hawkins*, J.

2. *To prove design, system, criminal intent, or guilty knowledge.*]

Criminal intent and guilty knowledge.]—Where a design, system, criminal intent, or guilty knowledge on the part of the defendant is to be proved, or the defence of accident or the like is to be met, the prosecutor may give in evidence other instances of his having committed the same offence for which he is under trial.

The principle on which this is allowed is laid down in *Makin* v. *Att.-Gen. for N. S. W.* [1894] *App. Cas.* 57; 63 *L. J.* (*P. C.*) 41; 17 *Cox*, 704.

The following instances illustrate its application to particular kinds of offence:—

1. *Homicide.*]—Where four indictments were found against a woman, which respectively charged her with poisoning her husband and two of her sons, and with attempting to poison a third son, evidence was tendered on the trial of the first indictment that arsenic had been taken by the three sons a few months after their father's death, that all the four persons when taken ill exhibited the same symptoms; and that the

prisoner had been in the habit of preparing their meals; the court held the evidence admissible for the purpose of proving that the husband died of arsenic, and that his death had not been accidental. *R.* v. *Geering*, 18 *L. J.* (*M. C.*) 215: *R.* v. *Garner*, 4 *F.* & *F.* 346. In *Makin* v. *Att.-Gen. for N. S. W.* [1894] *App. Cas.* 57; 63 *L. J.* (*P. C.*) 41; 17 *Cox*, 704, *R.* v. *Geering* was approved, and the Privy Council held that on an indictment for the murder of an infant, in order to prove malice or meet the defence of accident, the prosecution could properly adduce evidence that other infants had been received by the prisoners for a small sum, on a representation that they desired to adopt them, that the payments were insufficient to support the infants long, and that several bodies of infants had been found buried in the defendants' garden. In *R.* v. *Cotton*, 12 *Cox*, 400, on a charge against a mother for poisoning, evidence of the death of other children by the same poison was held admissible. In *R.* v. *Roden*, 12 *Cox*, 630, on a charge against a mother of murdering her infant by suffocation in bed, evidence was admitted of the previous death of other children at earlier ages. So, for the same reason, former menaces or assaults of the defendant, or expressions of malicious or vindictive feeling towards the deceased, or, in fact, the existence of any motive likely to instigate him to the commission of the offence in question, are also in such a case receivable in evidence. *R.* v. *Clewes*, 4 *C.* & *P.* 221: *see R.* v. *Hopkins*, 10 *Cox*, 229. Thus, on the trial of an indictment for the murder of an infant child, the fact that the prisoner had said to the mother of the child, about a fortnight before the alleged murder, "The child is no good; it is eating the other children's food," was held to be admissible as evidence. *R.* v. *Hagan*, 12 *Cox*, 357, *per Archibald*, J., *after consultation with Pollock*, B. So on a trial for murder, the deposition of the deceased against the prisoner, taken before the magistrates on another charge against him, and for which he was afterwards convicted, was held to be admissible evidence for the prosecution in order to prove malice or motive against the prisoner. *R.* v. *Buckley*, 13 *Cox*, 293, *Lush*, J. Upon an indictment for murder by poison of S., evidence is admissible of the previous death of J., and of the subsequent death of L., under like circumstances and attended by similar symptoms, to show that the poisoning was not accidental; and where it is proved that a motive for the death of S. might exist, by the fact of the prisoner having insured the life of S., evidence may also be given upon the same indictment that there might be an equal motive for the deaths of J. and L. by showing that their lives also had been insured by the prisoner. *R.* v. *Heesom*, 14 *Cox*, 40. *See also R.* v. *Flannagan*, 15 *Cox*, 403, also a case of murder by arsenical poisoning (in which *Butt*, J., followed the ruling in *R.* v. *Geering*, *ubi supra*, and disapproved *R.* v. *Winslow*, 8 *Cox*, 397): *R.* v. *Neill Cream*, 116 *Cent. Crim. Ct. Sess. Pap.* 1451: *R.* v. *Klosowski*, 167 *Cent. Crim. Ct. Sess. Pap.* 471, both cases of poisoning: *R.* v. *Serné*, 107 *Cent. Crim. Ct. Sess. Pap.* 418, a case of homicide consequent on arson.

Abortion.]—Upon the trial of an indictment under 24 & 25 *Vict. c.* 100, *s.* 58, for "feloniously and unlawfully using a certain instrument, to wit, a quill, with intent to procure a miscarriage," in order to prove the intent, evidence may be given that at other times the prisoner had caused miscarriages by similar means. *R.* v. *Dale*, 16 *Cox*, 703.

Arson.]—Where the prisoner was indicted for arson with intent to defraud an insurance company, for the purpose of throwing light upon the prisoner's intention, and proving that the fire was the result of design and not of accident, evidence was admitted that the prisoner had

previously occupied two houses in succession, both of which had been insured, that fires had broken out in both, and that the prisoner had made claims upon and been paid by the insurance companies in respect of the loss caused by each fire. *R.* v. *Gray*, 4 *F. & F.* 1102; approved in *Makin* v. *Att.-Gen. for N. S. W., ubi supra.*

The same rule applies, where it is requisite for the prosecutor to prove *malice* or *intent* on the part of the defendant. Thus, on an indictment for maliciously shooting, or for arson, if it be questionable whether the shooting or burning was by accident or design, proof may be given that at some other time the prisoner intentionally shot at the same person, or was attempting to set fire to the same building or stack. *R.* v. *Voke*, *R. & R.* 531: *R.* v. *Dossett*, 2 *C. & K.* 306.

Coinage offences.]—Upon an indictment for procuring base coin with intent to utter it, evidence of the defendant having a large quantity of such coin is admissible to prove the intent. *R.* v. *Fuller*, *R. & R.* 308. And upon an indictment for uttering counterfeit money, it is competent to the prosecutor to prove that other pieces of such counterfeit money were found upon the defendant, or were uttered by him at different times. *R.* v. *Wylie*, 1 *B. & P.* (*N. R.*) 95. For the same reason, proof of the defendant's conduct in such other utterings, as, for example, that he passed by different names, is admissible. *Bayley on Bills*, 449. So, on an indictment for having knowingly and with guilty intent the possession of coining instruments, evidence may be given of the defendant's previously uttering bad money. *R.* v. *Weeks*, *L. & C.* 18; 30 *L. J.* (*M.C.*) 141.

Cruelty to children.]—On an indictment for neglecting children between two specified dates, evidence of neglect prior to the earlier date was rejected. *R.* v. *Miller*, 65 *J. P.* 313, *Phillimore*, J.

Embezzlement.]—On an indictment for embezzlement, where the embezzlement had been effected by falsifying accounts, the prosecutor was allowed to prove a number of analogous errors in the prisoner's accounts for the purpose of proving that the case on which the indictment was founded was not accidental. *R.* v. *Richardson*, 2 *F. & F.* 343; 8 *Cox*, 448. And in *R.* v. *Proud*, *L. & C.* 97; 31 *L. J.* (*M. C.*) 71, another case of embezzlement, the master's books, kept by the prisoner, were given generally in evidence by the prosecution, though it was objected on behalf of the prisoner, that the evidence must be confined to the three particular entries referring to the three charges in the indictment, and the prisoner having been convicted, the conviction was affirmed. So where an indictment for embezzlement contained three counts, each charging a distinct act of embezzlement, it was held that the jury might consider the evidence that had been given as to the conduct of the prisoner in relation to the matters referred to in all the counts, when considering any one of them in order to determine whether the prisoner had failed to pay over money accidentally or fraudulently. *R.* v. *Stephens*, 16 *Cox*, 387 (*C. C. R.*).

False pretences and fraud.]—On the trial of an indictment for attempting to obtain money by false pretences, evidence is admissible of a previous or subsequent obtaining or attempting to obtain money by the defendant by false pretences not charged in the indictment, in order to prove that the defendant had a guilty knowledge of the falsehood of the pretence

charged in the indictment. *R.* v. *Francis*, *L. R.* 2 *C. C. R.* 128: 43 *L. J.* (*M. C.*) 97; 12 *Cox*, 612: *R.* v. *Rhodes* [1899] 1 *Q. B.* 77, 83: *R.* v. *Stenson*, 12 *Cox*, 111: *R.* v. *Cooper*, 1 *Q. B. D.* 19; 45 *L. J.* (*M. C.*) 15; 13 *Cox*, 123. And on this ground it was held, that on an indictment for attempting to obtain money by falsely pretending that a ring was composed of diamonds, which in fact was composed of crystals, evidence was admissible of a false pretence by the defendant on a prior occasion to another person that a chain was gold, whereas it was plated, and on another distinct prior occasion that a ring was of diamonds, which it was not. *R.* v. *Francis*, *ubi supra*. On a charge of obtaining goods by a false pretence, evidence of the defendant's obtaining, within a week after the offence charged in the indictment, other goods from a different person by a similar false pretence was held inadmissible in *R.* v. *Holt*, *Bell*, 280; 30 *L. J.* (*M. C.*) 11; 8 *Cox*, 411. "The question in *R.* v. *Holt* was whether the prisoner had the authority or not which he said he had. The piece of evidence there objected to seems to me to be quite immaterial on that point, and how the reception of a perfectly immaterial piece of evidence caused the court to quash the conviction I cannot understand." *R.* v. *Francis*, 43 *L. J.* (*M. C.*) 99, *Blackburn*, J. But the other false pretences, to be admissible in evidence, must not be isolated and distinct transactions, but must have some nexus or connection with the offence charged, *e.g.*, as showing part of a scheme for carrying on a bogus business. *R.* v. *Rhodes*, *ubi supra*. In that case *R.* v. *Holt* was distinguished as dealing with totally distinct pretences.

R. v. *Francis* and *R.* v. *Rhodes* were followed in *R.* v. *Wyatt* [1904] 1 *K. B.* 188; 68 *J. P. Rep.* 31 (*C. C. R.*), where the defendant was charged with obtaining credit by fraud (32 & 33 *Vict. c.* 62, *s.* 13). The evidence was to the effect that he had obtained board and lodging and had not paid. The court held evidence admissible that he had shortly before obtained lodgings at other places and had left without pay as tending to establish *a systematic course of conduct* on the part of the accused, and as negativing any accident or mistake, or the existence of any reasonable or honest motive.

In *R.* v. *Ollis* [1900] 2 *Q. B.* 758; 67 *L. J. Q. B.* 918; 19 *Cox*, 554, an indictment for obtaining money by falsely pretending that certain cheques given by the prisoner was a good and valid order for the payment of money, it was held by *Russell*, L.C.J., *Wright*, *Darling*, and *Channell*, JJ., that to prove guilty knowledge evidence was admissible to prove that the prisoner had given the prosecutor in exchange for a cheque of the latter another cheque which was dishonoured on presentation notwithstanding that the prisoner had already been indicted and acquitted on a charge of fraud in respect of this last cheque. *Bruce* and *Ridley*, JJ., dissented.

Forgery.]—Upon an indictment for disposing of and putting away a forged bank-note, knowing it to be forged, the prosecutor may give evidence (*See R.* v. *Millard*, *R. & R.* 245) of other forged notes having been uttered by the prisoner at other times, before or after the commission of the offence for which he is indicted; *R.* v. *Wylie*, 1 *B. & P.* (*N. R.*) 93; *S. C. sub nom. R.* v. *Whiley*, 2 *Leach*, 983; *R.* v. *Tattersal*, 1 *B. & P.* (*N. R.*) 93, *cit.*: *R.* v. *Ball*, *R. & R.* 132; 1 *Camp.* 324; 10 *R. R.* 695; 1 *Den.*, *p. iv.*; or that he had in his possession other forged notes of the same kind; *R.* v. *Hough*, *R. & R.* 120; or it would seem, of a different kind, *Bayley on Bills*, 450; in order to prove, or at least to raise a presumption of, his knowledge that the note in question was forged. So also, upon an indictment for uttering a forged bill of exchange, guilty knowledge may be proved by showing that the prisoner has at different times uttered

other bills forged in other names. *R.* v. *Salt*, 3 *F. & F.* 834. *See also* *R.* v. *Colclough*, 15 *Cox*, 92; 10 *L. R. Ir.* 241), as to the sufficiency of the proof of the other utterings, not the subject of the indictment, but offered in evidence to prove guilty knowledge.

Larceny.]—Where the prisoner was indicted under 7 & 8 *G.* 4, *c.* 29, *s.* 37 (*rep.*), in one count, for stealing coal from the mine of G. and from the mines of thirty other coal owners, and it appeared that the prisoner was himself the lessee of coal, and had carried workings from his own mine into the beds of forty different coal owners, from all of which he had got coal without their sanction, *Erle*, J., before whom the case was tried, thought it better that the attention of the jury should be confined to the charge of taking the coal of one owner, G.; but in order to show that when the prisoner took G.'s coal he knew he was out of his boundary, the learned judge permitted it to be proved that the prisoner had gone out of his boundary in many other instances, and into the property of many other persons, taking in all 15,000 yards of coal. *R.* v. *Bleasdale*, 2 *C. & K.* 765. And where, upon the trial of an indictment for larceny, it appears that the property alleged in such indictment to have been stolen at one time was taken at different times, although the prosecution may be called upon under 24 & 25 *Vict. c.* 96, *s.* 6, to elect upon which takings they will proceed, evidence may be given of takings other than those upon which they elect to proceed, in order to show guilty knowledge, and the felonious nature of the takings proceeded upon. *R.* v. *Firth*, *L. R.* 1 *C. C. R.* 172; 38 *L. J.* (*M. C.*) 54.

Libel.]—On this *see* *R.* v. *Pearce*, *ante*, p. 303, *R.* v. *Whiley*, *ante*, p. 311.

Receiving].—The cases and statutes as to evidence on a charge of receiving are given *post*, *Book II. Part I. sect.* 1, *tit.* "*Receiving.*"

Threatening letters.]—On an indictment for sending a threatening letter, prior and subsequent letters from the prisoner to the party threatened may be given in evidence, as explanatory of the meaning and intent of the particular letter upon which the indictment is framed, *R.* v. *Robinson*, 2 *Leach*, 749, if the intent cannot be inferred from the letter itself. *R.* v. *Boucher*, 4 *C. & P.* 562.

Matter of defence, etc.]—Matter of defence, when given in evidence under the general issue (*see ante*, p. 179), is proved by parol evidence, or by records or other written evidence, according to the rules laid down in the next chapter; when pleaded, and put in issue by the replication, it is also proved in the same manner, subject to the same rules as to variance, as indictments (*ante*, p. 296, *et seq.*).

Upon an indictment for a rape, the defendant may give general evidence of the woman's character for want of chastity (or that she is a common prostitute, *per Stephen*, J., in *R.* v. *Riley*, *infra*), or he may prove that she had before been criminally connected with him; *R.* v. *Riley*, 18 *Q. B. D.* 481; 56 *L. J.* (*M. C.*) 52: *R.* v. *Martin*, 6 *C. & P.* 562, and *n.*; but not that she had been criminally connected with others; *R.* v. *Holmes*, *L. R.* 1 *C. C. R.* 334; 41 *L. J.* (*M. C.*) 12; *R.* v. *Cockcroft*, 11 *Cox*, 410, *per Martin*, B., and *Willes*, J. (overruling *R.* v. *Robins*, 2 *M. & Rob.* 512): *R.* v. *Hodgson*, *R. & R.* 211. And the same upon an indictment for an assault with intent to commit a rape; *R.* v. *Clarke*, 2 *Stark.* (*N. P.*) 241; or for an indecent assault. *R.* v. *Holmes*, *ubi supra*. *See* *R.* v. *Barker*, 3 *C. & P.* 589. Upon an indictment for libel, the defendant has been allowed to give in evidence such other parts of the same publication as

were fairly connected with the libel in question, and upon the same topic, in order to disprove the motive imputed to him by the indictment, and to show the fair construction that should be put upon the passages therein set out. *R.* v. *Lambert*, 31 *St. Tr.* 335; 2 *Camp.* 398; 11 *R. R.* 748. And in *R.* v. *Horne Tooke*, 25 *St. Tr.* 1, 345; 1 *East, P. C.* 61, 62, it being proved on the part of the prosecution that the defendant had distributed several publications advocating republican principles, which was offered in evidence, in order to produce a presumption that parliamentary reform (which was expected to be set up by the prisoner in his defence) was a mere pretext to cover his treasonable purposes, the defendant, in order to rebut that presumption, was allowed to give in evidence a book upon parliamentary reform, written by him, and published twelve years before.

Character.]—The prisoner also will be allowed to call witnesses to speak generally as to his character, but not to give evidence of particular acts, unless it tends directly to the disproof of some of the facts put in issue by the pleadings. Evidence of the defendant's character can be of avail only in doubtful cases; where the probabilities of the defendant's guilt on the one side, and the probabilities of his innocence on the other, are nearly equal, satisfactory testimony as to his general good character for honesty or humanity may have the effect of raising a well-founded presumption in the minds of the jurors that a man of such character could not have been the perpetrator of the offence imputed to him; and in this sense it may be deemed evidence tending to the disproof of the matter in issue. The proper time for calling witnesses to character is before verdict and not after verdict in mitigation of sentence. *R.* v. *Mullins*, 3 *Cox*, 526; 7 *St. Tr., N. S.* 1110. A witness to character will not be allowed to speak to his own opinion of the prisoner's disposition, but only as to the general reputation in which the prisoner is held. *R.* v. *Rowton, L. & C.* 520; 34 *L. J.* (*M. C.*) 57. Thus a witness to character for a defendant indicted for perjury has been asked, "Do you consider him a man who would be likely to commit perjury?" *R.* v. *Hemp*, 5 *C. & P.* 468, *Denman*, L.C.J.: *sed quære.* Witnesses called by the prisoner as to character may be cross-examined either as to particular facts, *R.* v. *Hodgkiss*, 7 *C. & P.* 298, or as to the grounds of their belief. 1 *Taylor, Ev.* (9th ed.) 250. But it has been held that such a witness cannot be cross-examined as to circumstances of suspicion against the accused arising on the day of the alleged offence. *R.* v. *Rogan*, 1 *Cox*, 291, *Erle*, J. General evidence of good character may also be rebutted by general evidence of bad character. *R.* v. *Rowton, ubi supra.* And if the prisoner endeavours to establish a good character, either by calling witnesses himself, or by cross-examining the witnesses for the prosecution, the prosecution is at liberty, in most cases, to give proof of the prisoner's previous conviction. *R.* v. *Gadbury*, 8 *C. & P.* 676: *R.* v. *Shrimpton*, 2 *Den.* 219; 21 *L. J.* (*M. C.*) 37. As to mode of proof, *see* 28 *& 29 Vict. c.* 18, *s.* 6, and 34 *& 35 Vict. c.* 112, *s.* 18. And where he is himself called as a witness he may be cross-examined as to his character or previous offences, charges, or convictions, if the proof that he has committed or been convicted of another offence is admissible to prove that he is guilty of the offence charged, if he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his good character, or has given evidence of his good character, or if the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, or he has given evidence against any other person charged with the same offence. 61 *& 62 Vict. c.* 36, *s.* 1 (*f*) (ii.), (iii.), *post*, p. 395). The same course may be adopted if proof of the commission or

conviction of another offence is admissible evidence to show that he is guilty of the offence charged, *ante*, pp. 306–312. And apparently the previous convictions can now be put under 28 & 29 *Vict. c.* 18, *s.* 6 (*post*, p. 404).

The several cases just mentioned, when carefully considered, will be found to be not exceptions to, but rather illustrations of, the rule above mentioned (*ante*, p. 306), namely, that nothing may be given in evidence which does not tend directly to the proof or disproof of the matter in issue. In most of them, the evidence admitted tended directly to the proof of the knowledge or intention of the defendant at the time of the commission of the offence, which was a material ingredient in the crime imputed (*ante*, p. 308). In the case of rape above mentioned (*ante*, p. 312) the evidence tended to show the great improbability of any resistance upon the part of the woman, and also that the woman was not entitled to credit as a witness.

CHAPTER II.

THE MANNER OF PROVING THE MATTERS PUT IN ISSUE.

SECT. 1. *Preliminary Matters*, p. 315.
2. *Admissions and Confessions*, p. 325.
3. *Presumptions*, p. 339.
4. *Written Evidence*, p. 344.
5. *Parol Evidence*, p. 385.

SECT. 1.

PRELIMINARY MATTERS.

EVIDENCE may be classed under three heads: (1) admissions or confessions, (2) presumptions, and (3) proofs. These we shall consider fully in the several sections of this chapter. But before we enter into a particular consideration of the subject, it may be necessary first to notice one or two rules relating to evidence generally. Generally speaking, at common law the rules of evidence in criminal cases are the same as in civil cases. *R.* v. *Burdett*, 1 *St. Tr., N. S.* 1; 3 *B. & Ald.* 717; subject to certain specific statutory modifications, and to the rule of practice that more evidence is required to justify conviction of crime than a verdict for the plaintiff in a civil action for trespass arising out of the same circumstances. *See R.* v. *White*, 4 *F. & F.* 383, and *note*, and *see post*, p. 339, "*Presumptions.*"

Primary evidence.]—*First*, it is a general rule, that the best evidence of which the nature of the case will admit must be produced, if it can possibly be obtained; if not, then the next best evidence that can be obtained is admitted. This means that, as a general rule, where a written document is to be used as proof, the original document must be itself produced, and where a fact can be proved by persons who actually saw or heard it they must be called (but *see post*, p. 317). For if it appears that there is any better evidence existing than that which is produced, the non-production of it creates a presumption that, if produced, it would have detected some falsehood which at present is concealed. 3 *Bl. Com.* 368; *Gilb. Ev.* 16; 1 *Taylor Ev.* (9th ed.), 277–282: *R.* v. *James*, 1 *Show.* 397; *Carth.* 220; *cas. temp. Holt*, 284: *R.* v. *Paine*, 1 *Salk.* 281; 1 *Ld. Raym.* 729: *Williams* v. *H. E. I. Co.*, 3 *East*, 192; 6 *R. R.* 589. Therefore, before secondary evidence is offered, a foundation for it must first be laid, by proving that evidence at first hand cannot be obtained. The best evidence of the contents of a deed or other written instrument is the written instrument itself; secondary evidence is a true copy, or parol evidence of the contents, of the original. Therefore, before a copy of a written instrument, or parol evidence of its contents, can be received as proof, the absence of the original instrument must be accounted for, by proving that it is lost or destroyed, or that it is in possession of the opposite party. Thus, where it is sought to give in evidence the contents of a telegram sent by the prisoner to a witness, it is necessary that the original message handed to the post office should be produced, and the copy received by the witness cannot be given in evidence unless it is proved that such original has

been lost or destroyed. *R.* v. *Regan*, 16 *Cox*, 203, *Field*, J. The declarations or admissions of the opposite party, however, are always receivable in evidence against him, although they relate to the contents of a deed or other written instrument, and even though its contents be directly in issue in the suit. *Slatterie* v. *Pooley*, 6 *M. & W.* 664: *Howard* v. *Smith*, 3 *Scott* (*N. R.*) 574. *See post, sect.* 2, "*Admissions.*"

Records, however, are apparently an exception to the rule as to primary evidence, for they may be proved by exemplifications or other copies, in all cases, unless they are records of the court in which they are to be produced, and, the matter of record forms the gist of the pleading to be proved. *See Reid* v. *Margison*, 1 *Camp.* 469; and *Burnand* v. *Nerot*, 1 *C. & P.* 578. This exception has been adopted from necessity because of the difficulty or impossibility of removing the record from its proper custody. To require the record itself to be given in evidence would be productive of great inconvenience, for it probably might be wanted for that purpose in several parts of the kingdom at the same time; besides, by removing it from the place in which it was deposited, there would necessarily be great danger of its being lost. *Gilb. Ev.* 7, 8. For the same reasons, journals of the House of Lords or House of Commons, libels, answers, depositions, etc., in the ecclesiastical courts in most cases,—the rolls of a court baron, and other inferior courts,—parish registers,—entries in corporation books, or the books of public companies, *relating to things public and general*, or entries in foreign registers which may not be removed from their proper place of custody, may all be proved by copies duly certified. *See Lyell* v. *Kennedy*, 14 *App. Cas.* 437, *et seq.*, and as to the modes of proving such documents, *see post*, p. 344, *et seq.*; and as to evidence of entries in bankers' books, *see post*, p. 384.

When the copy of a document, the original whereof is not evidence at common law, is made evidence by Act of Parliament, a copy must be produced; the original is not made admissible evidence by implication. *Burdon* v. *Rickets*, 2 *Camp.* 121, *n.*

Notice to produce.]—Where a written instrument is in the hands of the opposite party, it is necessary to serve him or his solicitor with a notice to produce it: and if he does not produce it at the trial, in pursuance of the notice, then, upon proving the service of the notice, you will be allowed to give secondary evidence of its contents. The rule in this respect is the same in criminal as in civil cases; *Att.-Gen.* v. *Le Merchant*, 2 *T. R.* 201, *n.*; 26 *R. R.* 703; subject to the qualification that the rules for compelling discovery of documents by the defendant do not apply to criminal cases, save in the case of proceedings under the *Crown Suits Acts* and indictments in which a civil right is in issue. *See Spokes* v. *Grosvenor Hotel Co.* [1897] 1 *Q. B.* 124. The notice to produce must be served a reasonable time before the trial. What is such reasonable time must of course depend on the circumstances of each case. In general, when the parties live at a distance from the assize town, notice must be served before the commission day; *R.* v. *Ellicombe*, 1 *M. & Rob.* 260: *see Trist* v. *Johnson*, *Id.* 259; but this will depend on the nature of the document and the knowledge or probability of its being in the hands of the parties at the assize town, or the contrary. *See the cases collected*, *Roscoe*, *Nisi Prius* (17th ed.), p. 13. But in cases where the nature of the pleading gives sufficient notice to the defendant of the subject of inquiry, so that he may prepare himself to produce the written instrument, if necessary for his defence, a notice to produce it is not required; thus, for instance, it has been held that in trover for a bond the plaintiff may give parol evidence of it, to support the general description of it in the

declaration, without having given the defendant previous notice to produce it. *How* v. *Hall*, 14 *East*, 274; 12 *R. R.* 515. So, upon an indictment for stealing a bill of exchange, parol evidence of it was admitted, without a notice to produce it. *R.* v. *Aickles*, 1 *Leach*, 294; 2 *East*, *P. C.* 675. And on an indictment for stealing a post letter described as addressed in a certain way, *Pollock*, C.B., held that a witness might be asked how the letter was addressed, although no notice to produce it had been given. *R.* v. *Clube*, 3 *Jur.* (*N. S.*) 698. So, upon an indictment for administering an unlawful oath, where it appeared that the defendant read the oath from a paper, parol evidence of what the defendant in fact said was held sufficient, without giving him notice to produce the paper. *R.* v. *Moors*, 6 *East*, 419, *n.*, 421, *n.* So, where a seditious meeting came to certain resolutions, and the defendant, who was chairman, gave a copy of these resolutions to another person, it was held that this copy might be given in evidence, without a notice to produce the original. *R.* v. *Hunt*, 1 *St. Tr.*, *N. S.* 171; 3 *B. & Ald.* 566; 22 *R. R.* 485. In the same case it was also held, that it was not necessary to produce or account for banners bearing certain inscriptions, etc., exhibited at such meeting, but that parol evidence of such matters, by eye-witnesses, was perfectly admissible to show the general character and intention of the assembly. But upon an indictment for setting fire to a house, with intent to defraud an insurance office, secondary evidence of the policy of insurance cannot be given, without proof of due notice to produce the original. *R.* v. *Kitson*, *Dears.* 187; 22 *L. J.* (*M. C.*) 118. And upon an indictment for perjury in falsely swearing that there was no draft of a statutory declaration which had been prepared by the defendant, the materiality of the existence of such draft turned upon its contents and the fact of certain alterations having been made in it. Parol evidence of the contents of the draft and of the alterations made in it was held inadmissible, no notice to produce such draft having been given to the defendant. *R.* v. *Elworthy*, *L. R.* 1 *C. C. R.* 103; 37 *L. J.* (*M. C.*) 3. On the trial of an indictment for stealing a ring which had not been recovered, *Channell*, B., refused to allow evidence to be given of the contents of an inscription upon it, as no notice had been given to the prisoner to produce the ring, although his lordship admitted evidence of the fact that the ring bore *some* inscription. *R.* v. *Farr*, 4 *F. & F.* 336. But it is submitted that this case is inconsistent with those above cited. And in *R.* v. *Francis*, *L. R.* 2 *C. C. R.* 128; 43 *L. J.* (*M. C.*) 97, it was decided by the Court of Crown Cases Reserved that although where the question is as to the effect of a written instrument, the instrument itself is primary evidence of its contents, and until its non-production is excused, no secondary evidence can be received, there is no case whatever deciding that when the issue is as to the state of a chattel, *e.g.*, the soundness of a horse, or the equality of the bulk of goods to the sample, the production of the chattel is primary evidence, and that no evidence can be given in regard to it, unless it is produced in court, or its absence is accounted for. And therefore on the trial of an indictment for obtaining money by false pretences, evidence was allowed to be given that the prisoner had on a previous occasion endeavoured to obtain money by pretending that a ring, which was not produced at the trial, was a diamond ring, which it was not. *Id.*

Hearsay, generally.]—It is a general rule, that hearsay is no evidence; and for two reasons: what the other person said was not upon oath: and the party who is to be affected by it had no opportunity of cross-examining him. *R.* v. *Gunnell*, 16 *Cox*, 154 (*C. C. R.*): *R.* v. *Saunders*

[1899] 1 *Q. B.* 490 (*C. C. R.*): *Roscoe, Nisi Prius* (17th ed.), 44. To this rule, however, there are some exceptions, arising from necessity:—

(1) Hearsay is admissible to prove the death of a person beyond sea. *Bull.* (*N. P.*), 294; *Doe* v. *Griffin*, 15 *East*, 293; 13 *R. R.* 474.

(2) Hearsay is good evidence to prove a prescription, *Bull.* (*N. P.*), 295; or custom, *Nicholls* v. *Parker*, 14 *East*, 331, *n.*; 12 *R. R.* 542: *Doe* v. *Sisson*, 12 *East*, 62: *see R.* v. *Antrobus*, 2 *A. & E.* 788: *Pim* v. *Curell*, 6 *M. & W.* 234; or public right, *R.* v. *Bedfordshire*, 4 *E. & B.* 535, 541; 24 *L. J.* (*Q. B.*) 81; and for this purpose old witnesses are usually called to prove what they heard in their youth, from old persons since deceased, on the subject. *See Roscoe, Nisi Prius* (17th ed.), 48; 1 *Taylor, Evidence* (9th ed.), 392.

(3) What a witness has been heard to say at another time may, it is said, be given in evidence, in order to invalidate or confirm the testimony he gives in court. 2 *Hawk. c.* 46, *s.* 23; *but see* 2 *Taylor, Evidence* (9th ed.), 976.

(4) *Res gestæ.*]—When hearsay is introduced, not as a medium of proof to establish a distinct fact, but as being part of the transaction in question, it is admissible. *R.* v. *Gordon*, 21 *St. Tr.* 485, 535; 2 *Doug.* 591. This kind of evidence is usually described as *res gestæ*; and it does not seem quite accurate to class it as hearsay. *See Roscoe, Nisi Prius* (17th ed.), 53; 1 *Taylor, Evidence* (9th ed.), p. 376. Under this head declarations made by an agent, acting at the time within the scope of his authority, are received against his principal. *R.* v. *Hall*, 8 *C. & P.* 358. It would seem that the conduct of a person against whom an offence is committed, and especially the fact that he complained soon after the offence to persons to whom he would naturally complain, is relevant and admissible. *Steph. Dig., Ev.* (5th ed.), art. 8, p. 11; *R.* v. *Nicholas*, 2 *C. & K.* 246: *R.* v. *Rowland*, 62 *J. P.* 459.

Homicide.]—On an indictment for murder or manslaughter, a statement, made by the deceased immediately after he was knocked down, as to how the accident happened, has been held admissible. *R.* v. *Foster*, 6 *C. & P.* 325, *per Park*, J., *Patteson*, J., and *Gurney*, B.; *R.* v. *Lunny*, 6 *Cox*, 477 (*Ir.*), *Monahan*, C.J. In *R.* v. *Bedingfield*, 14 *Cox*, 341, on an indictment for murder, a statement made by the deceased immediately after the fatal wound was inflicted, on coming out of the house where it had been inflicted, and in which house the prisoner was directly afterwards found lying with his throat cut and speechless, was rejected by *Cockburn*, C.J., as not being part of the *res gestæ*. The ruling in this case was impugned by Mr. Pitt-Taylor, and the arguments for and against it, are set forth at large in two pamphlets by his Lordship and Mr. Pitt-Taylor, in which the former denied and the latter maintained the correctness of *R.* v. *Foster*, 6 *C. & P.* 325; *see* 1 *Taylor, Evidence* (9th ed.), 377, *n.* *R.* v. *Bedingfield* was followed in *R.* v. *Goddard*, 15 *Cox*, 7, by *Hawkins*, J., in which case the deceased shortly after the occurrence which resulted in her death was found in a fainting condition and apparently dying. It was proposed to give in evidence, as part of the *res gestæ*, a statement which she then made as to the cause of her injuries. The judge, however, refused to receive it in evidence as part of the *res gestæ*, but it afterwards appearing that the deceased had prefaced her statement by the words "I'm dying, look to my children;" he admitted the statement as a dying declaration. In *R.* v. *Lunny*, 6 *Cox*, 477 (*Ir.*), statements made by a deceased person to the first person who came up after the

fatal wound was inflicted, were held admissible as part of the *res gestæ*. Where on the trial of a prisoner for the murder of his wife, a neighbour swore that a week before the alleged crime was committed, the deceased visited her house, bringing an axe and carving-knife, and handed them to the witness, evidence was admitted of what was said by the deceased to the witness on handing her the instruments. *R.* v. *Edwards*, 12 *Cox*, 230, *Quain*, J. Where on a trial for murder it was proposed by the prosecution to ask a witness what the deceased said on leaving her lodgings, that being the last occasion on which she was seen alive, *Cockburn*, C.J., refused to allow the question to be put, on the ground that what the deceased said was no part of the act of leaving, but only an incidental remark or statement of intention, which might or might not have been carried out. *R.* v. *Wainright*, 13 *Cox*, 171, *Cockburn*, C.J. The answer to the question disallowed would have been, "She said she was going to 115, W. Road," a house in the occupation of the prisoner, in which the remains of the deceased were found. *See also R.* v. *Pook*, *Id.* 172, *n.*

Except in the class of cases next to be considered only the fact and not the terms of the complaint may be proved. *Steph. Dig. Ev.* (5th ed.), p. 11.

Rape, etc.]—In *R.* v. *Lillyman* [1896] 2 *Q. B.* 167; 65 *L. J.* (*M. C.*), 195; 18 *Cox*, 346; 60 *J. P.* 536; (*C. C. R.*), it was held after consideration of the earlier authorities that upon the trial of an indictment for rape or other kindred offences against women or girls the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint may, so far as they relate to the charge against the prisoner, be given in evidence on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as negativing consent on her part.

This decision overrules certain earlier authorities so far as they excluded proof of the particulars of the complaint. *R.* v. *Clarke*, 2 *Stark*, (*N. P.*) 241; 1 *Phillips and Amos on Evidence*, p. 204 (2): *R.* v. *Walker*, 2 *M. & Rob.* 212: *R.* v. *Megson*, 9 *C. & P.* 420: *R.* v. *Wink*, 6 *C. & P.* 397: *R.* v. *Osborne*, *C. & Mar.* 622. But the C. C. R. to some extent distinguished these authorities as deciding no more than that the complaint was not part of the *res gestæ*, but only confirmatory evidence. The court accepted *R.* v. *Brasier*, 1 *Leach*, 199; 1 *East*, *P. C.* 443, as correctly deciding that the mere complaint is no evidence of the facts complained of, and that its admissibility depends on proof of the facts by sworn or other legalized testimony; and it also accepted the ruling of *Bramwell*, L.J., in *R.* v. *Wood*, 14 *Cox*, 46, and the opinion of *Sir James Stephen*, *Dig. Ev.* (5th ed.), *art.* 8, *note v.*; *and see* 1 *Hawk. c.* 41, *s.* 9; 4 *Bl. Com.* 211, 213.

The extent of the rule above laid down is not quite exactly ascertained. In *R.* v. *Lillyman* (*ubi supra*) the charges in the indictment were—

(1) Attempt to have carnal knowledge of a girl of the age of 13 and under 16:

(2) Assault on the same girl with intent to ravish (*v. R.* v. *Brasier*, *ubi supra*): and

(3) Indecent assault.

The defendant was convicted on the first count only. On the first charge consent was immaterial, on the second and third it was material.

It would therefore seem that the *ratio decidendi* in *R.* v. *Lillyman* did

not depend on the question whether the girl consented or not. And in *Stephen, Dig. Ev.* (5th ed.), p. 169, it is said to be usual to apply the rule in *Lillyman's case*, irrespective of the question whether consent is or is not in issue. But the rulings on the subject are not uniform.

In *Beatty* v. *Cullingworth*, 62 *J. P.* 240, affirmed in the Court of Appeal, *Hawkins*, J., held that the rule in *Lillyman's case* applied only to rape and kindred offences. And in *R.* v. *Rowlands*, 42 *Sol. J.* 640: 62 *J. P.* 459, *Hawkins*, J., ruled that the terms of complaint were admissible only as evidence of want of consent. *See Stephen, Dig. Ev.* (5th ed.), p. 169. In *R.* v. *Kiddle*, 19 *Cox*, 77, *Ridley*, J., applied it to a charge of indecent assault on a girl under 13, as to which consent is not material. But in *R.* v. *Kingham*, 66 *J. P.* 393, on a similar charge *Laurance*, J., refused to apply the rule, saying that it applied only where consent was a material question. In *R. Folley*, 60 *J. P.* 569, *Hall*, Recorder, held that the rule was applicable to all criminal cases, and applied it to a charge of felonious wounding with intent to do grievous bodily harm. But it is very doubtful whether this view can be sustained, so as to admit the particulars of the complaint.

In *R.* v. *Merry*, 19 *Cox*, 442, *Bruce*, J., held that particulars elicited in the course of a conversation consequent on a complaint did not fall within the rule in *Lillyman's case* and were not admissible, as they were not volunteered by the complainant on her own initiative.

In *R.* v. *Eyre*, 2 *F. & F.* 579, *Byles*, J., seems to have been of a contrary opinion, but that decision is open to question. *See R.* v. *Lillyman* [1896] 2 *Q. B.* at p. 176.

In *R.* v. *Hoodless*, 64 *J. P.* 282, a quarter sessions case, a complaint of an act of gross indecency with a male person was held not to be within the rule in *R.* v. *Lillyman*.

To be admissible the complaint must be made within a reasonable time (*R.* v. *Lillyman*, *ubi supra*) which is for the court before which the complaint is offered in evidence. *R.* v. *Ingrey*, 64 *J. P.* 107, *Russell*, L.C.J. If a considerable time has elapsed between the commission of the offence charged and the complaint, it is inadmissible. *R.* v. *Rush*, 60 *J. P.* 777, *Wright*, J.; and in *R.* v. *Ingrey*, *ubi supra*, a complaint of an offence committed on a Saturday was rejected because it was not made till the Tuesday following. But the complaint need not be on the very earliest opportunity. *R.* v. *Kiddle*, 19 *Cox*, 77. In *R.* v. *Guttridge*, 9 *C. & P.* 471, where the prosecutrix was not called, it was sought to put in her complaint, but it was rejected by *Parke*, B., on the ground that, not being part of the *res gestae*, but only confirmatory evidence, it could not be used, as the prosecutrix had given no evidence.

(5) *Statements as to bodily or mental feelings.*]—Whenever the bodily or mental feelings of a person are material to be proved, the usual expressions of such feelings made at the time in question, are admissible. *Taylor, Ev.* (9th ed.), p. 374; *Aylesford Peerage claim*, 11 *App. Cas.* 1, and *see Roscoe, Nisi Prius* (17th ed.), 52. Thus the representation by a sick person of the nature and effects of the malady under which he is labouring are receivable. *R.* v. *Blandy*, 18 *St. Tr.*, 1117, 1135–1138, and *see R.* v. *Guttridge*, 9 *C. & P.* 471, 472, *Parke*, B. But written communications from a patient to his doctor describing his symptoms have been held inadmissible. *Witt* v. *Witt*, 3 *Sw. & Tr.* 143: 32 *L. J.* (*P. & M.*) 179, *Cresswell*, J. On a trial for murder by poisoning, statements by the deceased, shortly before he took poison, are admissible to prove the state of his health at that time. *R.* v. *Johnson*, 2 *C. & K.* 354: *R.* v. *Blandy*, *ubi supra*. On an indictment for murder alleged to have been

committed by withholding proper food from a child, a complaint by the child of being hungry is admissible. *R.* v. *Conde*, 10 *Cox*, 547. But such expressions, statements, and complaints, although admissible in evidence so far as they show the bodily condition of the person making them, at the time when they were made, cannot be given in evidence to show who caused such condition, or how it was caused. *R.* v. *Gloster*, 16 *Cox*, 471, *Charles*, J. *R.* v. *Abbott*, 67 *J. P. Rep.* 151, *Kennedy*, J. As to dying declarations, *see infra*.

(6) *Declarations against interest by deceased persons.*]—Declarations made by persons since deceased against their pecuniary or proprietary interest are admissible. *Higham* v. *Ridgway*, 10 *East*, 109; 10 *R. R.* 235; 1 *Taylor, Ev.* (9th ed.), p. 434, *et seq.*; *Roscoe, Nisi Prius* (17th ed.), 55; 2 *Smith, L. C.* (11th ed.), 327, *et seq.*, 360.

(7) *Declarations by deceased persons in course of duty or business.*]—A statement (whether written or oral, *R.* v. *Birmingham*, 1 *B. & S.* 763; 31 *L. J.* (*M. C.*) 63, or entry, which it is the duty of a person to make in the ordinary course of his business or professional employment, is admissible in evidence after his decease. *Price* v. *Earl of Torrington*, 1 *Salk.* 285, provided it be made contemporaneously with the act to which it relates. *Doe* v. *Turford*, 3 *B. & Ad.* 890. But such statement or entry is only admissible to prove those facts which it was the duty of the person making the statement or entry to include in it, *Chambers* v. *Bernasconi*, 1 *C. M. & R.* 347, 368, and of which he had personal knowledge. *Brain* v. *Preece*, 11 *M. & W.* 773; *R.* v. *Clapham*, 4 *C. & P.* 29, and *see Stephen, Evidence* (5th ed.), art. 27, p. 36; 1 *Taylor, Evidence* (9th ed.), p. 453, *et seq.* In accordance with this exception to the general rule excluding hearsay, where on a trial for murder it appeared that the deceased, a constable, in the course of his duty had made, shortly before his death, a verbal statement to his superior officer as to where the deceased was going, and what he was going to do, it was held that such statement, which was to the effect that deceased was going to watch the prisoner, was admissible. *R.* v. *Buckley*, 13 *Cox*, 293, *Lush & Mellor*, JJ.

(8) *Dying declarations.*]—Upon an indictment for murder or manslaughter, the dying declarations of the deceased are receivable in evidence, if it appears to the satisfaction of the judge (*R.* v. *John*, 1 *East, P. C.* 357, 358; 1 *Leach*, 504, *n.*: *R.* v. *Welbourn*, 1 *East, P. C.* 358, 360: *R.* v. *Hucks*, 1 *Stark.* (*N. P.*) 521) that the deceased was conscious of his being in a dying state at the time he made them (*R.* v. *Woodcock*, 1 *Leach*, 502; 1 *East, P. C.* 354, 356: *R.* v. *Welbourn*, 1 *East, P. C.* 358: *R.* v. *Christie, Carr. Sup.* 302: *R.* v. *Van Butchell*, 3 *C. & P.* 629: *R.* v. *Forester*, 4 *F. & F.* 857; 10 *Cox*, 368: *R.* v. *Goddard*, 15 *Cox*, 7, *ante*, p. 318), and was sensible of his awful situation (*R.* v. *Pike*, 3 *C. & P.* 598: *R.* v. *Crockett*, 4 *C. & P.* 544: *R.* v. *Hayward*, 6 *C. & P.* 157: *R.* v. *Spilsbury*, 7 *C. & P.* 187: *R.* v. *Perkins*, 2 *Mood. C. C.* 135; 9 *C. & P.* 395: *R.* v. *Howell*, 1 *Den.* 1; 1 *C. & K.* 689; 1 *Cox*, 151: *R.* v. *Mackay*, 11 *Cox*, 148), even though he did not actually *express* any apprehension of danger (*R.* v. *Woodcock*, 1 *Leach*, 500, 503: *R.* v. *Dingler*, *Id.* 504, *n.*: *R.* v. *Bonner*, 6 *C. & P.* 386), and his death did not ensue until a considerable time after the declarations were made. *R.* v. *Mosley*, 1 *Mood. C. C.* 97; 1 *Lewin*, 79: *R.* v. *Bernadotti*, 11 *Cox*, 316: *R.* v. *Reaney*, *Dears. & B.* 151; 26 *L. J.* (*M. C.*) 43; 7 *Cox*, 209.

The result of the decisions is that there must be an unqualified belief in the nearness of death, a belief, without hope, that the declarant is about

to die. "There must be an expectation of impending and almost immediate death, from the causes then operating. The authorities show that there must be no hope whatever." *R.* v. *Jenkins*, *L. R.* 1 *C. C. R.* 187; 38 *L. J.* (*M. C.*) 82; 11 *Cox*, 250. "Dying declarations ought to be admitted with scrupulous, and I had almost said with superstitious, care," *Id.*, *per Byles*, J., and *see R.* v. *Brooks*, 1 *Cox*, 6: *R.* v. *Dalmas*, 1 *Cox*, 95: *R.* v. *Peel*, 2 *F. & F.* 21: *R.* v. *Mooney*, 5 *Cox*, 318 (*Ir.*): *R.* v. *Nicolas*, 6 *Cox*, 120: *R.* v. *Qualter*, *Id.* 357. It must be shown for the prosecution that the deceased, at the time he made the statement, was under the impression that death was impending, not merely that he had received an injury from which death must ensue, but that, as the popular phrase goes, he then believed that he was at the point of death. *R.* v. *Forester*, 4 *F. & F.* 857; 10 *Cox*, 368: *R.* v. *Smith*, 16 *Cox*, 170: *R.* v. *Mitchell*, 17 *Cox*, 503: *R.* v. *Whitmarsh*, 62 *J. P.* 680, 711. A mere sense of danger is not enough. *R.* v. *Thomas*, 1 *Cox*, 52: *R.* v. *Errington*, 2 *Lewin*, 148. There must be a settled hopeless expectation of immediate death in the declarant. *R.* v. *Peel*, 2 *F. & F.* 21, *Willes*, J. This language was adopted by *Charles*, J., in *R.* v. *Gloster*, 16 *Cox*, 471. Cf. *R.* v. *Osman*, 15 *Cox*, 1, where *Lush*, J., is reported to have added, "If he thinks he will die to-morrow, it will not do." Where the party expressed an opinion that she should not recover, and made a declaration at that time; but afterwards, on the same day, asked a person whether he thought she would "rise again," it was held that this showed such a hope of recovery as rendered the previous declaration inadmissible. *R.* v. *Fagent*, 7 *C. & P.* 238: *see R.* v. *Megson*, 9 *C. & P.* 418: *R.* v. *Welbourn*, 1 *East*, *P. C.* 358. Where, however, it is clearly proved that the declaration was made under the solemn belief of impending death it was held admissible, although the declarant at a later period of the same day thought that she should recover. *R.* v. *Hubbard*, 14 *Cox*, 565, *Hawkins*, J.; and *cf. R.* v. *Taylor*, 3 *Cox*, 84. Where the declaration was reduced into writing, and in it the declarant was represented in the first instance as saying, "I have made the above statement with the fear of death before me, and with no hope of my recovery," but on its being read over to her, and on her being asked to correct any mistake, she said, "no hope at present of my recovery," and the writer then inserted the words "at present," it was held that this declaration was not admissible in evidence, as it did not appear to have been made under a settled hopeless expectation of death. *R.* v. *Jenkins*, *ubi supra*. So, where a declarant within half an hour before making her declaration said, "I do not think I shall be long with you," and after the declaration, at the request of a doctor, had been made, said, "Yes," in answer to the doctor's question, "Do you make this statement with the fear of death before your eyes?" it was held that these circumstances did not warrant the conclusion that the declaration had been made under such a settled, hopeless expectation of immediate death as to render it admissible. *R.* v. *Gloster*, 16 *Cox*, 471, *Charles*, J.; and *cf. R.* v. *Abbott*, 67 *J. P. Rep.* 151, *Kennedy*, J. If the declarant believed himself to be in a dying state when he made the declaration, the fact that the surgeon thought him likely to recover will not render it inadmissible. *Per Willes*, J., *R.* v. *Peel*, 2 *F. & F.* 21: *R.* v. *Whitworth*, 1 *F. & F.* 382. The dying declarations of a boy ten years old have been held admissible. *R.* v. *Perkins*, 2 *Mood. C. C.* 135; 9 *C. & P.* 395. Those of a child of four have been held not so. *R.* v. *Pike*, 3 *C. & P.* 598.

In *R.* v. *Cleary*, 2 *F. & F.* 850, *Erle*, C.J., said that he could not, in the face of a statement by the deceased from which it appeared that he did not think he should die, presume that a man who had been shot through the

body must necessarily feel that he was about to die. In *R.* v. *Morgan*, 14 *Cox*, 337, 389, *Denman*, J., acting, it would seem, upon a misconception of the ruling in *R.* v. *Cleary* (*ubi supra*), said that there was no case in which the consciousness of the deceased that he was in a dying state at the time he made the declaration had been founded entirely upon an inference drawn from the nature of the wound itself, and from giving the deceased credit for ordinary intelligence as to its natural results; but the attention of *Denman*, J., was not drawn to *R.* v. *Woodcock*, 1 *Leach*, 500; 1 *East*, *P. C.* 354, 356: *R.* v. *Dingler*, 1 *Leach*, 504, *n.*, and *R.* v. *Bonner*, 8 *C. & P.* 306, in which the contrary was expressly held, nor were those cases referred to, or was the question to which they relate raised in *R.* v. *Bedingfield*, 14 *Cox*, 341, where *Cockburn*, C.J., rejected the declaration of a woman made almost immediately after her throat had been frightfully cut, and a few minutes before her death, there being nothing beyond the nature of the wound to show that she was under the sense of impending death. It would seem to be clear from *R.* v. *Woodcock*, *R.* v. *Dingler*, *R.* v. *Bonner*, and *R.* v. *Cleary* (*ubi supra*) that the nature of the wound may be of itself sufficient evidence of impending death; *see* the reporters' notes to *R.* v. *Morgan* and *R.* v. *Bedingfield* (*ubi supra*).

A statement made by a person under circumstances which would not render it admissible as a dying declaration, becomes admissible as such if subsequently repeated in his presence and at his request by the person to whom it was previously made, and if assented to by him, if at the time of such repetition he was in such a state that if he had made a statement it would have been admissible as a dying declaration. *R.* v. *Steele*, 12 *Cox*, 168, *per Lush*, J. But a statement not amounting to a dying declaration made by the deceased in the presence of the accused ought not to be admitted unless it is accompanied by evidence which would justify the jury in finding that such statement was made upon an occasion when the accused had an opportunity of answering and might reasonably be expected to answer it, and in drawing an inference from his omitting to deny or question it, or from his language or demeanor that he did not dissent from the truth of it. *R.* v. *Smith*, 18 *Cox*, 470, *Hawkins*, J. The question whether there is any such evidence is for the court; its weight is for the jury. *Id.*

These dying declarations are only admissible where the death of the deceased is the subject of the charge, and the cause of the death the subject of the dying declaration. Therefore, upon an indictment for perjury, a dying declaration is not admissible to disprove the fact upon which the perjury is assigned. *R.* v. *Mead*, 2 *B. & C.* 605; 4 *D. & R.* 120, *Abbot*, C.J. So upon an indictment for rape: *R.* v. *Newton*, 1 *F. & F.* 641; or robbery: *R.* v. *Lloyd*, 4 *C. & P.* 233. So upon an indictment for administering savin or using instruments to procure abortion, or for using instruments with intent to procure her miscarriage, the woman's dying declarations are not admissible, though they relate to the cause of her death. *R.* v. *Hutchinson*, 2 *B. & C.* 608, *n.*: *R.* v. *Hind*, *Bell*, 253; 29 *L. J.* (*M. C.*) 147; 8 *Cox*, 300. And where a man was robbed, and died before the trial of the person charged with the robbery, *Bolland*, B., refused to receive his dying declarations respecting the robbery, holding that such declarations were evidence only in cases where the death of the party is the subject of the inquiry. *R.* v. *Lloyd*, 4 *C. & P.* 233. But on an indictment for the murder of A. by poison, which was also taken by B., who died in consequence, the dying declarations of B. were held admissible. *R.* v. *Baker*, 2 *M. & Rob.* 53. On an indictment for manslaughter, the declaration of the deceased at the time when she believed herself dying was admitted in evidence, although it related

generally to the conduct of the prisoner, and not to the particular violence. *R.* v. *Murton*, 3 *F. & F.* 492. The dying declarations of an accomplice have been held to be admissible in evidence. *R.* v. *Tinckler*, 1 *East, P. C.* 354, 356 (more correctly reported 1 *Den.* v, vi), provided he were at the time such a person as would be competent as a witness. *R.* v. *Drummond*, 1 *East, P. C.* 353 (*a*), 1 *Leach*, 378. And as dying declarations are only admissible where the death of the deceased is the subject of the charge (*R.* v. *Mead*, *ante*, p. 323), it would seem that the only case in which the dying declaration of an accomplice can be given in evidence against the prisoner is where the prisoner is charged with assisting in the self-destruction of the accomplice. 3 *Russ. Cr.* (6th ed.), 394. In *R.* v. *Jessop*, 16 *Cox*, 204, on an indictment charging with murder the survivor of two persons who had agreed to commit suicide together, *Field*, J., admitted statements by the deceased made when purchasing poison in the absence of the prisoner, on the ground that the acts and words of the deceased in carrying out a pre-arranged plan were evidence against the prisoner. Dying declarations in *favour* of the party charged with the death are admissible in evidence, as they may have an influence on the amount of punishment. *R.* v. *Scaife*, 2 *M. & Rob.* 551; 2 *Lewin*, 150. Where two such declarations were made, the second of which alone was reduced into writing in the presence of a magistrate, this written declaration not being forthcoming at the trial, the judges held that, in the absence of it, the first declaration was admissible evidence. *R.* v. *Trunter and Reason*, 16 *St. Tr.* 1; 1 *Str.* 499; *Fost.* 292. But where a declaration *in articulo mortis* was reduced into writing and signed by the party, the judge required production of the original and refused to receive either a copy of the paper or parol evidence of the declaration. *R.* v. *Gay*, 7 *C. & P.* 230: *R.* v. *Trowter*, 1 *East, P. C.* 356: *R.* v. *Woodcock*, 1 *Leach*, 500. On these cases *see* *R.* v. *Wallace* [1898], 19 *N. S. W. Rep. Law*, 155. The declaration if admissible need not be on oath, *R.* v. *Bernadotti*, 11 *Cox*, 316. It is equivalent to sworn evidence, *R.* v. *Ashton*, 2 *Lewin*, 147; but no statement in the declaration is admissible which would not have been so if the declarant had been examined on oath. *R.* v. *Sellers*, *Carr. Supp.* 233. The depositions taken under *Russell Gurney's Act* (30 & 31 *Vict. c.* 35), *s.* 6, are distinct from dying declarations. *See post*, p. 373.

It was formerly held that it was no objection against a declaration which had been reduced into writing that it was made in answer to questions put to the deceased, and not a continuous statement made by him, *R.* v. *Fagent*, 7 *C. & P.* 238, nor that it was made in answer to *leading* questions. *R.* v. *Smith*, *L. & C.* 607; 34 *L. J.* (*M. C.*) 153; 10 *Cox*, 882. In *R.* v. *Mitchell*, 17 *Cox*, 503, *Cave*, J., held that a statement which had been reduced into writing, must, to be admissible as a dying declaration, be *in the actual words of the deceased*, and if questions are put the questions and answers must both be given; and he expressly dissented from *R.* v. *Mann*, 49 *J. P.* 743, *Denman*, J. But in *R.* v. *Bottomley* [1903] 38 *L. J. Newsp.* 311; 115 *L. T. J.* 88, *Lawrance*, J., followed *R.* v. *Mann* in preference to *R.* v. *Mitchell*; and *see* *R.* v. *Whitmarsh*, 62 *J. P.* 680, 711. And in *R.* v. *Corbett* [1903] *Queensland St. Rep.* 246, the *Rt. Hon. Sir S. Griffith*, C.J., said, that *R.* v. *Mitchell* unsettled what had before been the law, and followed *R.* v. *Smith*, saying, further, that it was not essential that a dying declaration should be proved by writing.

Sect. 2.

ADMISSIONS AND CONFESSIONS.

Admissions and confessions fall into two classes, judicial and extra-judicial:—

I. *Judicial confessions.*]—Of judicial confessions there are four kinds of present concern, those by approvers and on abjuration having become obsolete.

1. Where the defendant in open court freely and voluntarily confesses that he is guilty of the offence of which he is charged in the indictment. *See Powlter's case*, 11 *Co. Rep.* 29. This admission may be of guilt as to the facts, subject to the view of the court as to whether admission of the facts amount to a plea of guilty in law. *See R.* v. *Brown*, 17 *L. J.* (*M. C.*) 145; *and ante*, p. 186. Where the defendant pleads guilty, and the court accepts the plea, further proof or trial is needless, and the plea is recorded by the proper officer, and the court proceeds to judgment on the prisoner's "own confession." This rule applies to treason and misprision of treason, where the accused confesses "willingly, without violence, in open court." 7 & 8 *W.* 3, *c.* 3, *s.* 2; *Fost.* 241. Confession may be made on arraignment, or at any subsequent stage of the proceedings on the trial, by withdrawal (*retraxit*), with the consent of the court, of the plea of not guilty, and substitution of a plea of guilty (*postea cognovit indictamentum*). 1 *Chit. Cr. L.* 429. As to the procedure where the trial is in the High Court and the plea in writing, *see Short & Mellor, Crown Office Practice*, 202, 220. The court will not allow a criminal case to be tried on admissions by the solicitors on both sides, nor unless the admissions are made at the trial by the defendant or his counsel. *R.* v. *Thornhill*, 8 *C. & P.* 575.

2. Where the defendant, upon an indictment for misdemeanor, yields himself to the King's mercy, and desires to submit to a small fine: which submission the court may accept, if they think fit, without putting the defendant to a direct confession. 2 *Hawk. c.* 31, *s.* 3; 1 *Chit. Cr. L.* 430, 431. If the plea is accepted the procedure is as in case 1. *Lambarde, Eirenarcha, bk. iv. c.* 9.

3. Where the defendant, upon the preliminary inquiry as to any indictable offence, before justices of the peace, under the *Indictable Offences Act*, 1848 (11 & 12 *Vict. c.* 42), *ss.* 17, 18, admits either his guilt or any fact which may tend to prove it at the trial.

4. Where in other legal proceedings the defendant has made admissions incriminating himself. *See post*, p. 328.

3. *Confessions, etc., to justices.*]—What may be termed *magisterial* confessions are admissions either of guilt or of any fact which may tend to prove guilt at the trial made by a defendant on a preliminary inquiry before a justice of the peace in respect of any indictable offence under the *Indictable Offences Act*, 1848. A distinction has been drawn in the books between treason and misprision of treason on the one side and felony and misdemeanor on the other. *See Berwick's case, Fost.* 10; 18 *St. Tr.* 367: *R.* v. *Willis*, 15 *St. Tr.* 613, 624. But the Act above cited applies to all indictable offences. As to the old mode of proof of a magisterial confession in cases of treason and misprision, *see post*, p. 337.

The *Indictable Offences Act*, 1848 (11 & 12 *Vict. c.* 42), provides (*s.* 18)

that, after the examinations of all the witnesses on the part of the prosecution of a person brought before any justice or justices of the peace, charged with any indictable offence, shall have been completed, "the justice of the peace or one of the justices by or before whom such examination shall have been so completed as aforesaid shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;' and whatever the prisoner shall then say in answer thereto shall be taken down in writing (N.) and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned, and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always that the said justice or justices, before such accused person shall make any statement, shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat; provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person."

Before this Act it was a common practice for justices to question or examine the accused: and confessions elicited by such questions were held admissible against him on the trial if no undue influence was exercised. 2 *Hawk. c.* 46, *ss.* 31-45: *R.* v. *Ellis, Ry. & M.* 432. But since the Act of 1848, the magistrate appears not to be entitled to question the accused at all (*R.* v. *Pettit*, 4 *Cox*, 164, *Wilde*, C.J.); and answers to questions put to him are inadmissible at the trial (*R.* v. *Berriman*, 6 *Cox*, 388, *Erle*, J.) unless he elects to be sworn as a witness under 61 & 62 *Vict. c.* 36, *s.* 1. Even before 11 & 12 *Vict. c.* 42, it was established that where a prisoner is willing to make a statement, the justice ought to receive it, but ought, before doing so, entirely to get rid of any impression on the prisoner's mind, that the statement may be used for his own benefit; and the justice ought also to tell him, that what he thinks fit to say will be taken down, and may be used against him on his trial. *See R.* v. *Arnold*, 8 *C. & P.* 621, *Denman*, C.J. And the rule is now expressed in 11 & 12 *Vict. c.* 42, *s.* 18, *supra.*

The *second* caution contained in the above proviso is not strictly necessary unless it appears that some inducement or threat had previously been held out to the accused, but it is prudent always to give it. *R.* v. *Sansome*, 1 *Den.* 545; 19 *L. J.* (*M. C.*) 143. The 28th section of 11 & 12 *Vict. c.* 42 declares, that the forms given in the schedule are to be deemed good, valid, and sufficient in law. The form (N.) of the prisoner's statement before the magistrate contains the first caution, but not the second. And it has accordingly been held that, if the prisoner's statement be returned purporting to be signed by the magistrate, and bearing on the face of it the *first* caution, it is admissible, by virtue of section 18, without

further proof. *Id.* But it will always be prudent in the magistrate to give the prisoner the second caution, as being the only course which will preclude all possibility of question as to the admissibility of his statement; for as it has not been decided whether that caution is not absolutely requisite when a previous inducement or threat has been held out, and as the magistrate can never be certain whether such previous inducement or threat has or has not been held out, a perplexing question might arise as to the sufficiency of the first caution to remove the effect on the prisoner's mind of such inducement or threat, should it turn out in fact that it had been held out. *See per Erle*, J., *R.* v. *Sansome, supra.* Where the prisoner, having been once examined before a justice, and cautioned by him in the manner prescribed by this statute, made a statement, which was taken down in writing but not signed by him or by the justice; he was then remanded, and on a subsequent day was brought again before the justice; no new witnesses were then examined, but the prisoner's solicitor put some questions to a witness who had been examined before: the prisoner was again cautioned, but declined to make any further statement: the statement made by him on the first occasion was held admissible against him on his trial. *R.* v. *Bond*, 1 *Den.* 517; 19 *L. J.* (*M. C.*) 138; *see R.* v. *Stripp, Dears.* 648; 25 *L. J.* (*M. C.*) 109. Where the prisoner has been duly cautioned by the magistrate in pursuance of 11 & 12 *Vict. c.* 42, *s.* 18, anything said by him thereupon is admissible in evidence against him, although there may have been a previous promise or threat held out to him to induce him to confess. *R.* v. *Pate*, 11 *Cox*, 686, *Montague Smith*, J. That the caution has been given requires no further proof than the fact of its appearing to have been so given on the face of the prisoner's statement, returned together with the depositions. *Id.* Oral evidence may be given against a prisoner at his trial, of statements made by him while cross-examining a witness before the magistrate; unless they have been reduced to writing as part of the depositions, in which case they must be proved by the depositions, and not by the witness so cross-examined. *R.* v. *Taylor*, 13 *Cox*, 77, *Brett*, J.

At common law examinations of a prisoner taken *upon oath* before justices respecting a criminal charge then made against him were not admissible. 1 *Hale*, 585; 2 *Hawk. c.* 46, *s.* 37, and old cases collected in *Archbold* (22nd ed.), p. 299. This rule did not apply to depositions made by him as a witness in another case. And depositions made by the accused before a magistrate under the *Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), are admissible against him at the trial, even though he declines to give evidence on his trial. *R.* v. *Bird*, 62 *J. P.* 760; 15 *T. L. R.* 26 (*C. C. R.*).

Statements by prisoner before coroners.]—It is now the practice to admit statements or depositions of the prisoner before the coroner if properly proved. Formerly there was some doubt as to their admissibility, and the cases on the subject were conflicting. *See R.* v. *Wheeley*, 8 *C. & P.* 250; *R.* v. *Owen*, 9 *C. & P.* 83, 238; *R.* v. *Haworth, Greenw. Coll. Stat.* 137; *R.* v. *Sandys*, 2 *Mood. C. C.* 229; *C. & Mar.* 345. In 1866, *Martin*, B., after consulting with *Willes*, J., on a trial for manslaughter, admitted as evidence against the prisoner his deposition on oath taken by the coroner upon the inquest held on the deceased. *R.* v. *Bateman*, 4 *F. & F.* 1068; *cf. R.* v. *Colmer*, 9 *Cox*, 506. By statutes of Quebec, commissioners were appointed to investigate the origin of any fires in the city of Quebec, with power to compel the attendance of witnesses and to examine them on oath. The prisoner being indicted for arson, it was held that his deposition taken on oath upon an inquiry before the commissioners into the

cause of the fire was admissible as evidence against him. *R.* v. *Coote, L. R.* 4 *P. C.* 599; 42 *L. J.* (*P. C.*) 45.

4. *Admissions in other cases.*]—Admissions by the prisoner on oath in another case are admissible against him, except as to questions which he was improperly compelled to answer, if he was under no obligation to criminate himself. Thus in *R.* v. *Chidley*, 8 *Cox*, 365, *Cockburn*, C.J., admitted as evidence against a prisoner a deposition made by him before a justice while under examination as a witness, another person being at that time charged with the crime; and this case was followed in *R.* v. *Laurent*, 62 *J. P.* 250, where admissions of indecent acts made by L. in his evidence on the prosecution of another for larceny were held admissible against him in a charge under 48 & 49 *Vict. c.* 69, *s.* 11. But this rule does not usually apply to a compulsory examination in which he is bound to answer incriminating questions. *See post*, pp. 329, 330.

Examinations in bankruptcy.]—The examination of a person taken on oath before commissioners of bankruptcy, he having been cautioned, and allowed to elect what questions he would answer, was held admissible against him on a charge of forgery. *R.* v. *Wheater*, 2 *Mood. C. C.* 45. So, where a bankrupt was examined touching a matter *not* relating to his trade, dealings, or estate, and did not refuse to answer on the ground that the answers would tend to criminate him, but answered without objection, his answers were held voluntary, and his examination admissible against him on a criminal charge. *R.* v. *Sloggett, Dears.* 656; 25 *L. J.* (*M. C.*) 93. And it has since been held, that where a bankrupt was examined under *s.* 117 of the *Bankruptcy Act* of 1849 (12 & 13 *Vict. c.* 106, now repealed, but in substance re-enacted in *ss.* 17, 24, and 27 of the *Bankruptcy Act*, 1883, 46 & 47 *Vict. c.* 52), he was bound to answer all questions, touching matters relating to his trade, dealings, or estate, or which might tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, although his answers may criminate himself; and such answers, though they do tend to criminate him, may be given in evidence against him on a criminal charge; *R.* v. *Scott, Dears. & B.* 47; 25 *L. J.* (*M. C.*) 128; *R.* v. *Cross, Dears. & B.* 68; *R.* v. *Robinson, L. R.*, 1 *C. C. R.* 80; 36 *L. J.* (*M. C.*) 78; *R.* v. *Hillam*, 12 *Cox*, 174, even although a promise may have been made to the bankrupt before his examination that it should not be used against him or filed; *R.* v. *Cherry*, 12 *Cox*, 32, *Martin*, B., except in a proceeding in respect of the misdemeanors referred to in 24 & 25 *Vict. c.* 96, *s.* 85 (including those substituted by 1 *Edw.* 7 *c.* 10 for those created by *ss.* 75 and 76 of the *Larceny Act*, 1861): *see* 53 & 54 *Vict. c.* 71 (*Bankruptcy Act*, 1890), *s.* 27, *sub-s.* 2. And so, on an indictment of a trader for obtaining property on credit, under the false pretence of dealing in the ordinary way of his trade, within four months before his liquidation, contrary to *s.* 11 of the *Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), an examination of the trader in liquidation taken under *ss.* 96 and 97 of the *Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71, now repealed, but analogous provisions to which are contained in *s.* 27 of the *Bankruptcy Act*, 1883, 46 & 47 *Vict. c.* 52), is admissible in evidence against him; *R.* v. *Widdop, L. R.*, 2 *C. C. R.* 3; 42 *L. J.* (*M. C.*) 9; although the summons to the trader to come up for examination may have been irregularly issued, as the trader by appearing, and submitting to be examined, waives the irregularity: *Id.*, but a witness *other than the bankrupt* examined under this section is entitled to refuse to answer questions on the ground that his answers may criminate him; *ex parte Schofield*, 6 *Ch. D.* 230 (*C. A.*). The *Bankruptcy Act*, 1883, 46 & 47 *Vict. c.* 52, *s.* 17 (as amended

by the *Bankruptcy Act*, 1890 (53 & 54 *Vict.* c. 71), *s.* 27 (1)), enacts that where the court makes a receiving order, it shall hold a public sitting for the examination of the debtor as to his conduct, dealings, and property; and *sub-s.* 8 of the same section enacts that "the debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the court may put, or allow to be put to him. Such notes of the examination as the court thinks proper shall be taken down in writing, and shall be read over to, *or by the debtor*, and signed by the debtor, *and may thereafter be used in evidence against him*." This sub-section does not exclude other modes of proving the debtor's admissions: *R.* v. *Erdheim* [1896], 2 *Q. B.* 260; 18 *Cox*, 355. *R.* v. *Hirschfield*, 61 *J. P.* 520. *Sects.* 24 and 27 of the Act of 1883 also authorize other examinations of the debtor, but they contain no provision like that above cited in *s.* 17, *sub-s.* 8, for using the examination in evidence against him. It would appear, however, from the cases above mentioned decided under former bankruptcy statutes containing enactments similar to *ss.* 24 and 27, that examinations under those sections, as well as under *s.* 17, may be so used. But by 53 & 54 *Vict.* c. 71, *s.* 27, *sub-s.* 2, a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy is not admissible as evidence against that person in any proceeding in respect of any of the misdemeanors referred to in 24 & 25 *Vict.* c. 96, *s.* 85 (including those substituted by 1 *Edw.* 7, *c.* 10 for those created by *ss.* 75 and 76 of the *Larceny Act*, 1861). A statement of affairs filed by a bankrupt under *s.* 16 of the *Bankruptcy Act*, 1883, is not within 53 & 54 *Vict.* c. 27, *sub-s.* 2, and is therefore admissible in evidence against him on a charge of misappropriation of trust moneys under *s.* 80 of the *Larceny Act*, 1861. *R.* v. *Pike* [1902], 1 *K. B.* 552; 71 *L. J. K. B.* 287; 20 *Cox*, 164; 66 *J. P.* 296 (*C. C. R.*). The question of the admissibility of the answers of a director of a company on his examination in proceedings to wind up the company was discussed in *R.* v. *Bottomley* (*Q. B. D.* 1893), and *R.* v. *Balfour* (*Q. B. D.* 1895, Oct. 15), but has not been decided. The answer of the defendant in a suit in equity, instituted against him by the prosecutor, is admissible on an indictment against him, *R.* v. *Goldshede*, 1 *C. & K.* 657, except in cases where it is otherwise provided by statute; *see* 24 & 25 *Vict.* c. 96, *s.* 85. But on an indictment against a bankrupt for concealing his effects, where it was proposed to prove the petitioning creditor's debt by putting in the bankrupt's balance-sheet delivered in upon oath, *Alderson*, B., and *Patteson*, J., held that it was not receivable for that purpose; *R.* v. *Britton*, 1 *M. & Rob.* 297; because, as explained by *Patteson*, J., in *R.* v. *Wheater*, 2 *Mood. C. C.* 45, 51, the balance-sheet was only admissible in the event of the commission being valid, and therefore it could not itself be given in evidence to prove the petitioning creditor's debt as a part of the commission.

Where the defendant on cross-examination in a civil action has been *compelled* to answer questions tending to criminate him, the admission so obtained cannot be used against him upon his trial on a criminal charge. *R.* v. *Garbett*, 1 *Den.* 236; 2 *C. & K.* 474. But declarations of a defendant, though made as a witness before a committee of the House of Commons, and under compulsory process, were held by *Abbott*, C.J., in *R.* v. *Merceron*, 2 *Stark.* (*N. P.*), 366, to be admissible against the defendant upon an indictment for corruptly granting licences to public-houses.

Confessions excluded by statute.]—By certain statutes admissions by a person on a former trial or inquiry in which he was examined as a witness, cannot be given in evidence against him on a criminal charge. Thus,

by 46 & 47 *Vict. c.* 51 (*Corrupt and Illegal Practices Prevention Act*, 1883), *s.* 59, *sub-s.* 1 (*b*), "an answer by a person to a question put by or before any election court shall not, *except in the case of any criminal proceeding for perjury in respect of such evidence*, be in any proceeding, civil or criminal, admissible in evidence against him." This provision, which applies primarily to inquiries before an election court respecting parliamentary elections, is extended to similar inquiries respecting municipal elections by 47 & 48 *Vict. c.* 70, *ss.* 20, 35, and respecting certain other elections to public offices. *Id. s.* 36. *See R.* v. *Buttle*, *L. R.* 1 *C. C. R.* 248; 39 *L. J.* (*M. C.*) 115: *R.* v. *Slator*, 8 *Q. B. D.* 267. Provisions of a similar nature are contained in 26 & 27 *Vict. c.* 119 (*Exhibition Medals Act*, 1863), *s.* 5, in 38 & 39 *Vict. c.* 87 (*Land Transfer Act*, 1875), *s.* 103, in 50 & 51 *Vict. c.* 28 (*Merchandise Marks Act*, 1887), *s.* 19, *sub-s.* 2, and in 46 & 47 *Vict. c.* 3 (*Explosive Substances Act*, 1883), *s.* 6, *sub-s.* 2. Subject, however, to any exceptions introduced by statute, the general rule deducible from the modern cases seems to be, that although a sworn statement *made by a prisoner*, under examination when before a magistrate on a criminal charge, cannot afterwards be used in evidence against him, except where by 61 & 62 *Vict. c.* 36, or some other statute, he may be sworn as a witness on his own behalf; *R.* v. *Bird*, 62 *J. P.* 760; 15 *T. L. R.* 26 (*C. C. R.*), yet any statement made by a person upon oath, *when being examined as a witness*, either before a civil tribunal, a coroner, or a magistrate, may be afterwards used against him on his trial on a criminal charge, unless, indeed, at the time of his examination he objected to answer the questions on the ground that the answers would tend to criminate him, and yet was improperly compelled to answer them. 2 *Tayl. Ev.* (9th ed.), 960; 3 *Russ. Cr.* (6th ed.), 520; *Roscoe Cr. Ev.* (12th ed.), 44; 61 & 62 *Vict. c.* 36, *s.* 1 (*post*, p. 393).

II. *Extrajudicial confessions.*]—An extrajudicial confession is made where the defendant makes an admission or confession of his guilt, or of any fact which may tend to the proof of it, to any person other than a judge or magistrate seised of the charge against him; or assents to what is said in his presence and hearing, relative to a fact within his knowledge. Thus, upon the trial of a prisoner for receiving stolen property, a list of the stolen articles which the prisoner had bought, was received in evidence in order to show that he had bought at an under-value. The circumstances under which the list was written, were that a constable asked the prisoner to say when he had bought the stolen property, to which the prisoner replied that his wife should make out a list of it, and on the next day the prisoner's wife in her husband's presence handed to another constable the list tendered in evidence, saying in her husband's hearing, "This is a list of what we bought and what we gave for them." It was held that this list was clearly admissible in evidence. *R.* v. *Mallory*, 13 *Q. B. D.* 33; 53 *L. J.* (*M. C.*) 134; but a statement made in the presence of an accused person ought not to be admitted as evidence against him, unless there is evidence (and whether this is or not is for the court to decide) which would justify the jury in finding that such statement was made upon an occasion when the accused had an opportunity of answering and might reasonably be expected to answer it, and in drawing an inference from his omitting to deny or question it, or from his language or demeanor that he did not dissent from the truth of it. *R.* v. *Smith*, 18 *Cox*, 470, *Hawkins*, J.; *and see post*, p. 335.

Confessions must be voluntary.]—These several species of confession, in order to be admissible, must be free and voluntary. And in the case of

a confession before a magistrate (who before 1848 exercised inquisitorial as well as judicial functions, 1 *Steph. Hist. Cr. L.* 221), or before any other person, unless it be shown affirmatively on the part of the prosecution that it was made without the defendant's being induced to make it by any promise of favour, or by menaces, or undue terror, it shall not be received in evidence against him. 2 *Hale*, 285: *R.* v. *Thompson* [1893] 2 *Q. B.* 12; 17 *Cox*, 641 (*C. C. R.*); and see generally on this question, *R.* v. *Baldry*, 2 *Den.* 430. "If it proceeds from remorse or a desire to make reparation for the crime, it is admissible; if it flows from hope or fear exacted by *a person in authority* it is inadmissible. On this point the authorities are unanimous." *R.* v. *Thompson* [1893] 2 *Q. B.* at p. 15, *Cave*, J. Therefore a confession will be inadmissible if it be said to the defendant that it will be better or worse for him if he do or do not confess; 2 *East, P. C.* 659; or if the confession be procured by a threat to take the defendant before a magistrate if he do not give a more satisfactory account; *R.* v. *Thompson*, 1 *Leach*, 291: *R.* v. *Parratt*, 4 *C. & P.* 570; or to send for a constable for that purpose; *R.* v. *Richards*, 5 *C. & P.* 318: *R.* v. *Hearn*, *C. & Mar.* 109; or by saying, "Tell me where the things are, and I will be favourable to you;" *R.* v. *Cass*, 1 *Leach*, 293, *n.*; or, "You had better tell all you know;" *R.* v. *Kingston*, 4 *C. & P.* 387; or, "You had better tell where you got the property;" *R.* v. *Dunn*, 4 *C. & P.* 543; or, "You had better split, and not suffer for all of them;" *R.* v. *Thomas*, 6 *C. & P.* 353; or, "It would have been better if you had told at first;" *R.* v. *Walkley*, 6 *C. & P.* 175; or, "I should be obliged to you if you would tell us what you know about it; if you will not, of course we can do nothing;" *R.* v. *Partridge*, 7 *C. & P.* 551; or, "It will be best for you if you tell me how it was transacted;" *R.* v. *Warringham*, 2 *Den.* 447; or, "It might be better for you to tell the truth and not a lie;" *R.* v. *Bate*, 11 *Cox*, 686; or, "You had better tell the truth, it may be better for you;" *R.* v. *Fennell*, 7 *Q. B. D.* 147; 50 *L. J.* (*M. C.*) 126; or, "You had better tell me all about the corn that is gone;" *R.* v. *Rose*, 68 *L. J.* (*Q. B.*) 289; 18 *Cox*, 717, *C. C. R.* Where the prosecutor asked the defendant for the money which he had taken, and, before it was produced, said, "I only want my money, and if you give me that you may go to the devil if you please," upon which the defendant took part of the money from his pocket, and said that was all he had left, a majority of the judges held that the evidence was inadmissible. *R.* v. *Jones*, *R. & R.* 152.

In *R.* v. *Brown* [1903] 68 *J. P. Rep.* 15, on a trial for murder, the prosecutor proposed to put in evidence answers given by one of the prisoners—a soldier to a commanding officer of military police. The officer had come to the barracks of the prisoner's regiment, and a parade of the regiment was ordered. The prisoner was arrested and taken to the guard-room, where the officer asked him certain questions on suggestion of the superintendent of police. After the prisoner had answered a few questions, the superintendent stopped the officer from asking more, and arrested the prisoner. *Wills*, J., held that the answers were admissible, as the officer had held out no threat nor inducement, and there was no compulsion, and nothing to force the prisoner—a position in which he would be likely to make an untruthful answer.

The prisoner made a confession which was inadmissible in evidence in consequence of its having been made after a promise held out by the person to whom it was made. That person, shortly after the confession so made to her, sent for a neighbour and informed him of the confession, and he then had an interview alone with the prisoner, and asked her questions upon the subject, but he held out no inducement, and she then

made a confession to him. It was held that this second confession was so connected with the promise held out by the person to whom the first confession was made as to be inadmissible. *R.* v. *Rue*, 13 *Cox*, 209, *Denman*, J., after consulting *Kelly*, C.B. Where a prisoner was told by a constable at 10 o'clock a.m. that it would be better for him to tell the truth, an admission by the prisoner to another constable after 6 o'clock in the evening of the same day was not allowed to be given in evidence, although the second constable had, before the prisoner made the admission, cautioned him not to say anything to criminate himself, for that anything he would say would hereafter come in evidence against him. This decision proceeded on the ground that the caution given by the second constable might not have had the effect of removing the expectation which might have been raised by the language of the first constable. *R.* v. *Doherty* (1), 13 *Cox*, 23, *per Whiteside*, C.J.: *R.* v. *Doherty* (2), 13 *Cox*, 24, *per Fitzgerald*, B. A confession, made with a view, and under a hope, of being thereby permitted to turn Queen's evidence, or of obtaining a pardon or reward, has been held inadmissible. *R.* v. *Hall*, 2 *Leach*, 559; *R.* v. *Blackburn*, 6 *Cox*, 333, *Talfourd*, J. And it is clearly so where such hope is the reasonable result of a communication from, or the conduct of, a person in authority. *R.* v. *Gillis*, 11 *Cox*, 69. *See R.* v. *Burley*, 2 *Stark. Ev.* (3rd ed.), 53: *R.* v. *Boswell*, *C. & Mar.* 584. *But cf. R.* v. *Dingley*, 1 *C. & K.* 637.

To exclude a confession made under the influence of a promise or threat, the promise or threat must be of a description which may be presumed to have had such an effect on the mind of the defendant as to induce him to confess; and therefore an exhortation, admonition, promise or threat, proceeding at a prior time from some one who has no concern in the apprehension, prosecution, or examination of the prisoner, but interferes without any authority, will not be sufficient to render a confession inadmissible. *R.* v. *Row*, *R. & R.* 153: *R.* v. *Hardwick*, 1 *Phil. Ev.* (7th ed.), 111: *R.* v. *Gibbons*, 1 *C. & P.* 97: *R.* v. *Tyler*, *Id.* 129: *R.* v. *Clewes*, 4 *C. & P.* 221. It seems that there was at one time a difference of opinion among the judges on this point—whether a confession made to a person who has no authority, after an inducement held out by that person, is receivable or not. *R.* v. *Spencer*, 7 *C. & P.* 776. It has, however, been long settled that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority, and that if a person not in any office or authority held out to the accused party an inducement to confess, this will not exclude a confession made to that party. *R.* v. *Taylor*, 8 *C. & P.* 733: *R.* v. *Moore*, 2 *Den.* 526; 21 *L. J.* (*M. C.*) 199, *C. C. R.* It is immaterial whether the inducement is held out by the person in authority or in his presence without his dissent by a third person. Thus, where such a person held out an inducement in the presence of the prosecutor's wife, who expressed no dissent, the confession was held not to be receivable. *R.* v. *Taylor*, *ubi supra*. *And see R.* v. *Hewett*, *C. & Mar.* 534: *R.* v. *Garner*, 1 *Den.* 329; 2 *C. & K.* 920; 18 *L. J.* (*M. C.*) 1: *R.* v. *Luckhurst*, *Dears.* 245; 23 *L. J.* (*M. C.*) 18. So where the prisoner was taken by the constable to an inn, and the innkeeper, in the constable's hearing, held out an inducement to him to confess, and the prisoner, in the constable's hearing, made a confession to the innkeeper, which the constable was called to prove, *Alderson*, B., thought the evidence inadmissible. *R.* v. *Pountney*, 7 *C. & P.* 302. *And see R.* v. *Dunn*, 4 *C. & P.* 543: *R.* v. *Slaughter*, *Id.* 544 *n.*: for the fact of the constable being present and not dissenting from what was said places the expressions used on the same footing as if they had been used by the constable.

R. v. *Laugher*, 2 *C. & K.* 225, *Pollock*, C.B. Where one of two defendants charged with larceny said to the other (a constable, and the owner of the property, W., being present), "You had better tell Mr. W. the truth," neither the policeman nor W. saying anything, a confession made thereupon by the other defendant was held admissible. *R.* v. *Parker*, *L. & C.* 42; 30 *L. J.* (*M. C.*) 144. Where a girl, being apprehended for the murder of her child, was left by the constable in the custody of a woman, who told her she had better tell the truth, otherwise it would lie upon her and the man would go free, upon which she made a confession: *Parke*, J., and *Taunton*, J., held this confession not receivable, as it was made in consequence of an inducement held out to the prisoner by a person who had her in custody. *R.* v. *Enoch*, 5 *C. & P.* 539. A woman in custody on a charge of murder was placed in a room alone with E. to be searched. E. was a "searcher" of female prisoners, but had no other duties or authority in the gaol. Whilst the search was being made, the prisoner said, "If I tell the truth, shall I be hung?" to which E. answered, "No, nonsense, you will not be hung." It was held that a statement made by the prisoner to E. immediately afterwards was not receivable. *R.* v. *Windsor*, 4 *F. & F.* 361. And confessions obtained from a servant through hopes and threats held out by the wife or by the relations and neighbours of her master and prosecutor (or, in the case of an offence committed against several persons in partnership, by the wife, etc., of any of them, *R.* v. *Warringham*, 2 *Den.* 447, *n.*), have been held inadmissible by all the judges. *R.* v. *Simpson*, 1 *Mood. C. C.* 410: *R.* v. *Upchurch*, *Id.* 465. This, however, does not apply to a case where the charge against the servant has no relation to the persons or property of the master or his family: *e.g.*, to a case of child murder or concealment of birth. *R.* v. *Moore*, 2 *Den.* 522; 21 *L. J.* (*M. C.*) 199.

The inducement must refer to a *temporal benefit*; for hopes which are referable to a future state merely are not within the principle which excludes confessions obtained by improper influence. *R.* v. *Gilham*, 1 *Mood. C. C.* 186. Where the inducements merely amount to a moral exhortation and do not refer to a temporary benefit, the confession is admissible. Thus where the defendant being in custody on a charge of setting fire to her master's farm-building, her master's married daughter said to her, "I am very sorry for you; you ought to have known better; tell me the truth, whether you did it or no;" the defendant replied, "I am innocent;" whereupon the other said, "Don't run your soul into more sin, but tell the truth;" a confession thereupon made by the defendant was held admissible. *R.* v. *Sleeman*, *Dears.* 249; 23 *L. J.* (*M. C.*) 19 (*C. C. R.*). *And see* 3 *Russ. Cr.* (6th ed.) 493. So where one of the prisoner's employers, having called him up into his private room, said, "I think it right that I should tell you that, besides being in the presence of my brother and myself, you are in the presence of two police officers; and I should advise you that, to any questions that may be put to you, you will answer truthfully, *so that if you have committed a fault you may not add to it by stating what is untrue*;" and having shown a letter to him, which he denied having written, added, "Take care; we know more than you think we know," and the prisoner thereupon made a confession; it was held that such confession was admissible. *R.* v. *Jarvis*, *L. R.* 1 *C. C. R.* 96; 37 *L. J.* (*M. C.*) 1. So where the mother of a little boy in custody on a criminal charge said to him and another little boy also in custody on the same charge, in the presence of the mother of the latter and of the policeman, "You had better, *as good boys*, tell the truth," whereupon both boys confessed, it was held that the confession was admissible. *R.* v. *Reeve*, *L. R.* 1 *C. C. R.* 362; 37 *L. J.*

(*M. C.*) 92. In that case, as well as in *R.* v. *Jarvis, supra*, the inducements do not seem to refer to a temporal benefit, but merely to amount to a moral exhortation, as in *R.* v. *Sleeman* (*ante*, p. 333).

So, where a prisoner under fourteen years of age, charged with murder, was told by a man, who was present when he was apprehended, "Now, kneel down, I am going to ask you a very serious question, and I hope you will tell me the truth, in the presence of the Almighty," and the prisoner in consequence made a statement, this was held (strictly) admissible. *R.* v. *Wild*, 1 *Mood. C. C.* 452. But where a constable, after having asked the prisoner what he had done with the stolen property, said, "You had better not add a lie to the crime of theft," *Gaselee*, J., refused to receive a statement thereupon made by the prisoner in evidence. *R.* v. *Shepherd*, 7 *C. & P.* 579.

The only proper questions are, whether the inducement held out to the prisoner was calculated to make his confession an *untrue* one, and whether the inducement continued to operate at the moment of the confession; if not, it will be admissible. Thus, where a prisoner asked of a witness with whom he was in conversation whether he had better confess, and the witness replied that he had better not confess, but he might say what he had to say to him, for it should go no further, a statement thereupon made by the prisoner was held admissible. *R.* v. *Thomas*, 7 *C. & P.* 345.

It is no objection to the admissibility of a confession, that it was made under a mistaken supposition that some of the defendant's accomplices were in custody, even though it were created by artifice, with a view to obtain the confession. *R.* v. *Burley*, 1 *Phil. Ev.* (7th ed.), 111. A statement made by a prisoner when drunk has been held admissible, even though the liquor was given him in the hope that he would make admissions. *R.* v. *Spilsbury*, 7 *C. & P.* 187. And a letter given by a defendant to the gaoler to put into the post is evidence against him. *R.* v. *Derrington*, 2 *C. & P.* 418. But where the prosecution tendered in evidence a letter written by the prisoner while in custody, to his wife, and given by him to a constable to post, who detained it, *Kelly*, C.B., refused to admit it, apparently upon the ground that the letter belonged in reality to the wife, who could not have been called upon to produce it had it reached her hands as it was intended by the prisoner to do. *R.* v. *Pamenter*, 12 *Cox*, 177. If the promise, or menace, etc., take place previously to the prisoner's being brought before the magistrate, the court will, in general, refuse to admit the confession to be given in evidence, unless it appear that the prisoner was undeceived by the magistrate, and cautioned by him not to expect the favour, or not to regard the menaces held out to him; 2 *East, P. C.* 658: *and see R.* v. *Lingate*, 1 *Phil. Ev.* (7th ed.), 414: *R.* v. *Arnold*, 8 *C. & P.* 621: 1 *Taylor Ev.* (7th ed.) 570. But where (before 11 & 12 *Vict. c.* 42) a defendant having been told by a constable that he might do himself some good by confessing, afterwards asked the magistrate if it would benefit him to confess, and the magistrate saying he could not say it would, the defendant then declined to confess, but afterwards, when going to prison, made a confession to the constable, the judges held the confession to be admissible, because the answer of the magistrate was sufficient to remove any expectation which the constable might have caused. *R.* v. *Rosier*, 2 *Phil. Ev.* (7th ed.) 112. *See R.* v. *Green*, 5 *C. & P.* 312: *R.* v. *Clewes*, 4 *C. & P.* 221: *R.* v. *Richards*, 5 *C. & P.* 318: *R.* v. *Howes*, 6 *C. & P.* 404: *R.* v. *Dingley*, 1 *C. & K.* 637. The only questions in these cases really are,—was any promise of favour, or any menace or undue terror made use of, to induce the prisoner to confess? and if so, was the prisoner induced by such promise or menace,

etc., to make the confession attempted to be given in evidence? If the judge be of opinion in the affirmative upon both these questions, he will reject the evidence. If, on the contrary, it appears to him, from the circumstances, that, although such promises or menaces were held out, they did not operate upon the mind of the prisoner, but that his confession was voluntary notwithstanding, and he was not biassed by such impression in making it, the judge will admit the evidence. *See* 2 *East, P. C.* 658: *R.* v. *Thompson* [1893] 2 *Q. B.* 12: *R.* v. *White*, 1 *Phil. Ev.* (7th ed.) 406: and *R.* v. *Nute*, 1 *Burn's J.* 973 (30th ed.), *citing* 1 *Burn's J.* 688 (24th ed.).

Questions to prisoners by police constables.]—By the law of this country no person ought to be made to criminate himself, and no police officer has any right, until there is clear proof of a crime having been committed, to put searching questions to a person for the purpose of eliciting from him whether an offence has been perpetrated or not. If there is evidence of an offence a police officer is justified, after a proper caution, in putting questions to a suspected person in order to ascertain whether or not there are fair and reasonable grounds for apprehending him. Even this course should be very sparingly resorted to. *R.* v. *Berriman*, 6 *Cox*, 388, *Erle*, J. The admissibility of answers to such questions put by the police before arrest must depend in each case upon the whole of the circumstances. *R.* v. *Miller*, 18 *Cox*, 54, *Hawkins*, J. In *R.* v. *Kershaw*, 18 *T. L. R.* 357; 37 *L. J. Newsp.* 120, *Bucknill*, J., after consulting *Wills*, J., admitted statements by a boy accused of murder made in answer to questions put by the father of the deceased in the presence of a constable. Where they are taken down in writing and voluntarily signed by the accused they are admissible. *R.* v. *Goddard*, 60 *J. P.* 491.

Where a constable said to the prisoner, who was suspected of the murder of her child, that "if she did not tell him where it was she might get herself into trouble, and that it would be the worse for her," a statement thereupon made by her to the constable was rejected. *R.* v. *Coley*, 10 *Cox*, 536, *Mellor*, J. But a statement made to a constable, after he had told the defendant the nature of the charge against him and that he need not say anything to criminate himself, but that what he did say would be taken down, and used as evidence against him, was held to be admissible. *R.* v. *Baldry*, 2 *Den.* 430; 21 *L. J.* (*M. C.*) 130 (*C. C. R.*); overruling *R.* v. *Drew*, 8 *C. & P.* 140, *Coleridge*, J.: *R.* v. *Morton*, 2 *M. & Rob.* 514: *R.* v. *Furley*, 1 *Cox*, 76, *Maule*, J.: *and R.* v. *Harris*, *Id.* 106, *Maule*, J.

Where a constable in the course of a conversation between himself and the prisoner respecting the subject-matter of the charge and immediately before apprehending the prisoner said to the prisoner, "I must know more about it," it was held that the use of this expression by the constable did not render a statement thereupon made by the prisoner inadmissible. *R.* v. *Reason*, 12 *Cox*, 228, *Keating*, J., after consultation with *Quain*, J. It has been held in Ireland that answers given by a prisoner to a constable who has taken him into custody, and has given him no caution, are admissible in evidence against the prisoner on his trial. *R.* v. *Johnston* (1864), 15 *Ir. Com. Law R.* 60 (*C. C. R.*), which appears to overrule *R.* v. *Bodkin*, 9 *Cox*, 403 (*Ir.*).

Where a constable said to the prisoner, who was suspected of having stolen the prosecutrix's purse, "Now is the time for you to take it back to her" (the prosecutrix), it was held that the use of these words by the constable did not render inadmissible a statement subsequently made to him by the prisoner, as the words imported no promise or threat to the prisoner to induce him to confess. *R.* v. *Jones*, 12 *Cox*, 241 (*C. C. R.*).

Although a person who is suspected of a crime may, before he is charged or is in custody, be asked what he has to say in answer to or explanation of the matter, yet after he is in custody the police have no right to ask him questions, and an admission or confession obtained in that way is inadmissible in evidence. *R.* v. *Gavin*, 15 *Cox*, 656, *A. L. Smith*, J. Where a constable said to the prisoner, before formally taking him into custody, "I am going to ask you some questions, and what you say may be taken down in writing, and might be used as evidence against you," the prisoner's admissions were held admissible. *R.* v. *Brackenbury*, 17 *Cox*, 628, *Day*, J. (who expressly dissented from *R.* v. *Gavin*, *supra*). Where a constable, after arresting and cautioning the prisoner, asked him questions and informed him of a written statement of a person who was subsequently a witness for the prosecution, which statement, at the prisoner's request, the constable read over to him (the prisoner being charged at the police station with an offence for which no warrant had been taken out), what the prisoner said on hearing the statement above referred to read was held inadmissible. *R.* v. *Male*, 17 *Cox*, 689, *Cave*, J.: *cf. R.* v. *Morgan*, 67 *L. J.* (*Q. B.*) 526; 59 *J. P.* 827. These decisions do not make a preliminary caution essential. *Rogers* v. *Hawken*, 67 *L. J.* (*Q. B.*) 528; 62 *J. P.* 279, *Russell*, L.C.J. Where one of two prisoners in custody on a charge against them jointly voluntarily made and signed a statement implicating the other, and such statement was read over to the prisoner implicated, and the latter, after being cautioned, made a confession which was taken down in writing and signed by him, it was held that the statement of the one prisoner and the confession of the other might be given in evidence upon the trial of the latter. *R.* v. *Hirst*, 18 *Cox*, 374, *Dugdale*, Q.C. (Commissioner), after consulting *Cave*, J. Where the prisoner was questioned by a police constable whilst in prison awaiting her trial without being cautioned, and the court was of opinion that such questions had been put to her for the purpose of entrapping her into making admissions, her answers were held inadmissible. *R.* v. *Histed*, 19 *Cox*, 16, *Hawkins*, J.

Evidence obtained in consequence of inadmissible confessions.]—Although a confession for the above or any other reasons may not be receivable in evidence, yet any discovery that takes place in consequence of such confession, or any act done by the defendant, if it be confirmed by the finding of the property, will be admitted; as, for instance, if a man by a promise of favour be induced to confess that he knowingly received certain stolen goods, and that they are in such a room in his house, and the goods be found there accordingly, although the confession itself cannot in that case be given in evidence, yet it may be proved, that in consequence of something the witness heard from the defendant he found the goods in question in the defendant's house. *R.* v. *Lockhart*, 2 *East*, *P. C.* 658; 1 *Leach*, 386: *and see R.* v. *Warrickshall*, 1 *Leach*, 263: *R.* v. *Mosey*, *Id.* 265, *n.*: *R.* v. *Butcher*, 2 *East*, *P. C.* 658: *R.* v. *Gould*, 9 *C. & P.* 364. And it would seem also, that declarations of the defendant accompanying such acts, may be received in evidence, even though the confession itself may be inadmissible. *R.* v. *Griffin*, *R. & R.* 151: *R.* v. *Jones*, *R. & R.* 152: *R.* v. *Leatham*, 30 *L. J.* (*Q. B.*) 205; 8 *Cox*, 498; *and see R.* v. *Jenkins*, *R. & R.* 492.

How proved.]—Confessions by the accused in open court before the court of trial are recorded and need no further proof, *vide ante*, p. 325.

A confession before a magistrate, if taken down in writing at the time, should be produced, and appear to have been duly taken. It was at one time supposed that it must be proved by the magistrate who took and

signed it, or by his clerk who wrote it: *see* 1 *Hale*, 585; 2 *Hawk. c.* 46, *s.* 43: *R.* v. *Bell*, 5 *C. & P.* 162; but it is clearly settled by the later authorities that it may be given in evidence on the prisoner's handwriting being proved by any person who was present at the preliminary enquiry. *R.* v. *Chappel*, 1 *M. & Rob.* 395: *R.* v. *Hopes*, *Id.* 396, *n.*; 7 *C. & P.* 136: *R.* v. *Foster*, 7 *C. & P.* 148: *R.* v. *Rees*, *Id.* 568: *R.* v. *Reading*, *Id.* 649: *R.* v. *Pikesley*, 9 *C. & P.* 124. Under *s.* 18 of the *Indictable Offences Act*, 1848 (*ante*, pp. 325, 326), it is proved by production of the statement signed by the justices before whom it was made, from the custody of the officer to whom it has been committed with the depositions; but the statutory mode of proof does not exclude other modes recognized by the common law. *R.* v. *Bird*, 79 *L. T., N. S.* 359; 62 *J. P.* 761, and *see ante*, p. 330. Before 1848 it was held that if the prisoner admit, when examined before the magistrate, that the deposition of a witness examined against him is true, that deposition may be read at the trial as part of the prisoner's statement, although the witness himself have been examined at the trial. *R.* v. *John*, 7 *C. & P.* 324. But the statement of one of several prisoners, brought before a magistrate for the same offence, cannot be read in evidence against the others; because they are only called upon to answer the depositions of the witnesses, taken on oath, not the statements of their fellow-prisoners. *R.* v. *Swinnerton*, *C. & Mar.* 593. Where a defendant was examined before the Lords of the Privy Council, and a witness took notes of his examination, which was not signed by or read over to the defendant, it was held that the witness might refresh his memory from the notes, but that the minutes were not admissible as a judicial examination. *R.* v. *Layer*, 16 *St. Tr.* 93, 215. The effect of 11 *& 12 Vict. c.* 48, *s.* 18, so far as regards the evidence of a confession, seems to be, that a written examination taken as the statute directs, is evidence *per se*, and the only admissible written evidence of the defendant's having made a declaration of the things therein contained; whereas, at common law (unless the defendant signed the paper, or, on its being read, allowed it to be true), the confession must have been proved by some person who heard it, and the writing could only have been made use of by the person who wrote it, for the purpose of refreshing his memory. 3 *Russ. Cr.* (6th ed.) 542.

Admissions or confessions to persons other than magistrates, if in writing, are proved as any other written instrument. *R.* v. *Swatkins*, 4 *C. & P.* 548. If made by parol, they are proved by parol evidence of some person who heard them. What the prisoner has been overheard to say to another, or to himself, is equally admissible; though it is a species of evidence to be acted on with much caution, as being liable to be unintentionally misrepresented by the witnesses. *See R.* v. *Simons*, 6 *C. & P.* 540. The provisions of 11 *& 12 Vict. c.* 42, *s.* 18 (*ante*, pp. 325, 326), apply to treason. Apart from that Act the confession of an overt act upon an examination before a magistrate or other person having authority for that purpose, if proved at the trial by two witnesses, has been held sufficient to convict the defendant; *R.* v. *Francia*, 15 *St. Tr.* 897, 1 *East, P. C.* 133, *n.*; *Fost.* 240; but evidence of a confession to a person not having such authority, although given by two or more witnesses, can only be received in corroboration of the other evidence in the case; and the treason must still be proved by two witnesses. *R.* v. *Willis*, 15 *St. Tr.* 613; *and see Fost.* 241, 243. But a confession before a magistrate or other person may be given in evidence to prove a collateral fact, as for instance, that the defendant is a natural-born subject: *R.* v. *Vaughan*, 13 *St. Tr.* 485: *R.* v. *Smith*, *Fost.* 242, or the like, and may be proved by one witness, as in ordinary cases.

Effect of.]—As to the effect of direct confessions in open court, *see ante*, p. 325. The court is usually reluctant to accept and record a confession of guilt on indictments for grave crimes, and will generally advise the defendant to retract it and plead not guilty. 2 *Hale*, 255. But where the defendant refuses to withdraw his confession, there is no alternative but to accept it, even in the case of murder, of which instances have occurred.

A free and voluntary confession of guilt made by a defendant, whether under examination before magistrates or otherwise, where it is direct and positive, if duly made and satisfactorily proved, is sufficient at once to warrant a conviction, without any corroborative evidence *aliunde*. *R.* v. *White*, *R.* & *R.* 508: *R.* v. *Tippet*, *Id.* 509: *R.* v. *Eldridge*, *Id.* 440: *R.* v. *Falkner*, *Id.* 481: *R.* v. *Francia*, *ubi supra*: *R.* v. *Lambe*, 2 *Leach*, 552: *R.* v. *Wheeling*, 1 *Leach*, 311, *n.*, and *see* 3 *Russ. Cr.* (6th ed.), 478. But admissions by implication are not entitled to the same weight.

In all cases, the whole of the confession should be given in evidence; for it is a general rule, that the whole of the account which a party gives of a transaction must be taken together; and his admission of a fact disadvantageous to himself shall not be received, without receiving at the same time his contemporaneous assertion of a fact favourable to him, not merely as evidence that he had made such assertion, but admissible evidence of the matter thus alleged by him in his discharge. 4 *Taunt.* 245; *and see Queen Caroline's Case*, 2 *B.* & *B.* 284, 294: 1 *St. Tr., N. S.* 1348. It has been said, that if there be no other evidence in the case, or none which is incompatible with the confession, it must be taken as true; *R.* v. *Jones*, 2 *C.* & *P.* 629; but the better opinion seems to be that, as in the case of all other evidence, the whole should be left to the jury, to say whether the facts asserted by the prisoner in his favour be true. *Smith* v. *Blandy*, *Ry.* & *M.* 257: *R.* v. *Higgins*, 3 *C.* & *P.* 603: *R.* v. *Clewes* 4 *C.* & *P.* 221.

A man's confession is only evidence against himself, and not against his accomplices; 1 *Hale*, 585 *n.*; 2 *Hawk. c.* 46, *s.* 34; *R.* v. *Tonge*, *Kel.* (J.), 17, 18; 6 *St. Tr.* 225; *R.* v. *Boroski*, 9 *St. Tr.* 1: *R.* v. *Swinnerton*, *C.* & *Mar.* 593; unless the confession was made in the presence of the accomplice, and under circumstances giving the latter an adequate opportunity of denying his own guilt, and when the prisoners were not before a magistrate. In such a case it is evidence, although of doubtful value, against the accomplice, and that even although he made no observation upon it. 1 *Phil. Ev.* 405 (7th ed.). Unsworn statements by one prisoner implicating others have no value as evidence, being neither admissions against interest nor strengthened by oath. But it is difficult to give effect at the same time to this rule, and to that requiring the whole of a confession to be put in. *See Anon.*, 1 *Lewin*, 107: *R.* v. *Clewes*, 4 *C.* & *P.* 221: *R.* v. *Fletcher*, *id.* 250. And if the accusations are believed the only way to get the full benefit of them is to accept the accuser as a witness for the Crown. If, however, the prisoners were before a magistrate at the time when the confession was made by one of them, charging the other, the mere fact that the latter did not deny the charge would not render the confession evidence against him; *R.* v. *Appleby*, 3 *Stark.* (*N. P.*) 33; although if he himself in his own statement before the magistrate made an express reference to the confession of his fellow prisoner, such reference might have the effect of rendering the confession as admissible against him. 3 *Russ. Cr.* (6th. ed.) 524. So, the confession of a principal is not evidence against an accessory to prove the guilt of the principal, which must be proved *aliunde*. *R.* v. *Turner*, 1 *Mood. C. C.* 347. In *Tinckler's case*, 1 *East, P. C.* 354, the dying declarations of a *felo de se* were held to be good

evidence against a person indicted for assisting the deceased in his self-murder: and the majority of the judges were of opinion that this evidence would of itself be sufficient to convict, although the testimony of the accomplice, if living, would not, unless corroborated by other evidence. But see comments on the report of the case in 1 *Den.*, v, vi. This case is no infringement of the general rule that a man's confession is no evidence against his accomplice, for an accomplice is admissible as a witness against his fellows, and a dying declaration made by a person who, if alive, would be admissible as a witness, is admissible as evidence where the death of the deceased is the subject of the charge, and the cause of the death the subject of the dying declaration. In cases of conspiracy, and of high treason in compassing the King's death, etc., or in which the case for the Crown is that the crime was the result of a conspiracy, anything said or written by one of the accomplices, not as a confession simply, but *for the purpose of furthering the common design*, is admissible evidence against the others. *R.* v. *Watson*, 2 *Stark.* (*N. P.*) 116, 140; 32 *St. Tr.* 1: *R.* v. *Desmond*, 11 *Cox*, 146: *and see Harrison's Dig., tit.* "*Confession.*" This does not extend to confessions after arrest when the design has necessarily been abandoned. *R.* v. *Shakespeare*, [1899] 34 *L. J. Newsp.*, 116.

Where two prisoners are jointly indicted, and are on their trial, and it appears from the opening of the counsel for the prosecution that there is no case against one of them, statements made by that one in the absence of the other, tending to show the guilt of the latter, cannot be given in evidence. *R.* v. *Gardner*, 9 *Cox*, 332.

Sect. 3.

PRESUMPTIONS.

Presumptive or (as it is usually termed) circumstantial evidence is receivable in criminal as well as in civil cases: and, indeed, the necessity of admitting such evidence is more obvious in the former than in the latter; for, in criminal cases, the possibility of proving the matter charged in the pleading by the direct and positive testimony of eye-witnesses or by conclusive documents is much more rare than in civil cases, and where such testimony is not available the jury are permitted to infer from the facts proved other facts necessary to complete the elements of guilt or establish innocence. Although presumptive evidence must, from necessity, be admitted, yet it should be admitted cautiously. And Sir Matthew Hale, in particular, lays down two rules most prudent and necessary to be observed in this respect: *first*, Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods; and *secondly*, Never to convict any person of murder or manslaughter, till at least the body be found—on account of two instances he mentions, where persons were executed for the murder of others who were then alive, although missing, 2 *Hale*, 290. This rule is obviously inapplicable in cases of murder at sea. *See post, tit.* "*Homicide.*"

Presumptions of fact.]—A presumption is where, some facts being proved, another fact follows as a natural or very probable inference or conclusion from them; so as readily to gain assent from the mere probability of its having occurred, without further proof. The fact thus assented to is said to be presumed, that is, taken for granted until the contrary be proved by the opposite party; *stabit præsumptio donec probetur in*

contrarium. 4 *Co. Rep.* 71 *b.* And it is adopted the more readily, in proportion to the difficulty of proving the fact by positive evidence, and to the facility of disproving it or of proving facts inconsistent with it, if it really never occurred. *See Stephen, Evidence* (5th. ed.), pp. 2, 161; *Wills, Circumstantial Evidence* (5th. ed.), 22.

Presumptions of fact are of three kinds: *violent* presumptions, where the facts and circumstances proved *necessarily* attend the fact presumed; *Gilb. Ev.* 147; *probable* presumptions, where the facts and circumstances proved *usually* attend the fact presumed; 3 *Bl. Com.* 372; and *light* or *rash* presumptions, which, however, have no weight or validity at all. *Id.*; *Gilb. Ev.* 147; *Co. Litt.* 6 *b.* If, upon an indictment for murder, it were proved that the deceased was murdered in a house, and that the defendant was immediately afterwards seen running out of it with a bloody sword in his hand; these facts raise a violent presumption that the defendant was the murderer; for the blood, the weapon, and the hasty flight, are all circumstances necessarily attending the fact presumed, namely, the murder. *Co. Litt.* 6 *b*; *Staundf.* 179 *a*; *Gilb. Ev.* 157. So, upon an indictment for stealing in a dwelling house, if the defendant were apprehended a few yards from the outer door, with the stolen goods in his possession, it would be a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof that they were actually stolen, would amount, not to a violent, but to a probable presumption merely; but, if the property were not found recently after the loss, as, for instance, not till sixteen months after, it would be but a light or rash presumption, and entitled to no weight. *Anon.*, 2 *C. & P.* 459: *see R. v. Adams*, 3 *C. & P.* 600, *Parke*, B.: *R. v. Cooper*, 3 *C. & K.* 318, *Maule*, J. And if the prisoner give a reasonable account of the manner in which he became possessed of the goods, this will so far rebut the presumption as to throw it upon the prosecutor to negative that account. *R. v. Crowhurst*, 1 *C. & K.* 370, *Alderson*, B.: *R. v. Smith*, 2 *C. & K.* 207, *Denman*, C.J.: *R. v. Harmer*, 2 *Cox*, 487, *Pollock*, C.B. Where, however, a prisoner was convicted of stealing some articles of dress, and the evidence against him consisted of proof that he was in possession of the property recently after it had been stolen, that he sold it openly, and on his arrest stated to the constable that C. and D. brought the things to his house, and that W., who was at his house, would say that that was true; C., D., and W. were persons known to the constable, and might have been produced as witnesses, but were not called; and inquiry was made of W., but the result of the inquiry was not given in evidence; it was held that the conviction was good, and that it was not incumbent on the prosecution to call the witnesses to whom the prisoner had referred, to disprove his statement. *R. v. Wilson, Dears. & B.* 157; 26 *L. J.* (*M. C.*) 45 (*C. C. R.*). Although the last-mentioned case may at first sight seem at variance with the doctrine laid down in *R. v. Crowhurst*, *R. v. Smith*, and *R. v. Harmer*, *ubi supra*, it is not so in reality; for although *R. v. Crowhurst* and *R. v. Smith* were cited in *R. v. Wilson*, the decision in *R. v. Wilson* did not turn on those cases, but on the question whether the whole evidence taken together was sufficient to justify a conviction. *Best on Evidence* (4th ed.), 295; *and see* 1 *Taylor, Evidence* (9th ed.), p. 63. So, where on the trial of an indictment for receiving stolen goods it appeared that the prisoner had told the constable who found the stolen property in his possession that he had purchased it of a tradesman in the same town, and that tradesman, although known, was not called for the prosecution, it was held that there being other circumstances in the case from which

the jury might fairly infer the falsehood of the prisoner's story, it was unnecessary to call the tradesman on the part of the prosecution. *R.* v. *Ritson* 15 *Cox*, 478 (*C. C. R.*). The presumption of guilt arising from the possession of stolen property will, of course, vary according to the nature of the property stolen, and whether it be or be not likely to pass readily from hand to hand. *See R.* v. *Partridge*, 7 *C. & P.* 551, *Patteson*, J. Upon an indictment for arson, proof that property, which was in the house at the time it was burnt, was afterwards found in the possession of the defendant, raises a probable presumption that the defendant was present and concerned in the arson. *See R.* v. *Rickman*, 2 *East*, *P. C.* 1034, 1035. A like inference has been raised in the case of murder, accompanied by robbery; *Wills*, *Circumstantial Evidence* (5th ed.) 77; in a case of burglary, *R.* v. *Gould*, 9 *C. & P.* 364, *Parke*, B.; *R.* v. *Exall*, 4 *F. & F.* 922, *Pollock*, C.B.; and in the case of the possession of a quantity of counterfeit money: *R.* v. *Fuller*, *R. & R.* 308: *R.* v. *Jarvis*, *Dears.* 552; 25 *L. J.* (*M. C.*) 30 (*C. C. R.*); 1 *Taylor*, *Ev.* (9th ed.) 121. The presumption can, of course, only arise, where the possession is proved. A bag was left by the owner near a place where the prisoner and two other persons were at the time. The prisoner passed the place on his way home, and shortly afterwards one of the other two persons followed in the same direction along with the prosecutor. They met the prisoner coming back to his home from the opposite direction, and, being questioned, he denied all knowledge of the bag, and said that he had been in a neighbouring wood for firewood. The wood, the prisoner's cottage, and some disused farm buildings near it, were then searched, without success. About twenty-four hours afterwards the bag was found in a hayloft in one of the disused farm buildings, near the highway. There was no door to it, and passers-by had easy access to it. The prisoner was then taken into custody, and said to the constable, after previously denying he had taken the bag, "I suppose I shall get a month for this." It was held that there was no evidence from which the jury might infer the prisoner had had possession of the bag, and therefore that the case could not be treated as one of recent possession. *R.* v. *Hughes*, 14 *Cox*, 223 (*C. C. R.*) Although upon an indictment for larceny it is necessary to prove that goods of the prosecutor have been taken, that may be proved by circumstances, although the witnesses for the prosecution cannot swear to the loss of the article said to be stolen, nor that the property found upon the prisoner and alleged to have been stolen is the prosecutor's. A large quantity of pepper was kept in bulk in a warehouse where the prisoner had no business. He was met coming out of the warehouse, having on him a quantity of pepper of the same description as that in the warehouse. On being stopped, he threw down the pepper, and said, "I hope you will not be hard with me." From the large quantity in the warehouse, it could not be proved that any pepper had been taken from the bulk. Upon these facts, it was held that there was abundant evidence to justify the conviction of the prisoner for stealing the pepper. *R.* v. *Burton*, *Dears.* 282; 23 *L. J.* (*M. C.*) 52. "If a man go into the London Docks sober, without means of getting drunk, and comes out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen, or any wine was missed." *Per Maule*, J., in *R.* v. *Burton*, *ubi supra*. *Cf.* *R.* v. *Dredge*, 1 *Cox*, 235, *Erle*, J.: *R.* v. *Mockford*, 11 *Cox*, 16 (*C. C. R.*). Where, upon an indictment for perjury, in falsely taking the freeholder's oath in the name of J. W., at a parliamentary election, it was proved that the freeholder's oath was administered to a person who polled on the

second day of the election by the name of J. W.; that there was no such person in fact as J. W.; that the defendant voted on the second day, though he was not a freeholder; that he did not vote in his own name or in any other than the name of J. W.; that there was but one false vote given on the second day's poll; and that the defendant some time afterwards boasted that he had "done the trick," and was not paid enough for the *job*, and was afraid he should be "pulled up for his bad vote;" the court held that this was sufficient evidence for the jury to presume that the defendant voted in the name of J. W., and consequently to find him guilty of the charge in the indictment. *R.* v. *Price*, 6 *East*, 323. Upon an indictment for disposing of and putting away a forged bank-note, knowing it to be forged, proof that the defendant has passed other forged notes raises a probable presumption that he knew the note, for the passing of which he is now indicted, to be forged; and if, in addition to this, it be proved that the defendant when he passed these notes gave a false name or address, it amounts to a violent presumption of a guilty knowledge. And the same upon indictments for uttering counterfeit money. (*See ante*, p. 310). The fact that a person is alive on a given day may be presumed from proof of his being alive on an antecedent day. If, for example, it was proved on the trial of a man for bigamy that the first wife was in good health on the day preceding the second marriage, the inference would be almost irresistible that she was living on the latter day, and the jury would, in all probability, find that she was so. If, on the other hand, it was proved that she was on the day before the second marriage in a dying condition, and nothing further was proved, they would probably decline to draw that inference. The question is, however, entirely for the jury, the law making no presumption either way. *R.* v. *Lumley*, *L. R.* 1 *C. C. R.* 196; 38 *L. J.* (*M. C.*) 86. In 1864 W. married A. In 1868 he was charged with bigamy in marrying B. in 1868, his wife A. being then alive, and was on such charge convicted. In 1879 he married C., and in 1880, C. being then alive, he married D. Afterwards, upon a charge of bigamy in marrying D., C. being then alive, W. was convicted, it being held by the presiding judge that there was no evidence that A. was alive when W. married C., or that the marriage with C. was invalid, by reason of A. being then alive. It was held, however, that the conviction could not be sustained, as the question should have been left to the jury whether upon the above facts A. was alive or not when W. married C. *R.* v. *Willshire* 6 *Q. B. D.* 366; 50 *L. J.* (*M. C.*) 57.

Presumptions of law.]—In addition to the presumptions which a jury may make from circumstantial evidence, there are also presumptions of law. "Presumptions of law consist of these rules, which in certain cases forbid or dispense with further inquiry." 1 *Taylor*, *Evidence* (9th ed.) 69. They fall into two classes—*disputable* presumptions, which can be rebutted by evidence sufficient to displace them; and *conclusive*, which are absolute and cannot be rebutted by any evidence.

1. *Disputable presumptions.*]—The most important of the disputable presumptions in criminal cases is the presumption that the accused is innocent. This is the maxim, "*semper præsumitur pro negante*," or that the burden of proof lies on the person who affirms a fact. *R.* v. *Twyning*, 2 *B. & Ald.* 386; 20 *R. R.* 480: *Sissons* v. *Dixon*, 5 *B. & C.* 758. But this presumption is easily rebutted by proof of acts tending to show guilt, and when these acts are wrongful and not accidental a presumption of malice or criminal intent arises. And where certain facts are proved against a defendant the law in certain cases presumes against him malice or intent,

or some state of mind involving criminal responsibility, as having accompanied the act proved. This rule may also be expressed by saying that to justify conviction in a criminal case the evidence of guilt must not be a mere balance of probabilities; but must satisfy the jury beyond reasonable doubt that the accused is guilty. *See R.* v. *White*, 4 *F. & F.* 384. In murder, the law presumes *malice* from the act of killing, until the contrary be proved by the defendant. *Fost.* 255; 1 *East, P. C.* 340. And malice is also presumed where any wrongful act is done intentionally, without just cause or excuse. "Malice," says *Bayley*, J., in delivering the judgment of the court in *Bromage* v. *Prosser*, 4 *B. & C.* 247, 255, "in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally*, and without just cause or excuse. If I maim cattle, without knowing whose they are,—if I poison a fishery, without knowing the owner,—I do it *of malice*, because it is a *wrongful* act, and done intentionally. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional." This definition was considered in *Allen* v. *Flood* [1898] *App. Cas.* 1, and seems to have been there approved. The latter case, which draws a distinction between malice in criminal and civil cases, has been explained in *Quinn* v. *Leathem* [1901] *App. Cas.* 495. The meaning of malice in a criminal case differs to some extent with the common-law or statutory definition of each offence. *See McDowell* v. *Mayor, etc., of Dublin* [1903] 2 *Ir. Rep.* 541 (*C. A.*).

On an indictment for libel a defamatory statement is presumed to be malicious unless the occasion is privileged. *R.* v. *Harvey*, 1 *St. Tr., N. S.* 1; 2 *B. & C.* 257: *Bromage* v. *Prosser*, 4 *B. & C.* 247: *R.* v. *Creevey*, 1 *M. & Sel.* 273; 14 *R. R.* 427. And the law also infers that every man must contemplate the necessary consequences of his own act. *R.* v. *Dixon*, 3 *M. & Sel.* 11; 5 *R. R.* 381; 1 *Taylor Evidence* (9th ed.), p. 80. Thus, the uttering of a forged stock receipt to a person who employed the prisoner to purchase stock to that amount, and advanced the money, was held sufficient evidence of an attempt to defraud, notwithstanding the belief of the party to whom it was uttered that the prisoner had no such intention. *R.* v. *Sheppard*, *R. & R.* 169. And upon an indictment for forgery, an intention to defraud the person who would have to pay the instrument if it were genuine, may be inferred even though the instrument be so framed as not to impose upon him, and the intention to defraud be general, and not confined or in any way pointed to the person by whom, if genuine, the instrument would be paid. *R.* v. *Mazagora*, *R. & R.* 291: *R* v. *Hill*, 2 *Mood. C. C.* 30; 8 *C. & P.* 274: *R.* v. *Cooke*, *Id.* 582. Where a man has in his possession a large quantity of counterfeit coin unaccounted for, it may be inferred that he procured it with intent to utter it, if there be no evidence that he was the maker. *R.* v. *Fuller*, *R. & R.* 308. Where a man was indicted under 43 *G.* 3, *c.* 58 (*rep.*), for setting fire to a mill, with intent to injure the occupiers, it was held that the intent might be inferred from the act. *R.* v. *Farrington*, *R. & R.* 207. So, in every case, intention can be but matter of presumption, arising either from the facts stated in the instrument, or from extrinsic facts stated in evidence. (*See ante*, p. 303, *et seq.*) As to the presumption from the fact of a previous conviction that a person found in possession of stolen goods knew that they were stolen, *see* 34 *&* 35 *Vict. c.* 112, *s.* 19, *post, tit.* "*Receiving.*"

In the case of possession of instruments adapted for *forgery* or *coining*

and counterfeit coins and certain forged documents, the presumption of guilt is placed by statute on the person found in possession, and he must prove a lawful excuse. *See* the statutes in these titles, *post*; and as to presumptions in cases of *larceny*, *see ante*, p. 311.

The intention to be implied from an act is not to be rebutted or got rid of, because the person committing such act has some ulterior intention. *Steele* v. *Brannan*, 41 *L. J.* (*M. C.*) 85, 91, *Grove*, J.

There is no presumption of law that a person proved to have been alive on a certain day was alive on a subsequent day, although a jury may be well warranted by such proof, in finding as a matter of fact that he was so. *R.* v. *Lumley*, *L. R.* 1 *C. C. R.* 196 (*ante*, p. 342). And where the question was whether a person was alive on the 7th September, 1879, and the only evidence of her being alive at that date was that she was living in June, 1868, it was held that such evidence ought to have been submitted to the jury. *R.* v. *Willshire* (*ante*, p. 342). Nor is there any presumption *of law* in favour or against the continuance of life for any given period. *R.* v. *Lumley*, *ubi supra*: *R.* v. *Tolson*, 23 *Q. B. D.* 168.

It is also a maxim of law, that "*omnia præsumuntur ritè et solenniter esse acta donec probetur in contrarium*;" upon which ground it will be presumed, even in a case of murder, that a man who has acted in a public capacity or situation was duly appointed, and has properly discharged his official duties. *R.* v. *Gordon*, 1 *Leach*, 515: *R.* v. *Rees*, 6 *C. & P.* 606: *R.* v. *Jones*, 2 *Camp.* 131; 11 *R. R.* 680: *R.* v. *Verelst*, 3 *Camp.* 432; 14 *R. R.* 775: *R.* v. *Murphy*, 8 *C. & P.* 297: *R.* v. *Catesby*, 2 *B. & C.* 814: *R.* v. *Newton*, 1 *C. & K.* 469: *R.* v. *Townsend*, *C. & Mar.* 178: *R.* v. *Cresswell*, 1 *Q. B. D.* 446; 43 *L. J.* (*M. C.*) 77; 13 *Cox*, 126: *R.* v. *Manwaring*, *Dears. & B.* 132: 7 *Cox*, 192 (*C. C. R.*): *R.* v. *Stewart*, 13 *Cox*, 296: *R.* v. *Roberts*, 14 *Cox*, 101 (*C. C. R.*).

The rule that ignorance of the law shall not excuse a man or relieve him from the penal consequences of a crime (*ante*, p. 33), is usually spoken of as arising from a presumption that every person knows the law. 1 *Taylor*, *Evidence* (9th ed.), p. 79. The following language, however, used by *Maule*, J., in *Martindale* v. *Falkner*, 2 *C. B.* 706, 720, is characterised by *Blackburn*, J., in *R.* v. *Mayor*, *etc.*, *of Tewkesbury*, *L. R.* 3 *Q. B.* 629; 37 *L. J.* (*Q. B.*) 238, as clear and common sense: "There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so."

2. *Conclusive presumptions.*]—It is an incontrovertible presumption of law (1) that a child under seven is incapable of committing crime; (2) that a male under 14 is incapable of sexual intercourse. *See ante*, p. 22. 48 & 49 *Vict. c.* 69, *ss.* 4, 5, enacts that the consent of a female under 16 to unlawful carnal intercourse is no defence to proceeding under the section: but the enactments only take away a defence and create no presumption as to capacity.

Sect 4.

WRITTEN EVIDENCE.

1. *Public documents*, p. 344.
2. *Private documents*, p. 380.

1. PUBLIC DOCUMENTS.

Proof by Copies.

As a general rule it is unnecessary to produce in evidence the original of any public document, for the reasons given *ante*, p. 316. Copies of public documents admissible in evidence fall into four classes.

1. *Exemplifications* (*i.e.*, copies under seals of state).]—An exemplification under the Great Seal is itself a record, and needs no further proof. *Leyfield's Case*, 10 *Co. Rep.* 93; *Roscoe, Nisi Prius* (17th ed.), 97; 2 *Taylor, Evidence* (9th ed.), 1015. Exemplifications under the seal of the court, to which the record belongs, whether it be a statutory or a common law court, are in the same position. *Olive* v. *Guin*, 2 *Sid.* 145; *Gilb. Ev.* 17, 19. Exemplifications produced from the proper custody, and purporting to exemplify a commission from the crown have been held admissible, though the seal has been lost. *Mayor of Beverley* v. *Craven*, 2 *M. & Rob.* 140.

2. *Office Copies* (*i.e.*, copies made by an officer of the court to which the document belongs).]—These are admissible without proof of collation of the copy with the original. *See Roscoe, Nisi Prius* (17th ed.) 98. Office copies, certificates, and other documents appearing to be sealed with a seal of the central office of the High Court, shall be presumed to be office copies, certificates, or other documents issued from the central office, and if duly stamped may be received in evidence, and no signature or other formality, except the sealing with a seal of the central office shall be required for the authentication of any such copy, certificate, or other document. *R. C. S.* [1883], *O.* 61, *r.* 7. By the *Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 61, all writs and documents issued out of or filed in any district registry of the High Court of Justice, and all exemplifications and copies thereof, purporting to be sealed with the seal of any such district registry, shall in all parts of the United Kingdom be received in evidence without further proof thereof.

An office copy has been rejected for contractions and abbreviations. *R.* v. *Christian, C. & Mar.* 388.

3. *Record Office Copies.*—In the case of records in the Public Record Office under the custody of the Master of the Rolls, copies certified by the Master of the Rolls, or deputy-keeper of the records, and purporting to be sealed or stamped with the seal of the Record Office are to be received in evidence in all courts of justice without any further or other proof thereof, in every case where the original record would have been received there as evidence. 1 & 2 *Vict. c.* 94, *ss.* 11, 12, 13. All records of the High Court are kept in the court for twenty years, and then transferred to the Record Office.

4. *Examined Copies* are copies made by any person from the record itself. The person to prove such a copy at the trial must examine the copy while the officer reads the record; but the officer need not also read the copy while the witness examines the record. *Reid* v. *Margison*, 1 *Camp.* 469: *Gyles* v. *Hill*, *Id.* 471, *n.*: *Rolf* v. *Dart*, 2 *Taunt.* 52; *Roscoe, Nisi Prius* (17th ed.) 98.

Statutes and Laws.

Public Acts.]—Public general statutes, like the rules of the common law or general customs of the realm, need not be either pleaded or proved, because the courts are bound *ex officio* to take judicial notice of them. Production at the trial of a public general statute is not for the purposes of putting it in evidence, but merely in aid of the memory of the court and jury. *Gilb. Ev.* 10; 2 *Taylor Evidence* (9th ed.) p. 1006; *Roscoe, Nisi Prius* (17th ed.) 105. In order to assure the correctness of the text of a statute, reference may be made to printed copies purporting to be published by authority, or to the official editions of the statutes; but no statutory provision exists as to proof of the public general statutes

of England, Great Britain, or the United Kingdom. In the case of early statutes an exemplification can be obtained of the Act as appearing on the chancery roll, or a certified or examined copy can be made from the parliament roll, or in case of need the original roll can be produced or referred to. 1 *Taylor, Evidence* (3rd ed.) p. 20; *The Prince's Case*, 8 *Co. Rep.* 18*a*, 20*b*; *Hardcastle on Statutes* (3rd ed.), *chaps.* 3 & 8. It seems that the preamble of a public general statute is admissible, but not conclusive evidence of the facts therein recited. *R.* v. *Sutton*, 4 *M. & Sel.* 532. The books of common prayer are judicially noticed as Acts of parliament, being scheduled to the Acts of Uniformity. 2 & 3 *Edw.* 6, *c.* 1; 5 & 6 *Edw.* 6, *c.* 1, *s.* 4; 1 *Eliz. c.* 2; 14 *Car.* 2, *c.* 4. Acts of the Irish Parliament, printed and published by the King's printer, are to be received as conclusive evidence in any court of Great Britain. 41 *G.* 3, *c.* 90, *s.* 9. There is no statutory provision as to the proof of a Scots Act. Colonial statutes are proved in England by the certificate of the proper officer of the colony that the document to which it is attached is a true copy of the statute in question. 28 & 29 *Vict. c.* 63, *s.* 6. All statutes of the United Kingdom passed since 1850, whether general, local and personal, or private, are public Acts, and to be judicially noticed as such, unless the contrary is expressly provided by the particular statute. 52 & 53 *Vict. c.* 63, *s.* 9. Such Acts therefore do not need proof, though in certain cases it may be expedient to plead them specially. Prior to 1850 it was not uncommon to insert in local and personal or private Acts a clause that they should be deemed and taken to be public Acts, and judicially noticed without being specially pleaded. This rendered a King's printer's copy admissible [as in the case of a public general Act]. *Brett* v. *Beales, M. & M.* 416, 421: *Woodward* v. *Cotton*, 1 *Cr. M. & R.* 44: *Beaumont* v. *Mountain*, 10 *Bing.* 404; 4 *Moo. & S.* 177: *Greswolde* v. *Kemp, C. & Mar.* 635. It has been held that such Acts must be specially pleaded to make facts therein admissible in evidence against strangers. *Brett* v. *Beales, ubi supra.* This decision must be read subject to 52 & 53 *Vict. c.* 63, *s.* 9, *supra*, and to the dicta of *Cairns*, L.C., in *Aiton* v. *Stephen*, 1 *App. Cas.* 456, to the effect that 13 & 14 *Vict. c.* 21 (of which 52 & 53 *Vict. c.* 63, is on this point a re-enactment), gave the *local* Acts to which it applied *all* the effect of *public* Acts.

Special or private Acts.]—The common law mode of proving a private statute is by an examined copy of the parliament roll, *Gilb. Ev.* 12: *R.* v. *Shaw*, 12 *East*, 479: or by an exemplification made from the chancery roll (1 *Statt. Realm, Introd. xxxv.*), or a certified copy from the clerk of the parliaments or the public record office. *See R.* v. *Milton*, 1 *C. & K.* 58, 59 *n.* By the *Evidence Act*, 1845 (8 & 9 *Vict. c.* 113), *s.* 3, as amended by the *Documentary Evidence Act* 1882 (45 & 46 *Vict. c.* 9), *s.* 2, all copies of private and local personal Acts of parliament, not public Acts, if purporting to be printed by the King's printers or under the superintendence or authority of his Majesty's stationery office, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed. As to available texts of private Acts, *see Roscoe, Nisi Prius* (17th ed.), 106.

Colonial and foreign laws.]—The law whether written or unwritten of a foreign country or of any part of the King's dominions outside England, must be proved in English courts by the oral testimony of witnesses of competent skill, and in the case of written law cannot be proved by the production of the written law itself, or of an authenticated copy.

Dalrymple v. *Dalrymple*, 2 *Hagg. (Consist. Rep.)* 54: *Sussex Peerage claim*, 6 *St. Tr., N. S.* 79: 11 *Cl. & F.* 85, 114–117; 8 *Eng. Rep.* 1034: *Baron de Bode* v. *R.*, 6 *St. Tr., N. S.* 237; 8 *Q. B.* 208, 250-267: *Castrique* v. *Imrie*, *L. R.* 4 *H. L.* 414: 2 *Taylor, Evidence* (9th ed.), 936, 1007: *Roscoe, Nisi Prius* (17th ed.), 121. The witness to prove a foreign law must be a person *peritus virtute officii*, or *virtute professionis*. *Sussex Peerage claim, ubi supra*. A Roman Catholic bishop, who held in this country the office of a coadjutor to a vicar apostolic, and as such was authorized to decide on cases affected by the law of Rome, was therefore held, in virtue of his office, to be a witness admissible to prove the law of Rome as to marriage. *Id.* But a witness whose knowledge of the law of a foreign country is derived solely from his having studied it at a university in another country, is not a good witness to prove it. *Bristow* v. *Sequeville*, 5 *Ex.* 275; 19 *L. J. (Ex.)* 289: *In the goods of Bonelli*, 1 *P. D.* 69; 45 *L. J. (P. D. & A.)* 42. A witness competent to give evidence on a point of foreign law may refer to foreign law-books to refresh his memory, or to correct or confirm his opinion, but the law itself must be taken from his evidence. *Sussex Peerage claim, supra*. The law of a foreign country may also be ascertained by the court here by obtaining an opinion on the subject from a superior court of the foreign country whose law is in question, if a convention has been entered into between the British Government and that of the foreign state. 24 & 25 *Vict. c.* 11. The law of one part of the King's dominions for the purpose of judicial proceedings in another part may be ascertained in a similar manner under 22 & 23 *Vict. c.* 63. Both these Acts have been extended by order in council to many places to which the *Foreign Jurisdiction Act*, 1890 (53 & 54 *Vict. c.* 37), applies. The principal orders in force at the end of 1903 are published in the 1904 edition of the *Statutory Rules and Orders Revised*, vol. 5, *tit.* "*Foreign Jurisdiction*;" those since that date in the volume of *Statutory Rules and Orders* for the year in which they were made. *See also Encycl. of Laws of England, tit.* "*Foreign Jurisdiction.*"

Proceedings in Parliament.

Entries in the journals of the House of Lords and House of Commons may be proved by examined copies from their minute-books; *Jones* v. *Randall*, 1 *Cowp.* 17; *R.* v. *Lord G. Gordon*, 2 *Doug.* 590, 594; 21 *St. Tr.* 485: *R.* v. *Lord Melville*, 29 *St. Tr.* 549, 683; or by copies purporting to be printed by the printers to the crown or to either House of Parliament, or under the superintendence or authority of the Stationery Office, without any proof being given that such copies were so printed. 8 & 9 *Vict. c.* 113, *s.* 3; 45 & 46 *Vict. c.* 9, *s.* 2. The journals of the House of Lords have been held evidence to prove not only an address of the Lords to the King, but also the King's answer. *R.* v. *Holt*, 5 *T. R.* 436, 445. *R.* v. *Francklin*, 17 *St. Tr.* 625, 637. But the resolutions of either house, with a view to ulterior proceedings, are no evidence of the facts therein stated: as, for instance, when the House of Commons resolved that a plot against the government existed, the resolution was held to be no evidence of the existence of such a plot. *Titus Oates' Case*, 10 *St. Tr.* 1073, at 1165. As a general rule the proceedings in either house are not admissible as an aid to construing a statute. *Steele* v. *Midland Ry. Co.*, *L. R.* 1 *Ch. App.* 275, 282. But *see* cases collected in *Hardcastle on Statutes* (3rd ed.), p. 139, *et seq.*

Statutory Rules.

Very many statutes authorize the making by the Privy Council or by government departments of "statutory rules," *i.e.*, of subordinate legislation under authority delegated by parliament. By the *Rules Publication Act*, 1893 (56 & 57 *Vict. c.* 66), it is enacted that all statutory rules made after December 31, 1893, shall forthwith be sent to the King's printer of Acts of parliament, and subject to regulations made by the Treasury with the concurrence of the Lord Chancellor and Speaker of the House of Commons be numbered, and save as provided by the regulations, be printed and sold by him, and in cases where such rules are required by any Act to be published or notified in the London, Edinburgh, or Dublin Gazette, a notice in the Gazette of the rules having been made, and of the place where copies can be purchased, is now sufficient compliance with such requirement. 56 & 57 *Vict. c.* 66, *s.* 3 (3). The regulations issued in 1894 (*Stat. Rules and Orders Revised* (ed. 1904), vol. 11, *tit.* "*Statutory Rule*"), restrict the operation of the Act of 1893 to rules which are of a legislative and not merely of an executive character, and to rules made, and not merely confirmed, by a government department: and rules of the latter class, which are of a merely local character, are for the most part not printed under the regulations. Proof of statutory rules may be given by production of the annual volume of *Statutory Rules and Orders* published by authority, containing them, or by a copy issued by the King's printer. *See R.* v. *Vos* [1895], 6 *Queensland L. J.* 215, an indictment under the *Pacific Islanders Protection Act*, 1872 (35 & 36 *Vict. c.* 19).

Primâ facie evidence of any order, or regulation, issued before or after the passing of the *Documentary Evidence Act*, 1868, by his Majesty, or by the Privy Council, and of any proclamation, order or regulation issued before or after the passing of that Act by or under the authority of any such department of the government or office, as is mentioned in the first column of the schedule thereto, may be given in all courts of justice and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned: that is to say:—

1. By the production of a copy of the Gazette purporting to contain such proclamation, order or regulation.

2. By the production of a copy of such proclamation, order or regulation purporting to be printed by the government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession:—

3. By the production, in the case of any proclamation, order or regulation issued by his Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the clerk of the Privy Council, or by any one of the lords or others of the Privy Council, and, in the case of any proclamation, order or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule, in connexion with such department or office. "Any copy or extract made in pursuance of that Act may be in print or in writing, or partly in print and partly in writing. No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order or regulation." *Documentary Evidence Act*, 1868 (31 & 32 *Vict. c.* 37, *s.* 2).

Schedule.

Column 1. NAME OF DEPARTMENT OR OFFICER.	Column 2. NAMES OF CERTIFYING OFFICERS.
"The Treasury" (*see* 52 & 53 *Vict. c.* 63, *s.* 12 (2)).	Any commissioner, secretary or assistant secretary of the Treasury.
"The Admiralty" (*see* 52 & 53 *Vict. c.* 63, *s.* 12 (4)).	Any of the commissioners for executing the office of Lord High Admiral, or either of the secretaries to the said commissioners.
Secretaries of State.	Any secretary or under-secretary of state.
"The Board of Trade" (*see* 52 & 53 *Vict. c.* 63, *s.* 12 (8)).	Any member of the "Board" or any secretary or assistant secretary of the "Board."
"The Local Government Board" (substituted for the Poor Law Board by 34 & 35 *Vict. c.* 70).	Any member of the Board; any secretary or assistant secretary of the Board (*see* 34 & 35 *Vict. c.* 70, *s.* 5).
The Board of Agriculture and Fisheries (*added by* 58 *Vict. c.* 9, *s.* 1; 3 *Edw.* 7 *c.* 31, *s.* 1).	The President, or any member of the Board, or the Secretary of the Board, or any person authorized by the President to act on behalf of the Secretary of the Board.
The Board of Education (substituted by 62 & 63 *Vict. c.* 33 for the Department of Education, *which was added by* 33 & 34 *Vict. c.* 75, *s.* 83); *and see* 62 & 63 *Vict. c.* 33, *s.* 7 (2), (3) & (4).	The document must bear the official seal of the Board authenticated by the signature of a member of, or any secretary or assistant secretary, or some person authorized by the president or some member of the Board to act on behalf of a secretary.
The Post-Master General (*added by* 33 & 34 *Vict. c.* 79, *s.* 21).	Any secretary or assistant secretary of the Post Office.

By 7 & 8 *Vict. c.* 101, *s.* 71, a copy of any rule, order, or regulation made by the Poor Law Commissioners, printed by the King's printer, shall, after the lapse of fourteen days from the date thereof, be received in evidence, and judicially taken notice of, and shall, until the contrary be shown, be deemed sufficient proof that such order was duly made and is in force.

The Poor Law Commissioners have been superseded by the Local Government Board, and (by 34 & 35 *Vict. c.* 70, *s.* 5): "a rule, order, or regulation made by the Local Government Board shall be valid if it is made under the seal of the Board and signed by the president or one of the *ex-officio* members of the Board, and countersigned by a secretary or assistant secretary: and the production of such *primâ facie* evidence of

any of the said rules, orders or regulations as is required by the *Documentary Evidence Act*, 1868 (*ante*, pp. 348, 349), with respect to the rules, orders, and regulations of the Poor Law Board, shall, until the contrary is shown, be a sufficient proof that any such rule, order or regulation of the Local Government Board was duly made."

"Subject to any law that may be from time to time made by the legislature of any British colony or possession, this Act shall be in force in every such colony or possession." 31 & 32 *Vict. c.* 37, *s.* 3. "The following words shall in this Act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such construction; that is to say, 'British colony and possession,' shall for the purposes of this Act, include the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in his Majesty by virtue of any Act of parliament for the government of India, and all other his Majesty's dominions; 'Legislature' shall signify any authority, other than the imperial parliament or his Majesty in council, competent to make laws for any colony or possession; 'Privy Council' shall include his Majesty in council and the lords and others of his Majesty's Privy Council, or any of them, and any committee of the Privy Council that is not specially named in the schedule hereto; 'Government printer' shall mean and include the printer to his Majesty, and any printer purporting to be the printer authorized to print the statutes, ordinances, Acts of State, or other public Acts of the legislature of any British colony or possession, or otherwise to be the government printer of such colony or possession; 'Gazette' shall include the London Gazette, the Edinburgh Gazette, and the Dublin Gazette, or any of such gazettes." *Id. s.* 5. "The provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing statute, or existing at common law." 31 & 32 *Vict. c.* 37, *s.* 6.

"Where any enactment, whether passed before or after June 19, 1882, provides that a copy of any Act of parliament, proclamation, order, regulation, rule, warrant, circular, list, gazette, or document shall be conclusive evidence, or be evidence, or have any other effect, when purporting to be printed by the government printer, or the King's printer, or a printer authorized by his Majesty, or otherwise under his Majesty's authority, whatever may be the precise expression used, such copy shall also be conclusive evidence, or evidence, or have the said effect (as the case may be) if it purports to be printed under the superintendence or authority of his Majesty's stationery office." 45 & 46 *Vict c.* 9, *s.* 2.

Executive Acts.

Of British Government.]—The London Gazette, printed and published by the King's printer, is evidence of all Acts of State, or public matters therein notified. *Att.-Gen.* v. *Theakston*, 8 *Price*, 89; 22 *R. R.* 716: *R.* v. *Holt*, 5 *T. R.* 436. Thus, a Gazette, which stated that addresses had been presented to the King from several bodies of his subjects, expressive of their loyalty, was held to be evidence of that fact. *Id.* But in *R.* v. *Gardner*, 2 *Camp.* 513; 11 *R. R.* 784, it was held not to be evidence of military appointments notified therein. And it is not evidence of a private matter contained therein, unless it be shown that the party to be affected has read the article. *Harratt* v. *Wise*, 9 *B. & C.* 712. The mere production of the Gazette would seem to be sufficient, without proof that it was bought at the Gazette office, or from whence it came. *R.* v. *Forsyth*, *R. & R.* 277. And where a statute (12 & 13 *Vict. c.* 106, *s.* 240 (*rep.*)) enacted that "a copy of the London Gazette" should be evidence,

it was held to be sufficient merely to produce a paper purporting to be the London Gazette, and to be printed by authority, although it did not purport to be printed by the Queen's printer. *R.* v. *Raudnitz*, 11 *Cox*, 360 (*C. C. R.*). But where a statute (11 *Vict. c.* 2, *s.* 21 (*rep.*)) enacted that "the production of the Dublin Gazette, *purporting to be printed by the Queen's printer*," should be evidence, it was held not sufficient to produce a paper purporting to be the Dublin Gazette and to be printed by authority by A. B., but not giving his style as Queen's printer. *R.* v. *Wallace*, 10 *Cox*, 500; 17 *Ir. Com. Law Rep.* 207. Where the production of the Gazette is made evidence of any matter, it is not sufficient to produce a whole leaf cut from the Gazette containing the matter sought to be proved, but not bearing the imprint of any printer or purporting to be published by authority. *R.* v. *Lowe*, 52 *L. J.* (*M. C.*) 122; 15 *Cox*, 286 (*C. C. R.*).

Articles of war.]—The articles of war for the better government of officers and soldiers of the army and the rules of procedure relating to courts-martial, etc., are to be judicially noticed by all judges and in all courts whatsoever, and therefore require no proof. 44 & 45 *Vict. c.* 58, *ss.* 69, 70: *see* the official "Manual of Military Law."

Letters patent.]—Letters patent may be given in evidence, without further proof; or they may be proved by exemplifications under the great seal (*see* 1 *Saund.* 119, *n.*), or under the wafer great seal. 47 & 48 *Vict. c.* 30. *And see* 2 *Taylor, Evidence* (9th ed.), 1007. *Roscoe, Nisi Prius* (17th ed.) 108.

Proclamations.]—Where a proclamation recited that it had been represented that certain outrages had been committed in different parts of certain counties, and offered a reward for the discovery and apprehension of the offenders, it was held to be admissible evidence to prove an introductory averment in an information for a libel, that divers acts of outrage had been committed in those places. *R.* v. *Sutton*, 4 *M. & Sel.* 532. It seems doubtful whether the courts will take judicial notice of royal proclamations without proof. *Dupays* v. *Shepherd*, 12 *Mod.* 216; *Van Omeron* v. *Dowick*, 2 *Camp.* 42; 11 *R. R.* 656. Such proclamations may be proved by the London Gazette (*ante*, p. 350), or by copies purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, [or purporting to be printed under the superintendence or authority of his Majesty's stationery office, 45 & 46 *Vict. c.* 9, *s.* 2 (*ante*, p. 350)], without proof being given that such copies were so printed. 8 & 9 *Vict. c.* 113, *s.* 3; and also under 31 & 32 *Vict. c.* 37 (*ante*, pp. 348, 349; *and see Roscoe, Nisi Prius* (17th ed.) 106.

Treaties.]—As a treaty has no municipal effect until confirmed by statute, *Walker* v. *Baird* [1892], *App. Cas.* 491, it is rarely needed in evidence. Extradition treaties, however, are brought into operation by order in council, and can be proved by a King's printer's copy of the order, under 31 & 32 *Vict. c.* 37, *s.* 2 (*ante*, p. 348), or by production of a copy of the official publication of statutory rules and orders (*ante*, p. 348).

Proclamations, etc., of colonial or foreign governments.]—All proclamations, treaties and other acts of State of any foreign country or British colony . . . may be proved in any court of justice or before any person having by law or consent authority to hear, receive, and examine evidence, either

by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved is a proclamation, treaty, or other act of State, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign State or British colony to which the original copy belongs . . . but if any of the aforesaid authenticated copies shall purport to be sealed as hereinbefore directed, the same shall be admitted as evidence in every case in which the original could have been received as evidence without any proof of the seal where a seal is necessary. 14 & 15 *Vict. c.* 99, *s.* 7. Examined copies must be examined with the public archives abroad. A copy printed and published abroad, by the authorized printer of the foreign government or colony, will not, it seems, be sufficient. *Richardson* v. *Anderson*, 1 *Camp.* 65, *n.*, 10 *R. R.* 628, *n.* As to colonial documents, *see* 31 & 32 *Vict. c.* 37, *s.* 3 (*ante*, p. 350).

Maps, Surveys, etc.

Ancient terriers, maps, etc.]—Ancient terriers, surveys, and maps of manors, etc., when evidence, must be produced at the trial, and such circumstances connected with them stated in evidence as may induce the court and jury to give credit to them. *See* 2 *Phil. Ev.* 152: 2 *Taylor Ev.* (9th ed.), 1168, 1169: *Roscoe, Nisi Prius* (17th ed.) 49. Modern maps, or plans, even ordnance maps, are not admissible, *see R.* v. *Milton*, 1 *C. & K.* 58, 61, *except as part of the evidence of the person who made them*, or unless they can be shown to bind in some way the person against whom they are tendered (2 *Taylor, Ev.* (9th ed.), p. 1168), or *semble* unless their accuracy has been verified by the personal examination of the *locus in quo* by the witness who produces them. Maps annexed to inclosure awards are not admissible against persons not subject to the jurisdiction of the commissioners who made the award. *R.* v. *Berger* [1894] 1 *Q. B.* 823: 17 *Cox*, 761.

In *Cator* v. *Hamilton* [1889] 53 *J. P.* 504, an ordnance map was received as evidence of boundary at the date when it was made, *sed quære.*

Surveys, inquisitions, etc.]—Inquisitions, taken by virtue of the King's writ, or of a commission under the seal of the Exchequer (if they have been returned and filed), etc., are proved by the production of the writ or commission and inquisition, or by an examined copy. It is questionable whether they can be evidence at all, until returned and filed. *Cornish* v. *Searell*, 8 *B. & C.* 471: 2 *Taylor, Ev.* (9th ed.) 1166, 1167.

Public surveys, taken by officers acting for the crown, many of which are to be found in the Public Record Office, are proved by the production of them by the proper officer, without further proof, or by examined copies, or copies taken under 1 & 2 *Vict. c.* 94, *s.* 13: 2 *Phil. Ev.* 153.

Domesday-book, when evidence (*see* 2 *Taylor, Evidence* (9th ed.), 1166), must be produced at the trial, if intended to prove the gist of the pleading; *Hob.* 188; but if intended to prove some collateral matter merely, an examined copy (or a Record Office copy) of that part of the book relating to it will be sufficient.

Documents in the Record Office.

All documents in the custody of the Master of the Rolls can be proved either by production of the originals by a clerk from the Record Office or by a Record Office copy made under 1 & 2 *Vict. c.* 94, *s.* 13, or by an examined copy. The documents to which the custody of the Master of

the Rolls extends are determined by 1 & 2 *Vict. c.* 94, *s.* 2, and the orders in council made thereunder. *See Statutory Rules and Orders Revised, ed.* 1904, *vol.* 11, *tit.* "*Record Office*," and *list in* 2 *Taylor, Ev.* (9th ed.), p. 983, *n.* They include the records of the courts merged in the High Court of Justice in 1875 (*ss.* 1, 3).

Public Registers.

Births, marriages, deaths, etc.]—Christenings, marriages, and burials may be proved by the parish register in which they are entered, by giving in evidence either the register itself or an examined copy of it (*Gilb. Ev.* 72; 2 *Bac. Abr. Ev.* (*F.*): *Doe* v. *Barnes*, 1 *M. & Rob.* 386; 42 *R. R.* 809), if the original is in the proper custody, that is, in the church itself, or in the custody of the rector, vicar, curate, or other officiating minister; 52 *G.* 3, *c.* 146; *Doe* v. *Fowler*, 14 *Q. B.* 700: *Walker* v. *Countess Beauchamp*, 6 *C. & P.* 552; or a copy certified by the incumbent or other person to whose custody the original register is intrusted, under 14 & 15 *Vict. c.* 99, *s.* 14 (*post*, p. 379). Before such books or examined copies are received the court must be satisfied that there was a public duty on the person keeping the register to satisfy himself of the truth of the entries made therein. *Doe* v. *Andrews*, 15 *Q. B.* 256, 259, *Erle*, J. Besides the register, some proof must be given of the identity of the parties married, *etc. Birt* v. *Barlow*, 1 *Dougl.* 171. It would seem that a certificate of baptism does not prove the age of the party or the date of birth; *Wihen* v. *Law*, 3 *Stark.* (*N. P.*) 63; 23 *R. R.* 757; *but see R.* v. *North Petherton*, 5 *B. & C.* 508. By 6 & 7 *W.* 4, *c.* 86, *s.* 38, certified copies of entries purporting to be sealed or stamped with the seal of the register office established by that Act are to be "received as evidence of the birth, death or marriage to which they relate, without any further or other proof of such entry." A copy of an entry in the register book of births in a registrar's district within a superintendent registrar's larger district, certified to be a true copy under the hand of the deputy superintendent registrar, who also certified under his hand that the register book was in his lawful custody, was held to be admissible evidence, under 14 & 15 *Vict. c.* 99, *s.* 14, of the entry in the register book upon the mere production of such copy. *R.* v. *Weaver*, *L. R.* 2 *C. C. R.* 85: *L. J.* (*M. C.*) 13. Upon an indictment for carnally knowing a girl, being above the age of ten years and under the age of twelve years, such a certified copy of an entry showing that the child was of the age of eleven years and eight months, was held sufficient proof of the age, there being independent evidence of the identity of the girl with the child whose name was entered in the book. *Id.*; *and see re Goodrich, Payne* v. *Bennett* [1904], *Prob.* 138, disapproving *re Wintle*, *L. R.* 9 *Eq.* 373, in which *Romilly*, M.R., held that the certificate was only evidence of the fact of birth before registration and not of the date of birth. In *R.* v. *Cox* [1898], 1 *Q. B.* 179; 18 *Cox*, 672, 675 (*C. C. R.*), it was held that no statute made production of a birth certificate necessary for proof of the age of a child, and that the age could be proved by persons who had seen the child and by the mistress of an elementary school at which the child attended. "An entry or certified copy of an entry of a birth or death in a register under the *Births and Deaths Registration Acts*, 1836 *to* 1874, or in a certified copy of such a register, shall not be evidence of such birth or death, unless such entry either purports to be signed by some person professing to be the informant and to be such a person as is required by law at the date of such entry to give to the registrar information concerning such birth or death, or purports to be made upon a certificate from a coroner, or in

pursuance of the provisions of this Act with respect to the registration of births and deaths at sea. When more than three months have intervened between the day of the birth and the day of the registration of the birth of any child, the entry or certified copy of the entry made after the commencement of this Act of the birth of such child in a register under the '*Births and Deaths Registration Acts*, 1836 *to* 1874,' or in a certified copy of such a register, shall not be evidence of such birth unless such entry purports (*a*) if it appear that not more than twelve months have so intervened, to be signed by the superintendent registrar as well as by the registrar; or (*b*), if more than twelve months have so intervened, to have been made with the authority of the registrar-general, and in accordance with the prescribed rules. Where more than twelve months have intervened between the day of a death or the finding of a dead body and the day of the registration of the death or the finding of such body, the entry or certified copy of the entry made after the commencement of this Act, of the death in a register under the *Births and Deaths Registration Acts*, 1836 *to* 1874, or in a certified copy of such register, shall not be evidence of such death, unless such entry purports to have been made with the authority of the registrar-general, and in accordance with the prescribed rules," 37 & 38 *Vict. c.* 88, *s.* 38. By the *Non-Parochial Registers Act*, 1840 (3 & 4 *Vict. c.* 92), *s.* 6, all registers and records deposited in the General Register Office by virtue of that Act, except the registers and records of baptisms and marriages at the Fleet and King's Bench prisons, at May-fair, at the Mint in Southwark, etc., which were deposited in the registry of the Bishop of London in the year 1821 (*see s.* 20), shall be deemed to be in legal custody, and be receivable in evidence in all courts of justice: and provision is made for the production of them by the registrar-general. *S.* 17 provides, that in all criminal cases the original register or record shall be produced: *but see* 14 & 15 *Vict. c.* 99, *s.* 14 (*post*, p. 379): 21 & 22 *Vict. c.* 25, *ss.* 1, 3. As to proof of births, deaths, and marriages at sea, *see* 57 & 58 *Vict. c.* 60, *ss.* 240, 253, and *s.* 64, *infra*. As to proof of marriages abroad under British law, *see* 55 & 56 *Vict. c.* 23, *s.* 16. As to proof of births, deaths and marriages out of England, *see Lyell* v. *Kennedy*, 14 *App. Cas.* 437, 448: *Brinkley* v. *Att.-Gen.* 15 *P. D.* 76. The Fleet books were not evidence of a marriage; *Reed* v. *Passer*, 1 *Peake* (3rd ed.), 303; 3 *R. R.* 696; or for any purpose. *Doe* d. *Davies* v. *Gatacre*, 8 *C. & P.* 578. But *see* 3 & 4 *Vict. c.* 92, *s.* 6, *supra*.

The marriage of Jews is by a written contract, which is afterwards solemnly ratified in the synagogue. In order to prove such a marriage, it is not sufficient, it seems, to prove the religious ceremony by the parol testimony of some person who was present, but the contract must also be proved. *Horn* v. *Noel*, 1 *Camp.* 61: *R.* v. *Althausen*, 17 *Cox*, 630; *Nathan* v. *Woolf* [1899] 15 *T. L. R.* 250: *R.* v. *Weinberg*, 33 *L. J. Newsp.* 239; *re de Wilton* [1900] 2 *Ch.* 481.

The register of the navy, with the letters *Dd.* opposite to a name therein registered (it being proved to be the practice of the navy office to write these letters opposite to the names of such persons as died), was held admissible evidence of the death of a man opposite to whose name these letters were written. *Bull.* (*N. P.*) 249; *R.* v. *Rhodes*, 1 *Leach*, 24.

By the *Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 64, *sub-s.* 2, "the following documents shall be admissible in evidence in manner provided by this Act, namely:—(*a*) Any register book under this part of this Act (*Register of British Ships*), on its production from the custody of the registrar, or other person having the lawful custody thereof; (*b*) A certificate of registry under this Act purporting to be signed by the registrar

or other proper officer; (*c*) An indorsement or a certificate of registry purporting to be signed by the registrar or other proper officer; (*d*) Every declaration made in pursuance of this part of this Act in respect of a British ship." *Sub-s.* 3: "A copy or transcript of the register of British ships kept by the Registrar-General of Shipping and Seamen, under the direction of the Board of Trade, shall be admissible in evidence in manner provided by this Act, and have the same effect to all intents as the original register, of which it is a copy or transcript." Further provision is made by *ss.* 719, 720, of the same Act, as to documents issued by the Board of Trade, as supervisor of British shipping.

As to the admissibility of registers of professional men, *see infra.*

By 44 & 45 *Vict. c.* 60 (*Newspaper Libel and Registration Act*, 1881) *s.* 15, "every copy of an entry in or extract from the register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient *primâ facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown."

Certificates given under Public Authority.

The certificates of bishops with respect to marriage, general bastardy, excommunication orders, and other like matters, were received in evidence; *Co. Litt.* 74: *R.* v. *Mawbey*, 6 *T. R*, 619, 637: 3 *R. R.* 282; so is the certificate of the Recorder of London, as to the custom of that city. 1 *Taylor, Ev.* (9th ed.), p. 7. And so are the certificates of justices of peace as to a highway being in repair. *R.* v. *Mawbey, ubi supra.*

But the certificate of a British consul abroad is not admissible as evidence in the courts of this country. *Waldron* v. *Coombe*, 3 *Taunt.* 162: 12 *R. R.* 629: *Ex parte Church*, 1 *D. & R.* 324; except under specific statutory provisions, *e.g.*, 52 & 53 *Vict. c.* 10, *s.* 6 (*Oaths*); 55 & 56 *Vict. c.* 23 (*Foreign Marriage*).

Professional qualifications—Barristers.]—The proof that a man is a barrister is by certificate of his call issued by the Inn to which he belongs. The *Law List* is not, strictly speaking, evidence as to barristers.

Solicitors.]—The certificates authorizing solicitors to practise, granted in pursuance of 23 & 24 *Vict. c.* 127, if in the form prescribed by 40 & 41 *Vict. c.* 25, *s.* 16, are, it seems, admissible in evidence without further proof. The *Law List*, published under the authority of the Commissioners of Inland Revenue, is *primâ facie* evidence of the right of solicitors and conveyancers named therein to practise during the current year; and on a prosecution for obtaining money by a false pretence of being a solicitor it was held sufficient to prove that the accused was not qualified by producing the *Law List*. 23 & 24 *Vict. c.* 127, *s.* 22: *R.* v. *Wenham*, 10 *Cox*, 222. An extract from the roll of solicitors kept by the Incorporated Law Society as registrar of solicitors, certified under the hand of the secretary of the society, is evidence of the facts appearing in such extract. 23 & 24 *Vict. c.* 127, *s.* 22; 51 & 52 *Vict. c.* 65, *s.* 5.

Medical practitioners.]—The mere production of a diploma of doctor of physic, under the seal of one of the universities, is not of itself evidence

to show that the party therein named is entitled to that degree, *Moises* v. *Thornton*, 8 *T. R.* 303. *See Collins* v. *Carnegie*, 3 *Nev. & M.* 703; 1 *A. & E.* 695. A copy of the *Medical Register*, annually published by the Registrar of the General Medical Council, is evidence of the due registration of the persons named therein: and absence of a name from the Register is *primâ facie* evidence that the person is not a registered medical practitioner: but in the case of a person not on the register a certified copy under the hand of the registrar of the general medical council, or of any branch council of the entry of the name of any person on the general or local medical register, is evidence that such person is registered under the *Medical Act*, 1858 (21 & 22 *Vict. c.* 90, *s.* 27: *see Pedgrift* v. *Chevallier*, 8 *C. B.* (*N. S*). 246. A certificate of the qualification of an apothecary if purporting to be under the common seal of the Society of Apothecaries is sufficient evidence of the qualification of the person therein named to practise as an apothecary without proof of the seal: 14 & 15 *Vict. c.* 99, *s.* 8. A certificate under the hand of the registrar, and countersigned by the president or two members of the council of the Pharmaceutical Society, is evidence that the person therein specified is registered under 15 & 16 *Vict. c.* 56, or the *Pharmacy Act*, 1868, as the case may be: 31 & 32 *Vict. c.* 121, *s.* 13. A copy of the register of dentists or veterinary surgeons, purporting to be printed or published in pursuance of the statute regulating those professions, is *primâ facie* evidence of registration: and provisions similar to those of *s.* 27 of the *Medical Act*, 1858, *supra*, are made as to proof of the registration of persons not appearing in the register, 41 & 42 *Vict. c.* 33, *s.* 29 (*Dentists*); 44 & 45 *Vict. c.* 62, *s.* 9 (*Veterinary Surgeons*).

Companies and societies.]—The incorporation of a company under the *Companies Acts*, 1862 to 1900, may be proved by the original certificate under 25 & 26 *Vict. c.* 89, *s.* 174, or by a copy given by the registrar or an assistant registrar of joint stock companies, and documents or parts of documents required to be registered with such registrar are proved by copies or extracts certified under the hand of the registrar or an assistant registrar. 40 & 41 *Vict. c.* 26, *s.* 6. A certified copy of the return made to the Commissioners of Inland Revenue under 7 *G.* 4, *c.* 46, *s.* 7, by the public officer of a joint stock bank is not the only admissible evidence of the making of the return. *R.* v. *Carter*, 1 *Den.* 65; 1 *C. & K.* 741.

The certificate of registry of a trade union issued by the Registrar of Friendly Societies, unless proved to have been withdrawn or cancelled, is conclusive evidence of compliance with the regulations of the *Trade Union Act*, 1871, with respect to registry: 34 & 35 *Vict. c.* 31, *s.* 13 (5). A like provision is made as to friendly societies by 59 & 60 *Vict. c.* 25, *ss.* 11, 96, 100; as to industrial and provident societies by 56 & 57 *Vict. c.* 39, *ss.* 8, 75; and as to building societies by 37 & 38 *Vict. c.* 42, *s.* 20.

Elections.]—In any criminal or civil proceedings in relation to corrupt practices at parliamentary elections, the certificate of the returning officer is sufficient evidence of the due holding of the election, and of any person therein named having been a candidate thereat. 26 & 27 *Vict. c.* 29, *s.* 6. This enactment is extended by *s.* 53 of the *Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 *Vict. c.* 51) to any prosecution on indictment for the offence of any corrupt practice within the meaning of that Act at a parliamentary election, and by *s.* 30 of the *Municipal Elections* (*Corrupt and Illegal Practices*) *Act*, 1884 (47 & 48 *Vict. c.* 70) which incorporates 46 & 47 *Vict. c.* 51, *s.* 53, to prosecutions on indictment for the offence of any corrupt practice at a municipal election, and by

s. 35 of 47 & 48 *Vict.* c. 70, to similar prosecutions for corrupt practices at municipal elections in the city of London, and by s. 36 of the last-mentioned statute to similar prosecutions for corrupt practices at certain other elections in the said section specified. It has been further extended to the elections of county councils (51 & 52 *Vict.* c. 41, s. 75) and of urban and rural district councils, and of boards of guardians and parish councils, 56 & 57 *Vict.* c. 73, s. 48: and of metropolitan borough councils, 62 & 63 *Vict.* c. 14, s. 2, *sub-s.* 5.

Acts, etc., of Public Bodies.

Corporation books, etc.]—Entries in corporation books, and in the books of public companies, relating to things public and general, and entries in other public books, may be proved by examined copies. *R.* v. *Mothersell*, 1 *Str.* 93: *R.* v. *Mayor, etc., of London*, *Id.* 307: *Mercers of Shrewsbury* v. *Hart*, 1 *C. & P.* 113. Entries in the books of the Custom House, of the Bank of England, or the like, may be proved in the same manner. *See Geery* v. *Hopkins*, 2 *Ld. Raym.* 851: *Warriner* v. *Giles*, 2 *Str.* 954; *Crew* v. *Saunders*, *Id.* 1005: *Edwards* v. *Vesey*, *Cas. (K. B.) temp. Hardw.* 128: *and see* 2 *Doug.* 593, *n.* 3: *Marsh* v. *Collnett*, 5 *R. R.* 763: 2 *Esp.* 665: *Hodgson* v. *Fullarton*, 4 *Taunt.* 787: *Mortimer* v. *M'Callan*, 6 *M. & W.* 58. But instruments of a private nature, such as a letter found in the corporation chest, *R.* v. *Gwyn*, 1 *Str.* 401, or the like, must be proved in the ordinary way as any other instrument. Where under any Act "a document or proceeding of any corporation or joint stock or other company is receivable in evidence," it shall be admitted if it purports to bear the seal, or stamp, or signature directed by the Act, without proof of the seal, stamp, or signature, or official character of the person purporting to have signed. 8 & 9 *Vict.* c. 113, s. 1 (*post*, p. 378); *and see Roscoe, Nisi Prius* (17th ed.), 132.

Inspection of corporation books and other public writings is granted in civil actions, but not in criminal cases where the corporation is defendant, as it would have the effect of making the corporation furnish evidence to criminate itself. *R.* v. *Heydon*, 1 *W. Bl.* 351: *R.* v. *Purnell*, *Id.* 37; 1 *Wils.* (*K. B.*) 239; *cf.* 1 *Ld. Raym.* 705; 2 *Id.* 927; 2 *Str.* 1210; *and see Spokes* v. *Grosvenor Hotel Co.* [1897] 2 *Q. B.* 124.

Proceedings of local authorities.]—A minute of proceedings at a meeting of the council of a municipal borough, or of a committee of such council, signed at the same or the next ensuing meeting, by the mayor, or by a member of the council, or of the committee, describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof. Until the contrary is proved, every meeting of the council, or of a committee, in respect of the proceedings whereof a minute has been so made, shall be deemed to have been duly convened and held, and all the members of the meeting shall be deemed to have been duly qualified; and where the proceedings are proceedings of a committee, the committee shall be deemed to have been duly constituted, and to have had power to deal with the matters referred to in the minutes, 45 & 46 *Vict.* c. 50, s. 22, *sub-ss.* 5, 6. As to the minutes of a metropolitan borough council, *see* 18 & 19 *Vict.* c. 120, s. 60; 62 & 63 *Vict.* c. 14, s. 2, *sub-s.* 5.

The minutes and proceedings of county councils are proved in the same way as those of town councils. 51 & 52 *Vict.* c. 41, s. 22, *sub-s.* 5. The minutes and proceedings of the London County Council are regulated by a local Act of 1893 (56 & 57 *Vict.* c. *ccxxi*, s. 10). They can be proved

either by printed copies under 44 & 45 *Vict. c.* 48, *s.* 33, or under 45 & 46 *Vict. c.* 50, *s.* 22. The minutes and proceedings of urban and rural district councils, and boards of guardians and their committees, may be proved under 38 & 39 *Vict. c.* 55, *s.* 199, and *sched.* 1, *r.* 10; 56 & 57 *Vict. c.* 73, *s.* 59, and minutes of parish councils and parish meetings as directed by 56 & 57 *Vict. c.* 73, *sched.* 1, *part* 3.

Parish books.]—On the trial of an indictment for the non-repair of a highway, entries in an ancient parish book, produced by the churchwarden from the parish chest, were held receivable in evidence to show who were the surveyors of the highways at that time. *R.* v. *Pembridge*, *C. & Mar.* 157.

By-laws.]—8 & 9 *Vict. c.* 113, *s.* 1 (*post*, p. 378), dispenses with proof of the seal or signature or official character of by-laws which purport to be sealed or signed in accordance with any other past or future Act. Under the *Municipal Corporations Act*, 1882, the production of a written copy of a by-law made by the council under that Act, or under any former or present or future general or local Act of parliament, if authenticated by the corporate seal shall, until the contrary is proved, be sufficient evidence of the due making and existence of the by-law, and, if it is so stated in the copy, of the by-law having been approved and confirmed by the authority whose approval or confirmation is required to the making or before the enforcing of the by-law. 45 & 46 *Vict. c.* 50, *s.* 24. This provision is extended by 51 & 52 *Vict. c.* 41, *s.* 23, to by-laws made by a county council, and by 62 & 63 *Vict. c.* 14, *s.* 5, *sub-s.* 2, and *sched.* 2, *part* 2, to by-laws made by a metropolitan borough council.

A copy of by-laws made under the *Public Health Act*, 1875 (made by a district council not being the council of a borough), if signed and certified by the clerk of the council to be a true copy, and to have been duly confirmed, shall be evidence, until the contrary is proved, in all legal proceedings of the due making, confirmation and existence of such by-laws without further or other proof. 38 & 39 *Vict. c.* 55, *s.* 186. By-laws made under prior statutes but continued in force by *s.* 326 of the *Public Health Act*, 1875, must be proved in accordance with the Act under which they were made, or under 8 & 9 *Vict. c.* 113, *s.* 1. A print of municipal by-laws with a print of the seal or certificate has been held insufficient. *Drew* v. *Harlow*, 39 *J. P.* 420. The proof of other by-laws depends on the statute under which they are made, and on 8 & 9 *Vict. c.* 113, *s.* 1 (*post*, p. 378). For a list of such statutes, *see* 2 *Taylor, Evidence* (9th ed.), 1088-1091.

Judicial Documents.

House of Lords.]—A judgment of the House of Lords is proved by an examined copy from the Journal of the House. *Jones* v. *Randall*, 1 *Cowp.* 17; or by a copy purporting to be printed by authority. *See* 8 & 9 *Vict. c.* 113, *s.* 3 (*ante*, p. 347).

Supreme Court.]—A record of the Supreme Court, or affidavit filed therein may be proved by production of the original from the central office, by an officer of the court, under order of a judge or master. A *subpœna* does not lie to produce it. *R. S. C.* 1883, *Order LXI., r.* 28. The order is obtained by obtaining the signature of a master to an official bespeak paper specifying the documents required, and where it is wanted for production elsewhere than at the Royal Courts by depositing a

sufficient sum to secure the expenses of the attendance of the producing officer. *Order LXI., r.* 29. Production of the original record or document or an exemplification appears to be necessary at common law when it is the gist of the indictment or defence, which is seldom the case, except on a plea of *autrefois convict* or *acquit* (*ante*, pp. 173, 177); or an indictment for an offence after a previous conviction (*post*, p. 360); or escaping from prison, or for being at large during sentence, *R.* v. *Shaw*, *R. & R.* 526; or for perjury. *R.* v. *Newman*, 2 *Den.* 390: 21 *L. J.* (*M. C.*) 75. Exemplifications are now seldom used for the purposes of proceedings in England. In all other cases an examined copy (*ante*, p. 345) may be used. *Leyfield's Cas.*, 10 *Co. Rep.* 92 *b.*; 2 *Rolle Abr.* 678, *L.* 45; *Hardr.* 119. But the modern form of office copy (*ante*, p. 345), being under the seal of the court is equivalent to an exemplification, and is the simplest mode of proof where the original is not necessary, and a Record Office copy would seem to be admissible. *See Roscoe, Nisi Prius* (17th ed.) 108. The ancient mode of obtaining an exemplification of a record of the Court of King's Bench for use in an inferior court was by removing the record into Chancery by *certiorari* issuing from the Petty Bag office to the Chief Justice of the court of which the record was: on removal an exemplification under the great seal was sent by *mittimus* to the inferior court. *Gilb. Ev.* 14, 15. The functions of the Petty Bag office, which included the preparation of exemplifications, were in part transferred to officers of the Supreme Court, and in part to the Clerk of the Crown in Chancery, by 37 & 38 *Vict. c.* 81, *s.* 5. And the Petty Bag office was under that section abolished in 1889, and the residue of its business, except as to the roll of solicitors, was transferred to the Crown Office of the High Court. (*See Statutory Rules and Orders Revised* (ed. 1904), *vol.* 12, *tit.* "*Supreme Court, E,*" p. 931). With the creation of the High Court the procedure by *certiorari* is apparently defunct, and application for an exemplification under the great seal apparently should now be made to the Clerk of the Crown in Chancery at the Lord Chancellor's office.

Proceedings not being records.]—Rules or regulations of court as to procedure are proved as statutory rules. (*See ante*, p. 348.) Rules or orders of court not amounting to judgments are proved by examined or office copies. *Selby* v. *Harris*, 1 *Ld. Raym.* 745: *Duncan* v. *Scott*, 1 *Camp.* 100: *Gyles* v. *Hill*, 1 *Camp.* 471, *n.*: *Streeter* v. *Bartlett*, 5 *C. B.* 562. A rule of court is evidence that the court have ordered as is therein stated; but it is not evidence of any matters in it which are the mere suggestions of the party who obtained it. *Woodroffe* v. *Williams*, 6 *Taunt.* 19.

By 8 & 9 *Vict. c.* 113, *s.* 2, "all courts, justices, masters in chancery, masters of courts, commissioners judicially acting; and other judicial officers, are thenceforth to take judicial notice of the signature of any of the judges of *the Supreme Court*, attached or appended to any decree, order, certificate, or other judicial or official document."

Affidavits, being admissions upon oath, are evidence as such against the parties who made them. *Gilb. Ev.* 51, 56; *Harmar* v. *Davis*, 7 *Taunt.* 577. When filed in the central office of the High Court, they may be proved by office copies; (*R. S. C.* 1883, *Order XXXVII., r.* 4), or by examined copies, or by production of the original from the proper custody. Affidavits not filed can be proved only by production of the affidavits themselves, and by parol evidence of their having been sworn: *Gilb. Ev.* 56. Even if not proved to be sworn, yet perhaps they may be received as admissions of the deponents, upon proof of their handwriting. *Gilb. Ev.* 56. Upon an indictment for perjury in an affidavit, the affidavit, if in existence, must in all cases be produced, whether filed or not, and

must be proved. *R.* v. *James*, 1 *Show.* 397: *Crook* v. *Dowling*, 3 *Dougl.* 75: *Rees* v. *Bowen*, *M'Clel. & Y.* 383. But upon proof that it has been lost or destroyed, secondary evidence may be given of its contents and of the defendant's signature to it. *R.* v. *Milnes*, 2 *F. & F.* 10. Where an affidavit purported to have been sworn before a commissioner of oaths, but his commission was not proved, *Patteson*, J., held the affidavit to be admissible, and that proof of the commissioner's acting was sufficient. *R.* v. *Howard*, 1 *M. & Rob.* 187. And on the trial of an indictment for perjury, assigned on an affidavit sworn in the Court of Queen's Bench, proof of the defendant's signature to the affidavit, and that under a jurat, "sworn in open court at Westminster Hall, the 10th day of June, 1846," the words, "by the court" were in the handwriting of one of the masters of the Court of Queen's Bench, was held sufficient evidence of the swearing of the affidavit in that court, without any further proof that the master was in court when the affidavit was sworn. *R.* v. *Turner*, 2 *C. & K.* 732: *see also R.* v. *Spencer*, 1 *C. & P.* 260; *Ry. & M.* 97.

Where an affidavit is sworn abroad by a person having authority to administer an oath not derived from the law of a foreign state, judicial or official notice is to be taken of his seal or signature affixed, impressed, or subscribed to the affidavit. 52 *&* 53 *Vict. c.* 10, *s.* 3 (2).

A *cognovit actionem* filed in court may be proved by an examined copy together with proof of the defendant's signature to the original: 3 *&* 4 *G.* 4, *c.* 39: *Scott* v. *Lewis*, 7 *C. & P.* 347; or by an office copy.

Convictions.]—The proper proof that a prisoner was in lawful custody under a sentence of imprisonment passed at the assizes is by the proof of the record of his conviction; and neither the production of the calendar of sentences, signed by the clerk of assize, and by him delivered to the gaoler, nor the evidence of a person who heard sentence passed, is sufficient for this purpose. *R.* v. *Bourdon*, 2 *C. & K.* 366, *Maule*, J.

At common law upon an indictment for a subsequent felony the record of a conviction for a previous felony can be proved by the production of the record itself if it be a record of the same court or by an exemplification if it be the record of another court.

By the *Evidence Act*, 1851 (14 *&* 15 *Vict. c.* 99), *s.* 13, "whenever, in any proceeding whatever (*civil as well as criminal*, *Richardson* v. *Willis*, *L. R.* 8 *Ex.* 69; 42 *L. J.*, *Ex.* 15), it may be necessary to prove the trial and conviction or acquittal of any person charged with an indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof; but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction and judgment, or acquittal, as the case may be, omitting the formal parts thereof." It seems that under this enactment the record must be made up, although the formal parts need not be included in the certificate; but the production by the officer of the court (being the same court in which the subsequent proceeding was had) of the caption, the indictment, with the indorsement of the prisoner's plea, the verdict, and the sentence of the court upon it, together with the minutes of the trial, made by the officer in court, was held sufficient evidence of the former trial, without the production either of the record or of a certificate under this section. *R.* v. *Newman*, 2 *Den.* 390; 21 *L. J.* (*M. C.*) 75: *R.* v. *Horne Tooke*, 25 *St. Tr.* 447. *See R.* v. *Parry*, 7 *C. & P.* 836. As to what constitutes a conviction, *see ante*, p. 230.

Convictions before justices of peace may be proved by examined copies, which the clerk of the peace for the proper county will make out upon an application for that purpose. *R.* v. *Gilkes*, 8 *B. & C.* 439. The previous conviction whether summary or on indictment is now in practice usually proved under the *Prevention of Crimes Act*, 1871 (34 & 35 *Vict. c.* 112) *s.* 18; which provides that "a previous conviction may be proved *in any legal proceeding whatever* against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted. A record or extract of a conviction shall, *in the case of an indictable offence*, consist of a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction, and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and *in the case of a summary conviction* shall consist of a copy of such conviction, purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned. A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same. A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom; and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof. A fee not exceeding five shillings may be charged for a record of a conviction given in pursuance of this section. The mode of proving a previous conviction authorized by this section shall be in addition to and not in exclusion of any other authorized mode of proving such conviction." As to proof of summary convictions by the court register, *see Commissioner of Police* v. *Donovan* [1903] 1 *K. B.* 895.

Under the following Acts upon an indictment for subsequent felony, after a previous conviction for felony, proof of the previous conviction may be given by a certificate containing the substance and effect only (omitting the formal part) of the indictment or conviction for the previous felony purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, which certificate is upon proof of identity sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same. 7 & 8 *G.* 4, *c.* 28, *s.* 11. Under this section it has been held that the certificate should show that judgment was given. *R.* v. *Ackroyd*, 1 *C. & K.* 158; *Cresswell*, J.: *R.* v. *Stonnell*, 1 *Cox*, 142, *Patteson*, J. As to the mode of proving a previous conviction against a person indicted for any offence punishable under the *Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *see s.* 116 (*post*, p. 430). As to the mode of proving a previous conviction of any offence against the coin, *see* 24 & 25 *Vict. c.* 99, *s.* 37. Upon the trial of an indictment for being at large before the expiration of a sentence of transportation, provision is made by 5 *G.* 4, *c.* 84, *s.* 24 for proof of the former conviction and sentence by a certificate of the officer of the court. *See also* 28 & 29 *Vict. c.* 18, *s.* 6 (*post*, p. 404), which regulates the proof of a conviction for the purpose of discrediting a witness.

In all cases not provided for by statute, where a copy of a record is

given in evidence, it must be a copy of the whole record; because the omission of part might have the effect of altering the sense and import of the residue. *Gilb. Ev.* 23; 3 *Co. Inst.* 173. Records are not complete until delivered into court on parchment; therefore a minute-book, from which an entry of the proceedings at sessions is made, and from which book the roll containing the record of such proceedings is subsequently made up, is not a record. *R.* v. *Bellamy, Ry. & M.* 171: *R.* v. *Thring*, 5 *C. & P.* 507: *see R.* v. *Ward*, 6 *C. & P.* 366: *R.* v. *Bourdon*, 2 *C. & P.* 366 (*ante*, p. 360). Thus, to prove a verdict you must give in evidence an examined copy or office copy of the whole record, including the judgment; *Bull.* (*N. P.*) 234: *Gilb. Ev.* 37, 68; for otherwise it would not appear but that judgment had been arrested, or a new trial granted; *Bull.* (*N. P.*) 234; *Pitton* v. *Walter*, 1 *Str.* 162; unless in the case of an issue out of Chancery, where no judgment was entered up. *Bull.* (*N. P.*) 234.

There is now no *Nisi Prius* record, and no *postea* in a civil case in the High Court. As to proof of a trial had by producing *Nisi Prius* record and *postea*, *see Archb. Cr. Pl.* (21st ed.) 283. And as to the *postea* in criminal trials in the High Court, *see Short & Mellor, Cr. Off. Pr.* 229. Under Order XXXVI., Rule 30, of the Rules of the Supreme Court, 1883, copies of the pleadings are to be deposited on entering the action for trial. The certificate provided by Order XXXVI., Rule 42, takes the place of the *postea*, and judgments and orders need not now be enrolled, whether the judgment is dated before or since the commencement of the *Judicature Act*, 1873, or November 1, 1875, Order LXI., Rule 8. "Office copies of all writs, records, pleadings, and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters, and between all persons or parties to the same extent as the original would be admissible." *R. S. C.* 1883, *Order XXXVII.*, *r.* 4. But this rule does not apply to proceedings on the Crown side of the K. B. D. On an indictment for perjury in an action it was held that an allegation that judgment was entered up was proved by production of the book from the judgment office in which the *incipitur* was entered. *R.* v. *Gordon, C. & Mar.* 410. Upon an indictment for perjury, charged as having been committed on the trial of an action in the High Court of Justice, the existence and trial of the action are sufficiently proved by the production, by the officer of the court, of the copy writ filed under Order V., Rule 7, and the copy pleadings filed under Order XLI., Rule 1, of the Rules of the Supreme Court, 1875, and by the production by the solicitor of the defendants in the action, of the original order to dismiss the action. *R.* v. *Scott*, 2 *Q. B. D.* 415; 46 *L. J.* (*M. C.*) 259. 14 & 15 *Vict. c.* 100, *s.* 22, prescribes the mode of proving the trial of an indictment for felony or misdemeanor upon the trial of an indictment for perjury or subornation of perjury, alleged to have been committed at the former trial. If it be necessary to prove what a witness said upon a former trial it may be proved upon oath from the notes or recollections of any person who was present at the time; *Mayor of Doncaster* v. *Day*, 3 *Taunt.* 262; 12 *R. R.* 650; but in order to let in such evidence, it must be first proved that the former trial took place.

At common law in order to prove a writ, if it be the gist of the pleading, you must get it returned, and then procure and give in evidence an examined copy of it. But if it be matter of inducement merely, it is not necessary that it should be returned or proved by an examined copy; *Gilb. Ev.* 39; but the writ itself, if in your possession, may be given in evidence; or if in the possession of the other party, then, upon proving the service of a notice upon him to produce it, and that it has been returned and filed, but that it was in the other party's possession after

the day on which it was returnable, you will be allowed to give a copy of it in evidence. *Edmondstone* v. *Plaisted* (or *Plaistow*), 4 *Esp.* 160; 2 *East*, 572. *See Knight* v. *Dauler* [1664] *Hardr.* 323: *Wright* v. *Pindar*, *Aleyn*, 18. Until the non-production is sufficiently accounted for parol evidence of its contents is not admissible. *Lester* v. *Jenkins*, 8 *B. & C.* 339.

Enrolled deeds.]—To prove a deed which has been enrolled, the indorsement of the enrolment is sufficient evidence, without further proof of the deed; *Gilb. Ev.* 24, 96; *Smartle* v. *Williams*, 1 *Salk.* 280; *and see Kinnersley* v. *Orpe*, 1 *Doug.* 56: *Rowe* v. *Brenton*, 8 *B. & C.* 737, 755. But if the deed be lost, it can be proved only by an examined copy of the enrolment. *Baikie* v. *Chandless*, 3 *Camp.* 17, 20; 13 *R. R.* 738. The copy is obtained in the case of deeds enrolled in the High Court from the enrolment department of the central office; *see R. S. C.* 1883, Order LXI. But enrolled deeds must within two years of enrolment be sent to the Public Record Office; and when this has been done they can be proved by a Record Office copy under 1 & 2 *Vict. c.* 94 (*ante*, p. 345). All this, however, must be understood of deeds only which need enrolment; for if any other deed be enrolled (as, for instance, a bargain and sale for years, or the like), and be afterwards offered in evidence, it must be proved in the ordinary way. *Gilb. Ev.* 99; *Page's case*, 5 *Co. Rep.* 53: *Smartle* v. *Williams*, 1 *Salk.* 280.

Proceedings in Courts of Equity.]—Prior to the *Judicature Acts*, the Court of Chancery was not regarded as a Court of Record. 3 *Bl. Com.* 24, *n.* Since its fusion with the High Court its records and documents are provable as documents of the High Court, *see ante*, p. 358. All the records of the old Court of Chancery are now lodged in the Public Record Office, and may be proved by Record Office copies under 1 & 2 *Vict. c.* 94, *s.* 13 (*ante*, p. 345). Decrees of the old Court of Chancery may still and judgments of the Chancery Division may be proved by exemplification under the wafer great seal; but this proceeding is only adopted for the purpose of enforcing them under the *Crown Debts Act*, 1801 (41 *G.* 3, *c.* 90). Independently of this mood of proof, in the case of proceedings prior to November 1, 1875, the bill and answer may be proved by examined copies, (*ante*, p. 345): *Gilb. Ev.* 56: *Hennell* v. *Lyon*, 1 *B. & Ald.* 182: *Hodgkinson* v. *Willis*, 3 *Camp.* 401; or by Record Office copies under 1 & 2 *Vict. c.* 94, (*ante*, p. 345). In order to prove the answer, it was necessary to give in evidence an examined copy of the bill as well as of the answer; *Gilb. Ev.* 55; but where it was proved by the proper officer that he had searched diligently in the office for the bill and could not find it, the court allowed the answer to be read without it. *Id. See Ewer* v. *Ambrose*, 4 *B. & C.* 25; *Rowe* v. *Brenton*, 8 *B. & C.* 737, 765. Where the bill and answer are recited (as formerly they were) in the decree, the production of the latter was sufficient proof of them. *Com. Dig. Evid.* (*C.* 1): *Wharton Peerage case*, 12 *Cl. & F.* 295; 8 *Eng. Rep.* 1410; *see Blower* v. *Hollis*, 1 *Cr. & M.* 393. Upon an indictment for perjury alleged to have been committed in an answer, the answer itself must be produced, and it must be proved either that the party was sworn to it, or that the name subscribed to it is his handwriting, and that the name subscribed to the jurat is the name and handwriting of a master or other person having authority for that purpose. *R.* v. *Morris*, 2 *Burr.* 1189: *R.* v. *Benson*, 2 *Camp.* 508. *See R.* v. *Spencer*, 1 *C. & P.* 260; *Ry. & M.* 97. And the same as to depositions in equity. As to the admissibility of decrees and orders in equity *see Layburn* v. *Crisp*, 4 *M. & W.* 320; 8 *C. & P.* 397; *Pim* v. *Curell*, 6 *M. & W.* 234; *Mayor of Ludlow* v. *Charlton*, 9 *C. & P.* 242. It would

seem that bills, answers, and depositions in equity might also be proved by copies certified by the Clerk of Records and Writs under 14 & 15 *Vict.* c. 99, *s.* 14 (*post*, p. 379). *Reeve* v. *Hodson*, 10 *Hare, App. XIX., Wood, V.-C.*

A decree in equity, if it remain in paper, may be proved by an examined copy (*ante*, p. 345), together with an examined copy of the bill and answer; but if it has been enrolled, it must be proved by an exemplification under the wafer great seal (*ante*, p. 345), or by a Record Office copy (*see ante*, 345).

Proceedings in Ecclesiastical Courts.]—The libel, answer, depositions, and sentence in ecclesiastical courts, in matters within their jurisdiction, are provable in the same manner as the bill, answer, depositions, and decree in equity. *See supra, Gilb. Ev.* 66, 67; *Com. Dig. Ev.* (*C.* 3); *Roscoe, Nisi Prius* (17th ed.), 117.

The practice of the ecclesiastical courts may be proved in the courts of common law by parol evidence. *Beaurain* v. *Scott*, 3 *Camp.* 388; 14 *R. R.* 759.

Proceedings in the Divorce Court.]—On the transfer of matrimonial causes to the Divorce Court, it was provided that all decrees and orders, and copies of decrees or orders, of the said court, sealed with its seal, should be received in evidence. 20 & 21 *Vict. c.* 85, *s.* 13. And this enactment is not affected by subsequent legislation, though the court is now part of the High Court of Justice. Judgments of a matrimonial court operate as judgments *in rem, i.e.*: if pronounced by a competent court on an issue properly arising in the cause, they are conclusive evidence of the facts they establish, except it is said in suits of jactitation of marriage. *Duchess of Kingston's case*, 20 *St. Tr.* 355; *Clewes* v. *Bathurst*, 2 *Str.* 960; *Cas.* (*K. B.*) *Temp. Hardw.* 11; *Mendez* v. *Villa Real, ib.* 18. *See Dicey, Conflict of Laws*, p. 430.

Proceedings in Probate Courts.]—With reference to wills proved since Jan. 11, 1858, it is enacted by *s.* 22 of the *Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), that "all probates, letters of administration, orders, and other instruments and exemplifications and copies thereof respectively purporting to be sealed with any seal of the Court of Probate shall in all parts of the United Kingdom be received in evidence without further proof thereof." This provision is not affected by the amalgamation of the Court of Probate with the High Court of Justice.

Wills affecting real estate proved since Jan. 11, 1858, can be proved by the probate or by an office copy under the seal of the court. 20 & 21 *Vict. c.* 77, *ss.* 61, 62. But the probate is not admissible to prove such wills proved in an ecclesiastical court prior to Jan 11, 1858. *See* 2 *Taylor, Evidence* (9th ed.), p. 1161. *Roscoe, Nisi Prius* (16th ed.), 145.

The following decisions are with reference to probate and grants in the ecclesiastical courts. In an indictment for perjury, it was averred, by way of inducement, that a suit was instituted in the Prerogative Court by A. against B., to dispute the validity of a will; it was held that the production of the original allegations of both parties to the suit, signed by their advocates, and proof of the advocates' signatures, and that they acted as advocates in that court, was sufficient proof of the averment, without the production of the *caveat*. *R.* v. *Turner*, 2 *C.* & *K.* 732. The probate of a will, under the seal of the proper ecclesiastical court, was sufficient evidence to prove the will of personal property, or that J. S. is the executor, or the like; and the seal of the court sufficiently authenticates it, without further proof. *Gilb. Ev.* 71; 1 *Rolle Abr.* 678: *R.* v.

Netherseal, 4 *T. R.* 258: *Hoe* v. *Nelthorpe*, 3 *Salk.* 154; *Bull.* (*N. P.*) 46: and *see Gorton* v. *Dyson*, 1 *B. & B.* 219: *R.* v. *Turner*, 2 *C. & K.* 732. The production of the original will from the proper custody, with the act of the court ordering probate, is sufficient evidence of the executor's title without accounting for the non-production of the probate. *Cox* v. *Allingham*, *Jacob*, 514. And where by the practice of an ecclesiastical court no book was kept, but grants of probate were recorded by a minute indorsed on or entered at the foot of the original will, and written by the officer of the court, it was held that the production of the will, with such minute on it, was sufficient. *Doe* d. *Edwards* v. *Gunning*, 2 *Nev. & Per.* 260: *Doe* d. *Basset* v. *Mew*, *Id.* 266. An examined copy of the act book is also evidence. *Davis* v. *Williams*, 13 *East*, 232: *Dorrett* v. *Meux*, 15 *C. B.* 142.

The copy of the probate is conclusive evidence in the above cases, that is to say, the other party will not be permitted to allege that the will proved is not the last will and testament of the deceased; *Gilb. Ev.* 73; *Chichester* v. *Philips*, *Sir T. Raym.* 404, 406; *Noell* v. *Wells*, 1 *Sid.* 359; except upon an indictment for forging a will, in which the probate unrevoked is not conclusive evidence of the validity of the will, so as to bar the prosecution; *R.* v. *Buttery*, *R. & R.* 342; but the prosecutor may give in evidence that the probate is forged, or that it was obtained by surprise. *Gilb. Ev.* 73, 74; *Sir T. Raym. and Sid., ubi supra.* To prove revocation of a probate, an entry of the revocation in the act book of the court, in which all cases are officially entered, is good evidence. *R.* v. *Ramsbottom*, 1 *Leach*, 25 *n.*

Letters of administration granted since Jan. 11, 1858, are proved under 20 & 21 *Vict. c.* 77, *s.* 22 (*ante*, p. 364); letters granted prior to that date can be proved by production of the letters of administration, or by a certificate from the ecclesiastical court, that administration was granted, or by calling a clerk from the Court of Probate to produce the book of acts, containing the direction for the letters to issue, and the surrogate's *fiat* for the same. *Bull.* (*N. P.*) 246: *Elden* v. *Keddell*, 8 *East*, 187; 9 *R. R.* 401: *Davis* v. *Williams*, 13 *East*, 232.

Proceedings in Admiralty.]—Proceedings in and records of the Admiralty Division of the High Court are proved as stated, *ante*, p. 358. The libel, answer, depositions, and sentence in the Admiralty Court, in proceedings in the Admiralty Court prior to the *Judicature Acts*, can be proved in the same manner as the bill, answer, deposition, and decree of a court of equity (*ante*, p. 365). *See Com. Dig. Ev.* (*C.* 1). The judgment is conclusive evidence of the facts it establishes, not only against those concerned in interest and persons claiming under them, but also against strangers. Thus, a sentence condemning goods as captured from the enemy is conclusive evidence that they were so captured. *Stirling* v. *Vaughan*, 11 *East*, 619; 11 *R. R.* 276: *Castrique* v. *Imrie*, *L. R.* 4 *H. L.* 414: *The Minna Craig* [1897] 1 *Q. B.* 55, 460; *and see Dicey*, *Conflict of Laws*, 265, 427.

Proceedings in courts of assize or quarter sessions.]—Courts of assize, oyer and terminer, and gaol delivery, including the Central Criminal Court, are now part of the High Court, and their records are those of that court. *R.* v. *Dudley*, 14 *Q. B. D.* 273, 560: *R.* v. *Parke* [1903] 2 *K. B.* 432. Courts of quarter sessions for the trial of indictments are said not to be inferior courts. *R.* v. *Smith*, 8 *B. & C.* 341, 342, *Tenterden*, L.C.J. The record, and not a mere minute or entry, must be produced, except in cases dealt with by statute (*ante*, p. 360): *R.* v. *Smith*, *ubi*

supra: Roscoe, Nisi Prius (17th ed.), 109, 118. Proof of previous convictions at quarter sessions or before a court of summary jurisdiction may be made under 34 & 35 *Vict. c.* 112, *s.* 18 (*ante*, p. 361).

Where the record of a court of quarter sessions is pleaded in a court of oyer and terminer, or the converse, or where the record of one court of oyer and terminer is pleaded in another, the exemplification, in strictness, should in like manner be obtained upon *certiorari*; but in the case of courts of oyer and terminer, and gaol delivery, which are now parts of the High Court (*see ante*, pp. 125, 365), *certiorari* would not now be appropriate.

But as to all these courts the general practice is, to apply simply to the clerk of the peace or clerk of assize, who will make it out for you accordingly, without writ, or will attend with the record itself at the trial. Where the "sessions book" was produced to prove an order of the quarter sessions, but the clerk of the peace said that he would have made up the record if it had been bespoken, *Parke*, B., refused to receive the book in evidence. *R.* v. *Ward*, 6 *C. & P.* 366: *see R.* v. *Bellamy, Ry. & M.* 171. But where the entry of the order in the book had a regular caption, and was in the present tense, and in every other respect like a record, and it was proved that no other record was ever made up, this was held to be legal evidence of the order. *R.* v. *Yeoveley*, 3 *A. & E.* 806: *and see Roscoe, Nisi Prius* (17th ed.), 109.

Proceedings in inferior civil courts of record.]—By *s.* 28 of the *County Courts Acts*, 1888 (51 & 52 *Vict. c.* 43), provision is made for the entry of a note by the registrar of all proceedings of a county court in a court book, and it is enacted that "such entries in the said book, or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the registrar of the court, shall at all times be admitted in all courts and places whatsoever, as evidence of such entries, and of the proceeding referred to by such entry, and of the regularity of such proceeding, without any further proof." And this is the only proper evidence of such proceedings. *R.* v. *Rowland*, 1 *F. & F.* 72. If a certificate is asked for, the purpose for which it is wanted must be stated on application and entered by the registrar on the certificate. *County Court Rules*, 1903, *Order XXIII. r.* 10. Where the entry, of which a copy was produced, stated that the court had been held before U., deputy-judge of the said court, it was held that this was sufficient evidence of the regularity of U.'s appointment. *R.* v. *Roberts*, 14 *Cox*, 101 (*C. C. R.*). Where office copies of proceedings in the court are required, they are prepared by the registrar on prepayment of the cost. *County Court Rules*, 1903, *Order II. r.* 7.

Judgments in a court baron, a common law county court, or other inferior court, may be proved either by producing the books in which they are entered; or by examined copies. *See Gilb. Ev.* 74: *Com. Dig. Ev.* (*C.* 1): *Roscoe, Nisi Prius* (17th ed.), 117, 120.

The court rolls of a manor may be proved by examined copies. *Gilb. Ev.* 75: *R.* v. *Hains, Comb.* 337; 12 *Mod.* 24; or, it seems, by a copy under the steward's hand; *Lee* v. *Boothby*, 1 *Keb.* 720; or you may get the steward or his deputy to produce them at the trial. *See Gilb. Ev.* 75.

Where the record of an inferior court forms the gist of a pleading in the King's Bench Division, and is to be proved by an exemplification, sue out a *certiorari*, in the King's Bench Division, directed to the judge, or officer of the court in whose custody the record is supposed to be, requiring him to certify the record to the King's Bench Division; and thereupon an exemplification of the record, under the seal of the inferior court,

will be transmitted to the King's Bench Division to be there used as evidence. (*See the form*, 6 *Went.* 24.)

Proceedings in bankruptcy.]—*Sect.* 132 of the *Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), contains the following provisions as to evidence :—"(1.) A copy of the *London Gazette* containing any notice inserted therein in pursuance of this Act shall be evidence of the facts stated in the notice. (2.) The production of a copy of the *London Gazette* containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date." A cutting from the *London Gazette* appearing on the Bankruptcy file is not sufficient; but the entire *Gazette* containing the notice or order must be produced. *R.* v. *Lowe*, 52 *L. J.* (*M. C.*) 122; 15 *Cox*, 286 (*C. C. R.*). In an indictment against a bankrupt for an offence against the bankrupt laws, it was formerly necessary to prove not only the adjudication, but also the other ingredients of the bankruptcy, namely, the *trading*, where that fact was material; the *petitioning creditor's debt*, where there was a petitioning creditor; and the *act of bankruptcy*. *R.* v. *Lands*, *Dears.* 567; 25 *L. J.* (*M. C.*) 14. From the terms of *s.* 132, *sub-s.* 2, it would appear that in no case is it now necessary in a criminal or civil proceeding, whether against the bankrupt or a third person, to do more than to produce the *Gazette* in order to prove the fact of bankruptcy, and that it is unnecessary to prove the petitioning creditor's debt, or act of bankruptcy. The following decisions on prior *Bankruptcy Acts* appear, therefore, to be no longer of authority. *R.* v. *Lands*, *Dears.* 567; 25 *L. J.* (*M. C.*) 14: *R.* v. *Levi*, *L. & C.* 597; 34 *L. J.* (*M. C.*) 174: *R.* v. *Robinson*, *L. R.* 1 *C. C. R.* 80; 36 *L. J.* (*M. C.*) 78: *R.* v. *Lyons*, 9 *Cox*, 299. An order of discharge is conclusive evidence of the bankruptcy, and of the validity of the proceedings therein. 46 & 47 *Vict. c.* 52, *s.* 30, *sub-s.* 3. By *s.* 133 of the same Act: "(1.) A minute of proceedings at a meeting of creditors under this Act, signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be, chairman of the meeting at which the minute is signed, shall be received in evidence without further proof. (2.) Until the contrary is proved, every meeting of creditors in respect of the proceedings whereof a minute has been so signed shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed or had." "Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate made by any court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit, or document, made or used in the course of any bankruptcy proceedings, or other proceedings had under this Act, shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever." *Id. s.* 134. "In case of the death of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to." *Id. s.* 136. "Every court having jurisdiction in bankruptcy under this Act shall have a seal describing the court in such manner as may be directed by order of the lord chancellor, and judicial notice shall be taken of the seal, and of the signature of the judge or registrar of any such court, in all legal proceedings." *Id. s.* 137. "A certificate of the Board of Trade that a person has been appointed trustee

under this Act, shall be conclusive evidence of his appointment." *Id.* s. 138. "(1.) All documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with the seal of the board, or to be signed by a secretary or assistant secretary of the board, or any person authorized in that behalf by the president of the board, shall be received in evidence, and deemed to be such orders or certificates without further proof unless the contrary is shown. (2.) A certificate signed by the president of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade, shall be conclusive evidence of the fact so certified." *Id.* s. 140.

As to proof of statements by a bankrupt in his public examination, *see ante*, pp. 328, 329.

Proceedings before Justices and Coroners.

Convictions.]—Convictions before justices may be proved in all legal proceedings under 34 & 35 *Vict.* c. 112, s. 18 (*ante*, p. 361); and see *Commissioner of Police* v. *Donovan* [1903] 1 *K. B.* 895.

Depositions before magistrates.]—The *Indictable Offences Act*, 1848 (11 & 12 *Vict.* c. 42), s. 17 (after directing justices to take in manner therein mentioned the statement on oath or affirmation of the witnesses against any person charged before them with an indictable offence), enacts, that "if upon the trial of the person so accused, it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same." These provisions are extended to depositions taken before justices on behalf of the accused by 30 & 31 *Vict.* c. 35, s. 3, which enacts in its concluding words that "upon the trial of such accused person, all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the deposition of witnesses hereby directed to be taken."

Unsworn evidence by children.]—Until 1894, the provisions of 11 & 12 *Vict.* c. 42, s. 17, applied only to depositions taken on oath or affirmation; and evidence not upon oath given before the committing magistrate by a child of tender years on a charge of carnally knowing a girl under the age of thirteen years by virtue of s. 4 of 48 & 49 *Vict.* c. 69 (*Criminal Law Amendment Act*, 1885), and reduced into writing by the magistrate and signed by him, and returned by him with the depositions of the other witnesses, could not be read at the trial. *R.* v. *Pruntey*, 16 *Cox*, 344, *Cave*, J. The law was altered in 1894 by 57 & 58 *Vict.* c. 41, s. 15 (*rep.*), and now by s. 15 (1) of the *Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, c. 15), where the unsworn evidence of a child of tender years has been taken before the magistrates upon the hearing of a charge under that Act, or for any of the offences mentioned in the first schedule to that Act, the evidence of such child, though not given on oath or affirmation, but otherwise taken and reduced into writing, in accordance with the provisions

of *s.* 17 of the *Indictable Offences Act*, 1848, 11 & 12 *Vict. c.* 42, shall be deemed to be a deposition within the meaning of that section.

The indictable offences to which this enactment applies, are—

(1) Cruelty to children (*s.* 1).

(2) Offences against *ss.* 27, 55, 56, of the *Offences against the Person Act*, 1861 (24 & 25 *Vict. c.* 100).

(3) Offences under the *Children's Dangerous Performances Acts*, 1879 & 1897 (42 & 43 *Vict. c.* 34, and 60 & 61 *Vict. c.* 52).

(4) Offences against a child under 16, under 24 & 25 *Vict. c.* 100, *ss.* 5, 43, 52, or 62, or *s.* 11 of the *Criminal Law Amendment Act* (48 & 49 *Vict. c.* 69).

(5) Any other offence involving bodily injury to a child under 16. As to this, *see post, Book II. Part I.* "*Illtreatment of Children.*"

But the evidence of the child must be corroborated by other material evidence in support thereof implicating the accused. 4 *Edw.* 7, *c.* 15, *s.* 15 (1). As to using such depositions at the trial, *see post*, p. 370.

Illness justifying the reading of a deposition.]—The words, "so ill as not to be able to travel," in 11 & 12 *Vict. c.* 42, *s.* 17, do not mean that the witness's coming to give evidence on the trial shall actually endanger his life, but that he is not reasonably fit, from illness, to attend. *R.* v. *Riley*, 3 *C. & K.* 116: *R.* v. *Cockburn, Dears. & B.* 203; 26 *L. J.* (*M. C.*) 136; 7 *Cox*, 265 (*C. C. R.*). *Cf. R.* v. *Day*, 6 *Cox*, 55: *R.* v. *Wilson*, 8 *Cox*, 453, 454, *n.* A witness came to the assize town and into court, but a short time before the trial came on he left the court and returned to his home by the advice of a medical man, who deposed that in his judgment it would have been highly dangerous for the witness to remain. While the trial was going on the witness was on his way home. *Channell*, Serj., after consulting with *Parke*, B., held that the witness was "so ill as not to be able to travel," and that his deposition before the committing magistrate might be read in evidence. *R.* v. *Wicker*, 18 *Jur.* 252. It is for the presiding judge at the trial to decide, in his discretion, whether the evidence that the witness is too ill to travel is sufficient; *R.* v. *Stephenson, L. & C.* 165; 31 *L. J.* (*M. C.*) 147; and such evidence need not *necessarily* come from a medical man. *Id.* Where, however, the only evidence that the person whose deposition it was proposed to put in was so ill as not to be able to travel, was that of a police officer, who said that he had that morning seen him in bed and that he had fever, *Byles*, J., rejected the deposition on the ground that to make it admissible there should be the evidence of a medical man, *or* other evidence which the court might think of equal value to medical testimony. *R.* v. *Welton*, 9 *Cox*, 296: *and see R.* v. *Ulmer*, 4 *Cox*, 442. Where it was proposed to put in the deposition of an absent witness on the ground that he was "so ill as not to be able to travel," and the evidence of such inability was that of a medical man, who said that he had last seen the witness on the Monday (the trial taking place on the Wednesday next following), and that he was then recovering from a severe attack of pain in the bowels, and was too feverish then to travel, but that it was possible he might have sufficiently recovered by the Wednesday to have travelled, but that he (the medical man) would not have advised it, *Blackburn*, J., refused to admit the deposition on the ground that no one had seen the witness for forty-eight hours, and that he might have become sufficiently recovered in that period. *R.* v. *Bull*, 12 *Cox*, 31. Unless there is actual illness, old age and nervousness and inability to stand a cross-examination are not enough foundation for the reading of the deposition of an absent witness; *R.* v. *Farrell, L. R.* 2 *C. C. R.* 116; 43 *L. J.* (*M. C.*) 94: even

although the bringing such witness into court would be dangerous to his life. *R.* v. *Thompson*, 13 *Cox*, 181, *Lush*, J.

Pregnancy.—In *R.* v. *Stephenson*, *L. & C.* 165; 31 *L. J.* (*M. C.*) 147, it was held that there might be incidents in regard to the state of pregnancy which might bring the case within the statute. And *Bramwell*, B., allowed the deposition of a married woman to be read on the evidence of her husband that she was pregnant and unable to attend; although he was unable to state how far advanced she was, and she was about the house attending to her household duties as usual, and had prepared breakfast for him that morning, and had not been confined to bed; but a fortnight before she had suffered in consequence of being driven to the assize town. *R.* v. *Croucher*, 3 *F. & F.* 285. And it is now settled that pregnancy may be a source of such illness as to render the witness unable to travel, *and be an illness* within the statute 11 *&* 12 *Vict. c.* 42, *s.* 17. *R.* v. *Wellings*, 3 *Q. B. D.* 426; 47 *L. J.* (*M. C.*) 100. These decisions appear to be inconsistent with and to overrule *R.* v. *Omant*, 6 *Cox*, 466, and the ruling of *Mellor*, J., in *R.* v. *Parker and Ashworth*, *Archb. Cr. Pl.* (22nd ed.), 342. In *R.* v. *Wellings* no medical evidence was tendered as to the condition of the witness whose deposition was held by the Court of Criminal Appeal to have been rightly admitted, and the only evidence as to her condition was given by her husband, who proved that he resided with his wife at a place fifteen miles distant from the place of trial, and that when he left his wife on that morning she was unable to move about without considerable difficulty, that she was then lying down, and had been so during the greater part of the past week, though able to get up for a few minutes at intervals. He further stated that his wife thought her confinement would not take place until the middle of the following week, but might, she also thought, occur at any hour. *Id.* So where a medical man gave evidence to the effect that he had examined the witness that morning; she was very near her confinement, and it would have been dangerous to expose her to the excitement of attending a criminal trial. That two days previously there were symptoms of approaching labour, and her confinement might take place at any moment. At the same time he could not say that her case differed in any way from any ordinary case of confinement: *Bowen*, J., after consulting with *Lush*, J., admitted her deposition. *R.* v. *Goodfellow*, 14 *Cox*, 326. In *R.* v. *Butcher* [1900] 64 *J. P.* 808, *Darling*, J., refused to accept as sufficient the evidence of a police constable that a witness was about to be confined, and stated that there should either be medical evidence or an application for an adjournment.

The above decisions with respect to pregnancy have been applied to illness following childbirth. In *R.* v. *Harvey*, 4 *Cox*, 441, the deposition of a woman who had just been confined was admitted, although it was urged that in a very few weeks the woman would almost certainly be able to attend. In *R.* v. *Marsella*, 17 *T. L. R.* 164; 35 *L. J. Newsp.* 693: 110 *L. T. J.* 237, *Bruce*, J., admitted the deposition of a woman who had been confined ten days before the trial on the oath of the doctor who attended her, that it would be dangerous for her to travel, and the learned judge held that the decisions to the contrary effect in *R.* v. *Wilton*, 1 *F. & F.* 309: *R.* v. *Walker*, *Id.* 534, were overruled by *R.* v. *Goodfellow*, *ubi supra*, and were no longer law.

Where the deposition of a child has been taken in respect of an offence alleged to have been committed against it under the *Prevention of Cruelty to Children Act*, 1904, or an offence in the first schedule of that Act (*see ante*, p. 369), the deposition is admissible in evidence for the prosecution or the defence, if the court of trial is satisfied on the evidence of a

registered medical practitioner that the attendance of the child before the court would involve serious danger to its life or health. 4 *Edw.* 7, *c.* 15, *s.* 14. This provision applies to depositions taken without oath under *s.* 15 of the Act (*ante*, pp. 369, 370) and to depositions taken out of court under *s.* 13 of the Act, as well as those taken under 11 & 12 *Vict. c.* 42, *s.* 17.

The deposition is receivable only where the indictment is substantially for the *same offence* as that with which the defendant was charged before the justice. *R.* v. *Ledbetter*, 3 *C.* & *K.* 103. But where the deposition was taken on a charge of feloniously wounding, it was held receivable on the trial of the defendant for the murder of the person wounded, who had in the meantime died of the wound. *R.* v. *Beeston, Dears.* 405; 24 *L. J.* (*M. C.*) 5; 6 *Cox*, 425 (*C. C. R.*). And so, where the deposition was taken on a charge of robbery with violence to the person, it was received on the trial of the prisoner for the murder of the person robbed, he having in the meantime died from the violence. *R.* v. *Lee*, 4 *F.* & *F.* 63. *Pollock*, C.B. And where the deposition had been taken on a charge of obtaining money by false pretences, it was allowed to be read on the trial of an indictment against the prisoner for uttering a forged promissory note, the charges of false pretence and uttering being substantially the same, both arising out of the same transaction and the same evidence proving both charges. *R.* v. *Williams*, 12 *Cox*, 101, *Montague Smith*, J. *See R.* v. *Radbourne*, 1 *Leach*, 457: *R.* v. *Smith*, *R.* & *R.* 339; *Holt* (*N. P.*), 614: *R.* v. *Dilmore*, 6 *Cox*, 52, *Wightman*, J.: *Leach* v. *Simpson*, 5 *M.* & *W.* 309. The point is not whether the inquiry before the magistrate was exactly the same as that before the judge, but whether that inquiry was such that a full opportunity of cross-examination has been given to the party accused. *Per Alderson*, B., in *R.* v. *Beeston*, *ubi supra*. Where a witness is so ill as not to be able to travel, the judge may, if he thinks fit, postpone the trial to the next assizes, instead of permitting the depositions to be read under 11 & 12 *Vict. c.* 42, *s.* 17. *R.* v. *Tait*, 2 *F.* & *F.* 553, *Crompton*, J. In all cases where there is any doubt as to whether the deposition is admissible in evidence, it would be prudent to apply to the judge for a postponement of the trial.

As to reading before the grand jury depositions taken under 11 & 12 *Vict. c.* 42, *s.* 17, *see ante*, p. 100.

Although the former statutes relating to the examination of witnesses against a prisoner before justices and coroners (1 & 2 *Ph.* & *M. c.* 13; 2 & 3 *Ph.* & *M. c.* 10; 7 *G.* 4, *c.* 64, *ss.* 2–5) did not contain any express enactment like that contained in 11 & 12 *Vict. c.* 42, *s.* 17, it was yet determined in many cases, and recognized as a rule of law, that, where the examinations of witnesses in cases of felony under these statutes were taken in the presence of the accused, and he had the opportunity of cross-examining them, the deposition of any such witness might be read in evidence against the accused on his trial, if the person who made the deposition were dead; 1 *Hale*, 305; *Bull.* (*N. P.*) 242 (*a*); or insane (though the insanity were of a temporary nature): *R.* v. *Marshall*, *C.* & *Mar.* 147: *R.* v. *Eriswell*, 3 *T. R.* 707, 720; (*but see R.* v. *Ferry Frystone*, 2 *East*, 54): or if it appeared satisfactorily to the court that he was kept out of the way by means of the procurement of the defendant; *R.* v. *Harrison*, 12 *St. Tr.* 833, 852: *R.* v. *Lord Morly*, *Kel.* (*J.*) 53, 55; 6 *St. Tr.* 770, 771 (in which case, however, the deposition is no evidence against other co-defendants, *R.* v. *Scaife*, 2 *Den.* 281; 17 *Q. B.* 238; 20 *L. J.* (*M. C.*) 229; or if he were bedridden, or so ill as to be unable to travel. 1 *Hale*, 305; 2 *Hawk. c.* 46, *ss.* 15–17: *R.* v. *Wilshaw*, *C.* & *Mar.* 145. But they cannot be thus read, if it merely appear that the witness is absent, even if he be resident abroad, and that

the prosecutor has in vain used his best endeavours to find him. *R.* v. *Lord Morly, Kel.* (*J.*) 55: *R.* v. *Scaife, ubi supra*: *R.* v. *Austin, Dears.* 612; 25 *L. J.* (*M. C.*) 48 (*C. C. R.*). Nor could depositions formerly be read upon an indictment for high treason; 5 & 6 *Edw.* 6, *c.* 12: *Fost.* 237; but in *R.* v. *Lynch* (*K. B. D.* Dec. 19, 1902) the deposition of a witness absent from illness was allowed to be read to the grand jury.

Depositions before magistrates, to be thus given in evidence must be taken conformably with the statute, *R.* v. *Smith, R. & R.* 339: *Holt* (*N. P.*) 614: 2 *Stark.* (*N. P.*) 208, 211 *n.* (*a*), and in the presence of the prisoner, so that he may have an opportunity of cross-examining the witness; 11 & 12 *Vict. c.* 42, *s.* 17 (*ante*, p. 368), *and see R.* v. *Paine*, 1 *Salk.* 281: *R.* v. *Woodcock*, 1 *Leach*, 500; 1 *East*, 354, 356: *Pyke* v. *Crouch*, 1 *Ld. Raym.* 730: *R.* v. *Dingler*, 2 *Leach*, 561: *and see Bull.* (*N. P.*) 243: *R.* v. *Forbes, Holt* (*N. P.*) 599 *n.* The fact that the prisoner had a full opportunity of cross-examining the witness may be negatived by proof that he was insane when the deposition was taken, or was otherwise incapacitated by illness from cross-examining the deponent. *R.* v. *Peacock*, 12 *Cox*, 21; *Brett and Mellor*, JJ. The depositions must also be taken in the presence of the justice; *R.* v. *Watts, L. & C.* 339; 33 *L. J.* (*M. C.*) 63 (*C. C. R.*); and nothing should be returned as a deposition, unless the prisoner had an opportunity of knowing what was said, and of cross-examining the party making it. *R.* v. *Arnold*, 8 *C. & P.* 621, *Denman*, L.C.J.; *R.* v. *Johnson*, 2 *C. & K.* 394. But where a deposition was not wholly taken in the presence of the prisoner, but the witness afterwards, in his presence, was resworn, and the deposition repeated, and signed, the judges held that it was, under the circumstances, admissible evidence; for the prisoner had then an opportunity of cross-examining the witness. *R.* v. *Smith, ubi supra*; *see R.* v. *Bates*, 2 *F. & F.* 317. As to depositions before coroners, *see post*, pp. 376, 377. In *R.* v. *Holloway*, 65 *J. P.* 712, *Wills*, J., admitted the deposition of a deceased witness, proved to have been read over to her and assented to by her, but not signed by her owing to injuries to her hands.

Where several depositions were taken on one sheet of paper, and at the foot of the whole was written "sworn before me," with the signature of the magistrate, the depositions previous to the last were held to be receivable in evidence. *R.* v. *Osborne*, 8 *C. & P.* 113, *Coleridge*, J. And it is now settled that although all the depositions are not taken on one sheet of paper, it is not necessary that each deposition should be signed by the magistrate taking it; and, therefore, where a number of depositions taken at the same hearing on several sheets of paper are fastened together and signed by the magistrate taking them once only at the end of all the depositions, in the form given in the *Schedule* (*M.*) to 11 & 12 *Vict. c.* 42, one of these depositions is admissible in evidence, after the death of the witness making it, although no part of it is on the sheet signed by the magistrate. *R.* v. *Parker, L. R.* 1 *C. C. R.* 225; 39 *L. J.* (*M. C.*) 60, which is in accordance with *R.* v. *Young*, 3 *C. & K.* 106, and *R.* v. *Lee*, 4 *F. & F.* 63, and overrules *R.* v. *Richards*, 4 *F. & F.* 860. In *R.* v. *Parker, ubi supra*, the case stated by the learned judge stated that "the deposition in question was the second of four depositions made at the same hearing, all of which were pinned together." It does not state, however, whether any proof was given at the trial, whether the depositions were pinned together at the time of the signature by the magistrate, although Mr. Justice *Byles*, in his judgment as reported 39 *L. J.* (*M. C.*) at p. 62, says, "the different sheets appear to have been attached together at the time of the signature." In an earlier case, however, it was held to be clear, that if the depositions are on separate sheets, and no distinct

proof be given of their having been fastened together at the time when the last was signed, those bearing no signature will be rejected. *R.* v. *France*, 2 *M. & Rob.* 207, *Alderson*, B. But where the depositions were on separate sheets, and were signed only at the end by the magistrate, the deposition of one of the witnesses who was dead was admitted in evidence, although it seems that the sheets were not fastened together at the time of the signature by the magistrate, but had been afterwards attached together by the magistrate's clerk. *R.* v. *Lee*, 4 *F. & F.* 63, *Pollock*, C.B. In *R.* v. *France*, *ubi supra*, it was held that depositions taken in cross-examination, at a subsequent time to those in chief, and not signed by the magistrate, were held to be so irregular as to prevent the whole depositions from being read against the prisoner; although both were sworn by the magistrate to have been accurately taken. But this seems to be no longer law. The depositions may also be given in evidence by the defendant, in cases where the witnesses appear, in order to show some material variance between their evidence at the trial and before the magistrate; and may be read by the prosecutor, as it would seem, and certainly by the judge, to impeach the credit of a witness, who gives evidence contradicting statements contained in the deposition made by such witness in a former proceeding in the same case. *R.* v. *Oldroyd*, *R. & R.* 88. It is not necessary, to make the depositions evidence, that *each* should have a separate *caption* or heading; a general caption or heading at the head of the body of depositions sufficiently shows that they were all taken under the statute. *R.* v. *Johnson*, 2 *C. & K.* 354. Indeed, a deposition is admissible in evidence though it has no caption, if it be described as the examination of the witness, and the evidence contained in it be relevant to the charge. *R.* v. *Langbridge*, 1 *Den.* 448; 2 *C. & K.* 975; 18 *L. J.* (*M. C.*) 198. The decision to the contrary by *Hill*, J., in *R.* v. *Newton*, 1 *F. & F.* 641, followed by *Mellor*, J., in *R.* v. *Johnson Metcalfe*, *York Spring Assizes*, 1862, *M.S.*, was given without *R.* v. *Langbridge* being cited.

Taking out of court depositions of persons dangerously ill.]—*The Criminal Law Amendment Act*, 1867 (30 & 31 *Vict. c.* 35, *known as* "*Russell Gurney's Act*") *after reciting that by s.* 17 *of* 11 & 12 *Vict. c.* 42, *it is permitted, under certain circumstances, to read in evidence on the trial of an accused person the deposition, taken in accordance with the said Act, of a witness who is dead, or so ill as to be unable to travel, and that it may happen that a person dangerously ill, and unable to travel, may be able to give material and important information relating to an indictable offence, or to a person accused thereof, and it may not be practicable or permissible to take, in accordance with the provisions of the said Act, the examination or deposition of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the accused person, and that it is desirable in the interests of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same,*—enacts (*s.* 6) that, "whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and, in the opinion of some registered medical practitioner, not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said Act of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the

same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof; and, if the same shall relate to any indictable offence for which any accused person is already committed, or bailed to appear for trial, shall transmit the same with the said addition, to the proper officer of the court for trial at which such accused person shall have been so committed or bailed; and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough in which he shall have taken the same, who is hereby required to preserve the same and file it of record; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will be ever able to travel, or to give evidence, it shall be lawful to read such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same," *see R.* v. *Peacock*, 12 *Cox*, 21, *Brett*, J. It is to be observed that the proviso at the close of this section overrides the whole section, and no statement, professedly taken under it, can be available as such at the trial unless notice has been given before taking it of the intention to take it. *R.* v. *Quigley*, 18 *L. T., N. S.* 211, *Mellor and Lush*, JJ. *Sect.* 7 points out the mode in which a prisoner in actual custody, who shall have served, or shall have received notice of an intention to take such statement, may have an opportunity of being present when it is taken: and such notice must be *in writing*, otherwise the statement cannot be read against the prisoner on the trial, although he may have been present when it was taken, and had a full opportunity of cross-examination. *R.* v. *Shurmer*, 17 *Q. B. D.* 323; 55 *L. J.* (*M. C.*) 153; 16 *Cox*, 94 (*C. C. R.*). In *R.* v. *Prestridge* (*C. C. C.*) *Nov.* 1881, 72 *L. T. Journ.* 93, after the deposition of a dying person had been taken under 30 & 31 *Vict. c.* 35, *s.* 6, and she had been cross-examined, further questions were put to her by the justice, and her answers were added to the depositions. The caption was added afterwards and returned with the deposition. *Hawkins*, J., refused to allow the answers to the justice's questions to be given in evidence, and further expressed a very strong opinion that the caption was an integral part of the deposition, and must be added at the time to render the deposition admissible; he stated that he should admit the deposition and reserve the point, but its admission was not pressed. In *R.* v. *Curtis*, 21 *Times, L. R.* 87, *Bigham*, J., refused to admit a deposition taken under the same enactment because the caption did not state where it was taken. A deposition of a dying person purporting to have been taken under 11 & 12 *Vict. c.* 42, *s.* 17, but to which there was no caption and which had not been taken by the committing justice was held inadmissible. *R.* v. *Rees, Glamorgan Assizes, Times Newsp.* (20 *Dec.* 1888), *Charles*, J. But where the deposition of a dying person was taken by a justice at a hospital in the presence of the accused and all the requirements of 11 & 12 *Vict. c.* 42, *s.* 17 were complied with, it was held that the deposition was admissible in evidence, though the requirements of 30 & 31 *Vict. c.* 35, *s.* 6 had not been complied with. *R.* v. *Katz*, 64 *J. P.* 807, *Darling*, J.; in which case counsel was authorized

by *Wills*, J., to state that he had altered the opinion to the contrary expressed by him in *R.* v. *Simpson*, 62 *J. P.* 825.

As to when statements made in the presence of the prisoner are evidence, *see ante*, p. 338.

Special provision is made by *s.* 13 of the *Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15), for the taking out of court of the depositions of children in respect of whom an offence of cruelty against that Act, or any of the offences mentioned in the schedule to the Act, is alleged to have been committed: *see those sections, post, Book II. Part I. ch. ii. sect.* 4.

Right of accused to copies of depositions.]—6 & 7 *W.* 4, *c.* 114, enacts (*s.* 4) that, "all persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had," and it is provided by *s.* 27 of the *Indictable Offences Act*, 1848 (which replaces 6 & 7 *W.* 4, *c.* 114, *s.* 3), "that at any time after all the examinations aforesaid shall have been *completed*, and before the first day of the assizes or sessions, or other first sitting of the court at which any person so committed to prison or admitted to bail as aforesaid, is to be tried, such person may require, and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of 1½*d.* for each folio of ninety words." The enactment does not apply in case of committal on remand, but only after committal for trial: *see R.* v. *Lord Mayor of London*, 5 *Q. B.* 555: *Dav. & M.* 484; *ex parte Fletcher*, 13 *L. J.* (*M. C.*) 67. Where a prisoner has obtained a certificate for legal aid under the *Poor Prisoners Defence Act*, 1903 (*ante*, p. 187), the cost of a copy of the depositions for his use is allowed as part of the costs of the prosecution: *s.* 1 (2). Where the depositions have been transmitted to the director of public prosecutions in pursuance of 42 & 43 *Vict. c.* 22 (*Prosecution of Offences Act*, 1879), *s.* 5, by that section he is put under the same obligation, and upon the same payment, to deliver to an applicant copies thereof.

Under 11 & 12 *Vict. c.* 42, *s.* 17, depositions were taken only of witnesses for the Crown. But the accused is now entitled to copies of the examinations of witnesses examined before the justices on his behalf, under *s.* 3 of 30 & 31 *Vict. c.* 35, as it is enacted by *s.* 4 of the same statute, that all the provisions of 11 & 12 *Vict. c.* 42, for giving the accused person copies of the examinations shall be read and shall have operation as part of the 30 & 31 *Vict. c.* 35.

By 7 *G.* 4, *c.* 64, *s.* 5 (as extended by 42 & 43 *Vict. c.* 22, *s.* 5), justices who fail to deliver to the court of trial or *to the director of public prosecutions* any examination, information, evidence, bailment, or recognizance, may, on examination and proof of the offence by the court of trial, summarily be fined as the court shall think meet. This enactment is not repealed, and seems to apply to magistrates neglecting their duty under 11 & 12 *Vict. c.* 42, *s.* 20, and the continuance of the liability to fine is clearly indicated by 42 & 43 *Vict. c.* 22, *s.* 5.

Prior to the passing of the *Indictable Offences Act*, 1848, the judges intimated that justices should return to the court of trial all depositions taken against the accused, whether the deponents had or had not been bound over by recognizance to attend the trial, and also that they should return a full statement of all that the witnesses said, not merely of so much thereof as they deem material, much time having been occupied in endeavouring to establish contradictions between the testimony of the

witnesses and their depositions, in the omission of minute circumstances in their statements before the magistrate. *See R.* v. *Simons*, 6 *C. & P.* 540: *R.* v. *Fuller*, 7 *C. & P.* 269: *R.* v. *Grady*, *Id.* 650: *R.* v. *Coveney*, *Id.* 667: *R.* v. *Thomas*, *Id.* 817. The opinions thus expressed are equally applicable to depositions taken under 11 & 12 *Vict. c.* 42. That statute obviously applies only to the case of a person bailed or committed to prison for some offence for which he is to be tried, and with a view of enabling him to prepare for trial, and does not extend to the case of a person committed to prison for default of sureties to keep the peace, and who has been discharged by the sessions. *Ex parte Humphrys*, 19 *L. J.* (*M. C.*) 189. A prisoner was not entitled, under 6 & 7 *W.* 4, *c.* 114, *s.* 2 (*rep.*), to a copy of *his own* statement returned by the magistrates, but only to a copy of the depositions of the witnesses. *R.* v. *Aylett*, 8 *C. & P.* 669, *Parke*, B. But it is submitted that under 11 & 12 *Vict. c.* 42, the statement is a part of the depositions in the case. The reading, on the part of the prosecution, of the prisoner's statement, returned with the depositions, does not give the prisoner the right to consider the depositions as in evidence on the part of the prosecution, though it appear that they were all taken before such statement was made: but if the prisoner wishes to have the whole or any particular part of the depositions read, he must read it as his evidence. *R.* v. *Pearson*, 7 *C. & P.* 671.

Depositions before coroners.]—The provisions of 11 & 12 *Vict. c.* 42, *s.* 17, do not in terms apply to the depositions taken before coroners. And it is submitted that the ruling to the contrary by *Darling*, J., in *R.* v. *Butcher*, 64 *J. P.* 808, appears to have been given *per incuriam*. But it is stated in *Bull.* (*N. P.*) 242 that depositions taken before a coroner may be read if the witness is dead or beyond sea. By the *Coroners Act*, 1887 (50 & 51 *Vict. c.* 71), *s.* 18, *sub-s.* 5, a person charged by an inquisition with murder or manslaughter shall be entitled to have from the person having for the time being the custody of the inquisition or of the depositions of the witnesses at the inquest, copies thereof, on payment of a reasonable sum for the same, not exceeding the rate of 1½*d.* for every folio of ninety words. The depositions in such cases are returned to the clerk of the court of trial (50 & 51 *Vict. c.* 71, *s.* 5). The judges had power, by their general authority as a court of justice, to order a copy of depositions taken before a coroner to be given to a prisoner indicted for the murder of the party concerning whose death the inquiry took place before the coroner, although in a case where the coroner could not have been compelled to return them under 7 *G.* 4, *c.* 64, *s.* 4. That section is repealed by 50 & 51 *Vict. c.* 71, but the repeal does not seem to affect the power of the judges. *Ex parte Greenacre*, 8 *C. & P.* 32. *R.* v. *Walford*, 8 *C. & P.* 767. There was formerly supposed to be a difference between depositions taken before a magistrate and before a coroner; for the latter were said to be evidence, even though the party accused was not present when they were taken. *Bull.* (*N. P.*) 242: *R.* v. *Eriswell*, 3 *T. R.* 707, 713, *Buller*, J. The reason given for this exception was, that the coroner is an elective officer, appointed on behalf of the public, to make inquiry of matters within his jurisdiction, who therefore is presumed to take the depositions fairly and impartially. *Bull.* (*N. P.*) 242. Although the propriety of this distinction had been questioned (*see* 2 *Stark. Ev.* 384), the practice nevertheless formerly was to admit such depositions without inquiry whether the party accused was or was not present; and in *R.* v. *Purefoy*, *Peake Ev.* 64; 2 *Phil. Ev.* (7th ed.), 373, *Hotham*, B., received depositions taken before a coroner, although it appeared, and was objected, that the defendant was not present. But in *R.* v. *Rigg*, *Leeds Summer Assizes*, 1866, *MS.*, 4 *F. & F.* 1085,

Montague Smith, J., refused to admit in evidence the deposition of a witness taken before the coroner, where the prisoner was not present at the inquest when the witness was examined. The dicta and expressions of opinion in favour of a contrary practice, cited above, were brought on that occasion under his lordship's notice; but he said that he had no doubt upon the subject, and had no hesitation in rejecting the deposition. This ruling is in accord with the opinions expressed by the ablest text writers on the subject. 1 *Taylor, Ev.* (9th ed.), 339; 3 *Russ. Cr.* (6th ed.) 672, *n.*; *Stark Ev.* (4th ed.) 38: *Jervis on Coroners* (6th ed.), 51, 52. Depositions taken before the coroner must, in order to be admissible, appear to have been taken before the coroner *quâ* coroner, and must be signed by him. 50 & 51 *Vict. c.* 71, *s.* 4, *sub-s.* 2; *R. v. England*, 2 *Leach*, 767, 771. The depositions must appear also to have been upon oath; 2 *Hale*, 284; *Bull. (N. P.)* 242.

50 & 51 *Vict. c.* 71, *s.* 4, *sub-s.* 2, enacts, that the deposition shall be signed by the witness as well as by the coroner, which the old statutes did not. This gets rid of the ruling in *R. v. Flemming*, 2 *Leach*, 854: 1 *East, P. C.* 440. A deposition taken before a coroner may be proved by the coroner, or by any person who can prove the coroner's and the witness's signature, and that the witness was sworn, and that the prisoner was present and had an opportunity of cross-examining the witness. 50 & 51 *Vict. c.* 71, *s.* 4, *sub-s.* 2; 1 *Tayl. Ev.* (9th ed.), 339: *R. v. Wilshaw, C. & Mar.* 145: *Sills v. Brown*, 9 *C. & P.* 601.

Depositions taken abroad.]—A deposition taken out of England is not admissible in England in substitution for the oral statement of the deponent, except under statutory provision, although it may be put against the deponent if made by him and containing confessions or admissions.

Depositions may be taken abroad in certain criminal cases, under the following statutes, 13 *G.* 3, *c.* 63: 24 *G.* 3, *sess.* 2, *c.* 25: 26 *G.* 3, *c.* 57, as to offences in India (*see Ilbert*, Government of India, p. 259); and under 42 *G.* 3, *c.* 85, as to offences by public officers outside Great Britain. Such depositions are admissible in England. The *Evidence on Commission Act*, 1831 (1 *W.* 4, *c.* 22), does not relate to criminal proceedings (*R. v. Upton St. Leonards*, 10 *Q. B.* 827), and commissions are it is believed never issued in criminal cases under the *Evidence by Commission Act*, 1859 (22 *Vict. c.* 20). If the witness had been examined abroad, under 13 *G.* 3, *c.* 63, and has there proved original documents, those documents themselves must be transmitted and given in evidence in this country: copies are not admissible. *R. v. Douglas*, 1 *C. & K.* 670.

Provision is made in Extradition Treaties for the execution of commission to take evidence for the purposes of proceedings against a fugitive criminal: but there is no statutory provision rendering the evidence so taken admissible in proceedings in England.

By the *Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 691, *sub-s.* 1, "Whenever in the course of any legal proceedings instituted in any part of his Majesty's dominions before any judge or magistrate, or before any person authorized by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of such proceeding, then, upon due proof, if such proceeding is instituted in the United Kingdom, that such witness cannot be found in that kingdom, or, if in any British possession, that he cannot be found in the same possession, any deposition that such witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in his Majesty's dominions, or any British consular officer elsewhere, shall be admissible in evidence,

provided that:—(*a*) If the deposition was made in the United Kingdom, it shall be admissible in any proceeding instituted in the United Kingdom. (*b*) If the deposition was made in any British possession, it shall not be admissible in any proceeding instituted in that British possession. (*c*) If the proceeding is criminal, it shall not be admissible unless it was made in the presence of the person accused. (*Sub-s.* 2.) Every deposition so made shall be authenticated by the signature of the judge, magistrate, or consular officer before whom it is made; and the judge, magistrate, or consular officer shall certify, if the fact is so, that the accused was present at the taking thereof. (*Sub-s.* 3.) It shall not be necessary in any case to prove the signature or official character of the person appearing to have signed any such deposition; and in any criminal proceeding a certificate under this section shall, unless the contrary is proved, be sufficient evidence of the accused having been present in manner thereby certified. (*Sub-s.* 4.) Nothing herein contained shall affect any case in which depositions taken in any proceeding are rendered admissible in evidence by any Act of parliament, or by any Act or ordinance of the legislature of any colony, so far as regards such colony, or to interfere with the power of any colonial legislature to make such depositions admissible in evidence, or to interfere with the practice of any court in which depositions not authenticated as hereinbefore mentioned are admissible." Where witnesses whose evidence had been taken abroad by a British vice-consul under 17 & 18 *Vict. c.* 104, *s.* 270 (of which this section is a re-enactment), were the officers of a British sailing vessel, which was stated by a clerk in the office of the registrar-general for seamen, from his examination of official records, never to have been in this country, this was held to be sufficient evidence that the witnesses could not be found in the United Kingdom, and as the depositions purported to be taken in the presence of the prisoner and of the British vice-consul, and also to be signed by the latter, they were admitted in evidence. *R.* v. *Conning*, 11 *Cox*, 134: *see also R.* v. *Anderson*, 11 *Cox*, 154: *R.* v. *Stewart*, 13 *Cox*, 296.

Proceedings in Colonial and Foreign Courts, etc.]—By *s.* 7 of the *Evidence Act*, 1851 (14 & 15 *Vict. c.* 99), "all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state, or in any British Colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned, that is to say . . . if the document sought to be proved be a judgment decree order or other judicial proceeding of any foreign or colonial court or an affidavit pleading or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court; and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal: but if any of the aforesaid authenticated copies shall purport to be signed or sealed as hereinbefore respectively directed the same shall respectively be admitted as evidence in every case in which the original document could have been admitted in evidence, without any proof of the seal where a seal is necessary or of the signature or of the truth of the statement attached thereto, where such

signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement." *See R.* v. *Newman, Dears.* 85. This enactment does not apply to the proceedings of the courts of Scotland or Ireland, nor it would seem to those of the Isle of Man or Channel Islands, and judgments of these courts must in criminal cases ordinarily be proved as those of foreign courts were at common law, *i.e.* by exemplifications under the seal of the court, if the court has a seal, and evidence must also be given that the seal affixed to the exemplification is in fact the seal of the court. *Henry* v. *Adey*, 3 *East*, 221: *Alves* v. *Bunbury*, 4 *Camp.* 23: *Cavan* v. *Stewart*, 1 *Stark.* (*N. P.*) 525: *Appleton* v. *Lord Braybrook*, 2 *Stark.* (*N. P.*) 6; 6 *M. & Sel.* 34; 18 *R. R.* 294: *Flindt* v. *Atkins*, 3 *Camp.* 215, *n.*: *Alivon* v. *Furnival*, 1 *Cr. M. & R.* 277.

Records of Irish Courts.]—Records of the courts in Ireland might, it is said, be proved by examined copies, etc., in the same manner as English records; *but see Harris* v. *Saunders*, 4 *B. & C.* 411. It was necessary, however, that the court should be satisfied that it was with a *record* the copy was examined; and, therefore, where the witness produced to prove the copy stated that he examined it with a parchment roll shown to him in a room over the Four Courts at Dublin, without seeing from whence it was taken, or knowing the person who produced it to be an officer of the court, Lord *Ellenborough* refused to receive it in evidence. *Adamthwaite* v. *Synge*, 4 *Camp.* 372; 16 *R. R.* 804: *Slane Peerage case*, 5 *Cl. & F.* 23: 7 *Eng. Rep.* 311.

Statutory modes of proving public documents.]—The production in evidence of most of the documents above mentioned has been much facilitated by the following statutes. The *Evidence Act*, 1845 (8 & 9 *Vict. c.* 113), enacts (*s.* 1), that "whenever by any Act now in force, or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either house of parliament, or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence." And the *Evidence Act*, 1851 (14 & 15 *Vict. c.* 99), *s.* 14, provides that, "whenever any book or other document (*see Reeve* v. *Hodson*, 10 *Hare, app. xix.*) is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer (*see In re Hall's Estate*, 22 *L. J.* (*Ch.*) 177: *Re Porter's Trusts*, 25 *L. J.* (*Ch.*) 688: *R.* v. *Weaver*, *L. R.* 2 *C. C. R.* 85; 43 *L. J.* (*M. C.*) 13, *ante*,

p. 353) to whose custody the original is entrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words."

2. PRIVATE DOCUMENTS.

Inscriptions and entries.]—In pedigree cases an entry in a family Bible, an examined copy of an inscription on a tombstone, a pedigree hung up in a family mansion, and the like, are admissible evidence. *Goodright* v. *Moss*, 2 *Cowp.* 591: *Berkeley Peerage Claim*, 4 *Camp.* 401; 14 *R. R.* 732; *Roscoe, Nisi Prius* (17th ed.), 44.

Deeds and other instruments in writing.]—When a deed is to be given in evidence, the deed itself must be produced at the trial. *Leyfield's case*, 10 *Co. Rep.* 92 *b*, 93, except in the following cases, (1) where the deed is in the hands of the opposite party:—*Read* v. *Brookman*, 3 *T. R.* 151; *Wymark's case*, 5 *Co. Rep.* 73 *a*; (2) where it has been lost by time or accident, or by any other casualty, as by fire, etc., *Read* v. *Brookman*, 3 *T. R.* 153, *n.* (*see Kensington* v. *Inglis*, 8 *East*, 273; 9 *R. R.* 188; *Brewster* v. *Sewell*, 3 *B. & Ald.* 296; *Freeman* v. *Arkell*, 2 *B. & C.* 494, *as to proof of the loss, etc.*). In such cases its contents may be proved by a copy or other secondary evidence. *Leyfield's case*, 10 *Co. Rep.* 92 *b*: *Medlicot* v. *Joyner*, 1 *Mod.* 4. In *R.* v. *Hunter*, 3 *C. & P.* 591; 4. *C & P.* 128, where it appeared that the deed alleged to be forged was in the custody of the defendant, who, after notice, refused to produce it, secondary evidence of the deed was received. In *R.* v. *Hall*, 12 *Cox*, 159, *Cleasby*, B., after consulting *Byles*, J., refused to admit secondary evidence of the document alleged to be forged in that case, on the ground merely that no foundation had been laid for the admission of such evidence by proof of the loss or destruction of the document. But in both cases the court declined to recognize a rule once supposed to assert that a person could not be convicted of forgery without the actual production of the forged document.

If there have been no subscribing witness to, then proof of the handwriting of the parties will be sufficient, the law in such a case presuming a delivery. The *Evidence Act*, 1865 (28 & 29 *Vict. c.* 18), *s.* 7, which is applicable to all sorts of criminal judicature (*see s.* 1), enacts that it shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness thereto. This enactment got rid of the old rule requiring the calling of an attesting witness to any document purporting to be attested. *Gilb. Ev.* 99: *Barnes* v. *Trompowsky*, 7 *T. R.* 266: *Marsh* v. *Collnet*, 2 *Esp.* 665; 5 *R. R.* 763: *Manners* v. *Postan*, 4 *Esp.* 239; 3 *B. & P.* 343: *and see England* v. *Roper*, 1 *Stark.* (*N. P.*) 304. And it is now unnecessary to call the attesting witness to prove the execution of a deed, unless the deed is one to the validity of which attestation is requisite. A list of instruments to the validity of which attestation is requisite, and which therefore must still, subject to the exceptions to be presently mentioned, be proved by the subscribing witness, will be found in 2 *Taylor Ev.* (9th ed.), p. 1207, *n.* It does not appear necessary that the subscribing witness when called should swear that the deed was actually executed in his presence. If he were afterwards desired to attest it by the party who executed it (*Grellier* v. *Neale*, 1 *Peake* (3rd ed.), 198; 3 *R. R.* 669: *Powell* v. *Blackett*, 1 *Esp.* 97), or in the presence of the party (*Park* v. *Mears*, 3 *Esp.* 171: 2 *B. & P.* 217), and attested it accordingly, this will be sufficient, provided that the attesta-

tion and execution be done so nearly at the same time, as fairly to be deemed parts of the same transaction. *MS., E.* 1814. On the other hand, a person who sees an instrument executed, but who is not desired by the parties to attest it, cannot, by afterwards putting his name to it, prove it as an attesting witness. *M'Craw* v. *Gentry*, 3 *Camp.* 232.

To this rule of proving the execution by the evidence of an attesting witness, which is now limited, as we have seen above, to the case where the deed is one to the validity of which attestation is requisite, there are, however, many exceptions.

1. Where the execution forms one of the admissions in the cause; but this exception is applicable to civil cases only.

2. Where the deed (and the same as to a will, although it be less than thirty years since the testator's death, *Doe* d. *Oldham* v. *Woolley*, 8 *B. & C.* 22) is thirty years old or upwards, the court will presume that it has been duly executed, and will not require it to be proved, *Bull.* (*N. P.*) 255: *Chelsea Waterworks Co.* v. *Cowper*, 1 *Esp.* 275, 278, provided possession have followed the deed, or some satisfactory account be given of it, and provided there be no erasure or interlineation in it, and that it do not import fraud; otherwise it must be proved as in ordinary cases, either by the attesting witness, or by evidence of his and the party's handwriting. 2 *Bac. Abr. Ev.* (*F.*); *Bull.* (*N. P.*) 255; *and see Swinnerton* v. *Marquis of Stafford* [1810] 3 *Taunt.* 91. It may be necessary here to remark, that when you give an ancient obligation for the payment of money in evidence, you should be prepared to prove the payment of interest within the last twenty years, or other circumstances sufficient to rebut the presumption which the law will otherwise raise of such obligation having been satisfied. *See Forbes* v. *Wale*, 1 *W. Bl.* 532.

3. Where a deed enrolled (and to which enrolment was necessary) is given in evidence, it is not necessary to prove the execution of it by the subscribing witness: but it may be proved by the enrolment indorsed on it, or, if the deed be lost, by an examined copy of the enrolment, as already mentioned, *ante*, p. 345.

4. Where one deed is recited in another, proof of the second deed is deemed proof of the one recited, as against the parties to the second deed and those claiming under them. 2 *Bac. Abr., Ev.* (*F.*).

5. Secondary evidence of the execution may be given by proving the handwriting of the witness and the party, upon proof of any of the following circumstances: that the subscribing witness is dead, *Nelson* v. *Whittall*, 1 *B. & Ald.* 19, or has become insane, 12 *Vin. Abr.* 224: *Currie* v. *Child*, 3 *Camp.* 283, or is abroad out of reach of the process of the court, *Holmes* v. *Pontin*, *Peake* (3rd ed.), 135: *Cooper* v. *Marsden*, 1 *Esp.* 1: *Wallis* v. *Delancey*, 7 *T. R.* 266, *n.*; 12 *Vin. Abr.* 224: *and see Hodnett* v. *Forman*, 1 *Stark.* (*N. P.*) 90, whether there domiciled or not; *Prince* v. *Blackburn*, 2 *East*, 250, or has set out for the purpose of leaving the kingdom, *Ward* v. *Wells*, 1 *Taunt.* 461; 10 *R. R.* 581: or that from circumstances it may fairly be presumed that he has left the kingdom, *Wardell* v. *Fermor*, 2 *Camp.* 282: *Wyatt* v. *Bateman*, 7 *C. & P.* 586; or that he is serving in the navy, *Parker* v. *Hoskins*, 2 *Taunt.* 223, or the like; or that after a *bonâ fide* serious and diligent inquiry, he cannot be found, *Cochlan* v. *Williamson*, 1 *Doug.* 93: *Cunliffe* v. *Sefton*, 2 *East*, 183; *Barnes* v. *Trompowsky*, 7 *T. R.* 266; *Crosby* v. *Percy*, 1 *Camp.* 303; 1 *Taunt.* 364: *Wardell* v. *Fermor*, 2 *Camp.* 282: *Willman* v. *Worrall*, 8 *C. & P.* 380: *Earl of Falmouth* v. *Roberts*, 9 *M. & W.* 469; or that he is or has become incompetent as a witness from any cause, *Jones* v. *Mason*, 2 *Str.* 833. The rule on this subject is not affected by the power to examine witnesses abroad on interrogatories, under *s.* 4 of the *Evidence*

on Commission Act, 1831 (1 *W.* 4, *c.* 22), *Glubb* v. *Edwards*, 2 *M. & Rob.* 300. But the declarations of the witness himself as to the place of his residence, or hearsay statements of others on the subject, cannot be admitted to prove that he is abroad. *Doe* d. *Beard* v. *Powell*, 7 *C. & P.* 617

And even if the subscribing witness has become blind, the instrument cannot be read without calling him. *Cronk* v. *Frith*, 9 *C. & P.* 197; 2 *M. & Rob.* 262; but *see Wood* v. *Drury*, 1 *Ld. Raym.* 734: *Pedler* v. *Paige*, 1 *M. & Rob.* 258, *contrà*. In *Page* v. *Mann*, 1 *M. & M.* 79, Lord *Tenterden* held, that proof of the handwriting of the subscribing witness, who was dead, was sufficient, without any further proof of the identity of the parties than the identity of the name and description. *See also Kay* v. *Brookman*, *Id.* 286: *Mitchell* v. *Johnson*, *Id.* 176. But *see Whitelocke* v. *Musgrove*, 1 *Cr. & M.* 511: *Jones* v. *Jones*, 9 *M. & W.* 75. If there be two witnesses to the deed, and any of the circumstances just now mentioned apply only to one of them, the deed must of course be proved by the other. Also by 26 *G.* 3, *c.* 57, *s.* 38, bonds or other deeds or writings executed in the East Indies, and attested by any person or persons resident there may be given in evidence in Great Britain, upon proof by one or more credible witnesses of the handwriting of the parties and of the witnesses. *Lastly*, where the subscribing witness at the trial is unable, or refuses to disclose the truth, the deed may be proved by other witnesses. *Goodtitle* v. *Clayton*, 4 *Burr.* 2224: *Talbot* v. *Hodson*, 7 *Taunt.* 251.

Upon an indictment for forging a deed or other written instrument, all that it is incumbent upon the prosecutor to prove is, that the name subscribed to the deed is not the handwriting of the party whose signature it purports to be, which may be proved by the party whose name is forged.

To prove a will of lands, it was at common law only necessary to call one of the witnesses who attested it; *Doe* v. *Smith*, 1 *Esp.* 391; *Dayrell* v. *Glascock*, *Skin.* 413: *Holdfast* v. *Dowsen*, 1 *W. Bl.* 8; 2 *Str.* 1253: *Lowe* v. *Jolliffe* [1761] 1 *W. Bl.* 365; if the opposite party wish he might call the others. *Bull.* (*N. P.*) 264. The witness called, however, should be prepared to give parol evidence of every circumstance attending the attestation necessary to show that the will was duly executed and attested. Wills of lands over thirty years old require no proof; 1 *Taylor*, *Ev.* (9th ed.), p. 86. And the ordinary mode of proving wills of lands is by production of the probate if granted since January 11, 1858 (*see ante*, p. 364).

All other writings, not under seal, are proved in the same manner as deeds; that is, by the subscribing witness, if there be one (*see ante*, p. 380); *Wetherston* v. *Edgington*, 2 *Camp.* 94; and *see Stone* v. *Metcalf*, 1 *Stark.* (*N. P.*) 53: *Higgs* v. *Dixon*, 2 *Stark.* (*N. P.*) 180; and if the instrument is one to the validity of which attestation is requisite, 28 & 29 *Vict. c.* 18, *s.* 7 (*ante*, p. 380); if not, then either by the subscribing witness or by proof of the party's handwriting. It is said also, that a writing of this kind, if ancient, shall be received in evidence without proof, in the same manner as an ancient deed. *Tr. per Pais*, 370; *but see Fortesc.* 43. If the original has been lost or destroyed, copies or other secondary evidence of their contents will be received; but evidence must be given at the same time of the genuineness of the original instrument. *See Goodier* v. *Lake* [1737] 1 *Atk.* 446; *R.* v. *Pembridge*, *C. & Mar.* 157.

Handwriting.]—The handwriting of a witness or party may be proved either by some person who has a knowledge of it from having seen him write, *see Burr* v. *Harper*, *Holt* (*N. P.*) 420; 17 *R. R.* 656; even once only, *Willman* v. *Worrall*, 8 *C. & P.* 380; *Warren* v. *Anderson*, 8 *Scott*,

384; or his surname only, *Lewis* v. *Sapio, M. & M.* 39; (dissenting from *Powell* v. *Ford*, 2 *Stark.* (*N. P.*) 164), or from having been in the habit of corresponding with him, *Gould* v. *Jones*, 1 *W. Bl.* 384; *Harrington* v. *Fry, Ry. & M.* 90; or of acting upon his correspondence with others, *R.* v. *Slaney*, 5 *C. & P.* 213; 38 *R. R.* 205: *see Doe* v. *Suckermore*, 5 *A. & E.* 703; 2 *Nev. & Per.* 16; or the handwriting of a party may be proved by his own admission. *Waldridge* v. *Kennison*, 1 *Esp.* 143. But the witness must at least be prepared to swear that he believes the writing to be that of the witness or party. *Eagleton* v. *Kingston*, 8 *Ves.* 438, 475, *Eldon, L.C.* *see* hereon 58 *J. P.* 813.

By *s.* 8 of "*Denman's Act*" (28 & 29 *Vict. c.* 18, which by *s.* 1 applies to all courts of criminal judicature), "comparison of a disputed writing with *any* writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." (*a*) It seems that under this section the disputed writing and the writing whose genuineness is proved cannot be submitted to the jury in order that they may draw their own unaided conclusion from a comparison, but that they must be assisted by the evidence of an expert; *R.* v. *Harvey*, 11 *Cox*, 546, *per Blackburn*, J.; or of a person who in the ordinary course of business has come to know the handwriting in question. *Fitzwalter Peerage claim*, 10 *Cl. & F.* 193; 2 *Taylor, Ev.* (9th ed.), p. 1227.

A man is an expert in handwriting who has an adequate knowledge and skill as to handwriting whether acquired in the way of his business or not. *R.* v. *Silverlock* [1894] 2 *Q. B.* 766 (*C. C. R.*). In *R.* v. *Wilbain*, 9 *Cox*, 448 (*Ir.*) and *R.* v. *Harvey, ubi supra*, a police officer was held not to be qualified as an expert.

It has long been established practice to admit the evidence of persons skilled in detecting forgeries to prove that a writing is in a feigned hand, though they never saw the party write. *R.* v. *Cator*, 4 *Esp.* 177; *Goodtitle* v. *Bruham*, 4 *T. R.* 497. There are decisions to the contrary; *see Carey* v. *Pitt. Peake* (*Add. Cas.*), 130; 4 *R. R.* 895; *Batchelor* v. *Honeywood*, 2 *Esp.* 714; *Gurney* v. *Langlands*, 5 *B. & Ald.* 330: *R.* v. *Backler*, 5 *C. & P.* 118. In *Doe* v. *Suckermore*, 5 *A. & E.* 703; 2 *Nev. & Per.* 16, the court was equally divided.

Stamps.]—The absence of a revenue stamp from a document is now no bar to its production in criminal proceedings. *See* the *Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 14, *sub-s.* 4, which enacts, that "save as aforesaid, an instrument executed in any part of the United Kingdom, or relating,

(*a*) Until this enactment, handwriting could not be proved by comparing it with other writings, although confessedly written by the person whose handwriting was in question. *Garrels* v. *Alexander*, 4 *Esp.* 37; *R.* v. *Cator*, 4 *Esp.* 117: *Macferson* v. *Thoytes, Peake* (3rd. ed.), 29: *Stranger* v. *Searle*, 1 *Esp.* 14: *see Griffits* v. *Ivery*, 11 *A. & E.* 322; 3 *Per. & D.* 179: *Hughes* v. *Rogers*, 8 *M. & W.* 123: *Younger* v. *Honner*, 2 *M. & Rob.* 536; 1 *C. & K.* 51. But on a question as to the genuineness of handwriting, the jury might compare the document with authentic writings of the party to whom it was ascribed, if such writings were in evidence for other purposes of the cause. *Solita* v. *Yarrow*, 1 *M. & Rob.* 133: *R.* v. *Morgan, Id.* 134, *n.*: *Griffith* v. *Williams*, 1 *Cr. & J.* 47: *Waddington* v. *Cousins*, 7 *C. & P.* 595: *Doe* v. *Newton*, 5 *A. & E.* 514; 1 *Nev. & P.* 1. In an action for a libel, which charged the plaintiff with having published a libel on the defendant, where the defendant justified on the ground that the plaintiff had published such libel, letters written by the plaintiff, not otherwise evidence in the cause, in which the defendant's name was spelt in a peculiar manner, were held to be admissible to show that the libel in question, which contained the defendant's name spelt with the same peculiarity, was also written by the plaintiff. *Brookes* v. *Tichborne*, 5 *Ex.* 929.

wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, *except in criminal proceedings*, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed." This enactment replaces 17 & 18 *Vict. c.* 83, *s.* 27 (*rep.*), which got rid of the difficulties of proof in criminal cases caused by prior *Stamp Acts*. As to former law *see Archbold, Cr. Pl.* (22nd ed.), 354.

Bankers' books.]—The *Bankers' Books Evidence Act*, 1879 (42 & 43 *Vict. c.* 11), was passed to obviate the inconvenience occasioned to bankers and their customers, by removal of ledgers and other account books from banks for the purpose of production in legal proceedings, and to facilitate proof of transactions recorded in such ledgers and account books. The material parts of the Act are as follows:—"Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *primâ facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded," *s.* 3. "A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorized to take affidavits," *s.* 4. "A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry, and is correct. Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorized to take affidavits," *s.* 5. "A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts, therein recorded, unless by order of a judge made for special cause," *s.* 6. "On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs," *s.* 7. "The costs of any application to a court or judge under or for the purposes of this Act, and the costs of anything done or to be done under an order of a court or judge made under or for the purposes of this Act, shall be in the discretion of the court or judge, who may order the same or any part thereof to be paid to any party by the bank, where the same have been occasioned by any default or delay on the part of the bank. Any such order against a bank may be enforced as if the bank was a party to the proceeding," *s.* 8. "In this Act the expressions 'bank' and 'banker' mean any person, persons, partnership, or company carrying on the business of bankers, and having duly made a return to the Commissioners of Inland Revenue, and also any savings bank certified under the Acts relating to savings banks, and also any post office savings bank.

"The fact of any such bank having duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by

production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue; the fact that any such savings bank is certified under the Acts relating to savings banks may be proved by an office or examined copy of its certificate; the fact that any such bank is a post office savings bank may be proved by a certificate purporting to be under the hand of her Majesty's Postmaster-General, or one of the secretaries of the Post Office."

"Expressions in this Act relating to 'bankers' books' include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank," *s.* 9. "In this Act the expression 'legal proceeding' means any civil or *criminal* proceeding or inquiry in which evidence is or may be given, and includes an arbitration; the expression 'the court' means the court, judge, arbitrator, persons, or person, before whom a legal proceeding is held or taken; the expression 'a judge' means with respect to England a judge of the High Court of Justice, and with respect to Ireland a judge of the High Court of Justice in Ireland," *s.* 10. "Sunday, Christmas Day, Good Friday, and any bank holiday, shall be excluded from the computation of time under this Act," *s.* 11.

"The expressions 'bank' and 'bankers' in the *Bankers' Books Evidence Act*, 1879 (*supra*), shall include any company carrying on the business of bankers to which the provisions of the *Companies Acts*, 1862 to 1880, are applicable, and having duly furnished to the registrar of joint stock companies a list and summary with the addition specified by this Act, and the fact of such list and summary having been duly furnished may be proved in any legal proceedings by the certificate of the registrar or any assistant registrar for the time being of joint stock companies." 45 & 46 *Vict. c.* 72 (*Revenue, etc., Act*, 1882), *s.* 11, *sub-s.* 2.

Most of the decisions on these Acts are collected in the *Annual Practice*, 1905, *notes to* Order XXXVII., *r.* 7. It was held in *R.* v. *Bradlaugh*, 15 *Cox*, 222, *n.*; 47 *J. P.* 243; by *Coleridge*, L.C.J., that justices before whom a preliminary inquiry is proceeding are not a court which can make an order under the Act, and that the order must be made by the High Court or a judge thereof. In criminal proceedings the application in the High Court is made on the crown side, and the order drawn up in the Crown Office. It may be made *ex parte*.

Sect. 5.

PAROL EVIDENCE.

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8. *Examination of Witnesses*, p. 414.

1. *In what Cases receivable.*

Parol evidence is admissible, (1) When it is the best evidence of the facts to be proved, *e.g.*, where it is the evidence of a person who saw or

heard them; (2) As secondary evidence of the contents of writings, in which case it is inferior to the evidence of the documents themselves. As a general rule, the contents of a written document which is capable of being produced, must be proved by the document itself, and not by parol evidence: *Queen Caroline's Case*, 2 *B. & B.* 284, 289; 1 *St. Tr., N. S.* 1348; subject to this exception, that what a party to the record says is *primary* evidence against him as an admission, though it relates to the contents of a written instrument, and though the contents be directly in issue in the cause. *Slatterie* v. *Pooley*, 6 *M. & W.* 664; 10 *L. J. Ex.* 8; 1 *Taylor, Ev.* (9th ed.), p. 291. In conformity with this rule, it used to be held that secondary evidence could not be given of a document, which, if producible, could not be put in because it was unstamped. *Rippiner* v. *Wright*, 2 *B. & Ald.* 478: *R.* v. *Castle Morton*, 3 *B. & Ald.* 588: *Doe* v. *Cartwright*, *Id.* 326; *Teal* v. *Autey*, 2 *B. & B.* 99. But these cases are no longer of authority, so far as they depend on the absence of a stamp on a written agreement (*see ante*, pp. 383, 384). But where a parol contract is made subsequently to, and in substitution for, a former written contract, parol evidence may be given of the latter contract. *White* v. *Parkin*, 12 *East*, 578; 11 *R. R.* 488. As to the cases in which parol evidence may be received as secondary evidence of a written instrument, where the written instrument is proved to have been burnt, destroyed, or lost, or in the possession of the opposite party, *see ante*, p. 315.

There are no *degrees* of secondary evidence: and therefore a party who has laid the foundation for such evidence, may prove the contents of a deed by parol, although it appear that there is an attested copy in existence. *Doe* v. *Ross*, 7 *M. & W.* 102: *Brown* v. *Woodman*, 6 *C. & P.* 206: *Hall* v. *Ball*, 3 *Scott* (*N. R.*) 577. But it has been held, that where there is a copy of the original document, it cannot be proved by a copy of that copy. *Liebman* v. *Pooley*, 1 *Stark.* (*N. P.*) 167; 18 *R. R.* 756. *Everingham* v. *Roundell*, 2 *M. & Rob.* 138. It must not, however, be understood that parol evidence can never be received where written evidence of the same fact is attainable. For although parol evidence cannot be substituted for any instrument which the law requires to be in writing; 1 *Taylor, Ev.* (9th ed.), 282; nor for the written evidence of any contract which the parties have put in writing; *Id.* p. 284: nor for any writing, the existence or contents of which are disputed, and which is material to the issue between the parties, and is not merely the memorandum of some other fact, *Id.* p. 290; yet where the writing does not fall within either of these three classes, no reason exists for excluding parol evidence of its existence and contents, *Id.* p. 293. Thus, although a written receipt may have been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it. *Rambert* v. *Cohen*, 4 *Esp.* 213; 6 *R. R.* 854. So the fact of marriage may be proved by the evidence of a person who was present at it, although the marriage may have been registered. *R.* v. *Manwaring*, *Dears. & B.* 132; 26 *L. J.* (*M. C.*) 10. And where three witnesses stated that a vessel was a British ship of Shields, and that she was sailing under the British flag, but no proof was given of the register of the vessel or of the ownership, it was held, that this was sufficient proof that the vessel was British. *R.* v. *Seberg*, *L. R.*, 1 *C. C. R.* 264: 39 *L. J.* (*M. C.*) 133. And on an indictment for unlawful assembly, parol evidence of proclamations and inscriptions has been admitted without producing copies. *R.* v. *Hunt*, 1 *St. Tr., N. S.* 171: *R.* v. *Fursey*, 3 *St. Tr., N. S.* 543, 561: *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1, 278.

As a general rule, parol evidence is not admissible as to anything not

immediately within the knowledge of the witness; he must speak of facts which happened in his presence, or within his hearing. This rule excludes hearsay evidence, save in the cases mentioned, *ante*, pp. 317, 318. It also, as a general rule, excludes the expression of opinion or belief. But to this rule there is a necessary exception on questions of the identity of things or persons, or the genuineness of handwriting, where the witness is qualified to express a credible opinion or belief on the subject. *R.* v. *Silverlock* [1894] 2 *Q. B.* 766; 2 *Taylor, Ev.* (9th ed.), p. 930, *ante*, p. 382. And in matters of science or trade, an expert, or person intimately acquainted with it may be called upon to give his opinion as to the probable result or consequence from certain facts already proved. As, for instance, if it were required to determine whether a man died of any particular disease, symptoms being proved, a physician may be called upon to give in evidence his opinion as to the disease of which the party died, as founded upon the symptoms so proved, although he have never seen the deceased. So, upon an indictment for murder, the deceased's wounds, etc., being described, a surgeon may be called upon to give in evidence his opinion whether the deceased died in consequence of his wounds, or from natural causes. Upon a question of insanity, a witness of medical skill may be asked whether such and such appearances, proved by other witnesses, are, in his judgment, symptoms of insanity; but he cannot be asked, if, from the testimony given, the act with which the prisoner is charged is, in his opinion, an act of insanity; which is the very point to be decided by the jury. *R.* v. *Wright, R. & R.* 456; 2 *Taylor, Ev.* (9th ed.), p. 931–936; *and see ante*, p. 28. On an indictment for uttering a forged will, which it was suggested had been written over pencil-marks that had been rubbed out, it was held that the evidence of an engraver, who had examined the paper with a mirror and traced the pencil-marks, was admissible on the part of the prosecution. *R.* v. *Williams*, 8 *C. & P.* 434.

2. *Competency of Witnesses.*

Mode of ascertaining.]—It is the business of the judge to decide as to the competency of a witness. *R.* v. *Whitehead, L. R.* 1 *C. C. R.* 33; 35 *L. J.* (*M. C.*) 186; 1 *Taylor, Ev.* (9th ed.), p. 25: which may be done by examining him on the *voir dire*, or by evidence *aliunde*. *R.* v. *Wakefield*, 2 *Lewin*, 279: *M. & M.* 197, *n.*, *Murray's Report*. It was at one time held that the objection for incompetency must be made before the witness was sworn in chief; but it has been generally allowed to be made at any time during the trial. *Stone* v. *Blackburn*, 1 *Esp.* 37: *Turner* v. *Pearte*, 1 *T. R.* 717. It is, however, always advisable to make the objection before the witness has been examined in chief, and if he can be examined as to it, to examine him on the *voir dire*; and more recent cases appear to decide that the objection should, in strictness, be taken at that time; *see Hartshorne* v. *Watson*, 5 *Bing. N. C.* 477: *Wollaston* v. *Hakewill*, 3 *Scott* (*N. R.*) 593; unless the incompetency appears only in the course of his examination in chief. *Yardley* v. *Arnold*, 10 *M. & W.* 141: *Jacobs* v. *Layborn*, 11 *M. & W.* 685. And the opposite party cannot, after the witness has been sworn and examined, adduce other evidence to show his incompetency. *Dewdney* v. *Palmer*, 4 *M. & W.* 664. If the judge has admitted a witness as competent to give evidence, but upon proof of subsequent facts affecting the capacity of the witness, and upon observation of his subsequent demeanor, the judge changes his opinion as to his competency, the judge may stop the examination of the witness, strike his evidence out of his notes, and direct the jury to consider the case

exclusively upon the evidence of the other witnesses. *R.* v. *Whitehead*, *L. R.* 1 *C. C. R.* 33; 35 *L. J.* (*M. C.*) 186.

What witnesses competent.]—Persons who by the common law were deemed to be incompetent as witnesses, and not allowed to give evidence upon a criminal prosecution, may be classed as follows: (1) those who do not appear to have sufficient discretion; (2) those who do not appear to have a right sense of the sanctity and moral obligation of an oath; (3) those whose crimes render them infamous; (4) those who are interested in the event of the suit. The 3rd and 4th disqualifications were removed by *Lord Denman's Act*, 6 & 7 *Vict. c.* 85 (*post*, p. 390). The competence of husband and wife and of counsel and solicitors is considered, *post*, p. 397, *tit.* "*Privilege.*"

1. *Want of discretion.*]—An idiot is not allowed to give evidence; *Co. Litt.* 6 *b*; 2 *Taylor, Ev.* (9th ed.), p. 896; a lunatic during a lucid interval may. *Id.*: *Com. Dig. Testm.* (*A.*). When a lunatic is tendered as a witness, it is for the judge to ascertain whether he is of competent understanding to give evidence, and is aware of the nature and obligation of an oath; if satisfied that he is, the judge should allow him to be sworn and examined, leaving the jury to decide the worth of his testimony. *R.* v. *Hill*, 2 *Den.* 254; 20 *L. J.* (*M. C.*) 222. A person who is deaf and dumb is not incompetent if he can be made to understand the nature of an oath, and if intelligence can be conveyed to and received from him by means of signs; *Ruston's Case*, 1 *Leach*, 480: *R.* v. *O'Brien*, 1 *Cox*, 185 (*Ir.*), and may be examined through the medium of a sworn interpreter, who understands his signs (*Id.*). A dumb man, not deaf, is sworn in the usual way, and then the interpreter is sworn to interpret his signs. If a dumb witness can write he will be allowed to write down his evidence. *See* 2 *Taylor, Ev.* (9th ed.), p. 897.

An infant of any age may be a witness in any criminal case, provided such infant appear sufficiently to understand the nature and moral obligation of an oath; for its competency not upon its age, but its understanding. *R.* v. *Powell*, 1 *Leach*, 110: *R.* v. *Brasier*, *Id.* 199 (1 *East*, *P. C.* 443): *R.* v. *Williams*, 7 *C. & P.* 320. *See* 2 *Hale*, 278, 284; *Com. Dig.*, *Testm.* (*A.* 1): *R.* v. *Travers*, 2 *Str.* 700; 2 *Taylor, Ev.* (9th ed.), 896. The court has refused to postpone the trial of an indictment, in order that a child of six, who was a necessary witness for the prosecution, and who could not be examined from want of knowledge of the nature and obligation of an oath, might in the meantime be instructed therein. *R.* v. *Nicholas*, 2 *C. & K.* 246; 2 *Cox*, 136, *Pollock*, C.B. But in another case where an indictment for rape on a girl of ten was ignored because the girl did not understand the nature of an oath, an order was made to detain the accused in custody until the girl could be instructed. *R.* v. *Baylis*, 4 *Cox*, 23, *Erle*, J.: and the same course was followed in *R.* v. *Cox*, 62 *J. P.* 89. It is submitted (*Taylor, Ev.* vol. ii. (9th ed.), p. 898), that the matter is for the discretion of the judge in each case.

There are several statutes under which a court may receive the unsworn evidence of a child of tender years who is tendered as a witness, and who, in the opinion of the court, does not understand the nature of an oath, if the court is satisfied that the child is of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; but to justify a conviction such unsworn evidence must be corroborated by other material evidence. The *Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *s.* 4, permits such unsworn evidence upon the hearing of a charge of unlawfully and carnally

knowing any girl under the age of thirteen years, or attempting to have unlawful carnal knowledge of any such girl. The *Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15), *s.* 15, makes the like provision as to proceedings for an offence under that Act, or for an offence specified in the schedule thereto, *i.e.*, offences under *ss.* 27, 55, 56 of the *Offences against the Person Act*, 1861 (24 *&* 25 *Vict. c.* 100), and offences against a child under the age of sixteen years under *ss.* 5, 43, 52, 62, or *s.* 11 of the *Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), and offences against the *Dangerous Performances Acts*, 1879 and 1897 (42 *&* 43 *Vict. c.* 34, and 60 *&* 61 *Vict. c.* 52), and any other offence involving bodily injury to a child under the age of sixteen. As to the last paragraph *see* *R.* v. *Roberts*, 18 *Cox*, 530: *Lord Advocate* v. *Fraser*, 3 *Fraser* (*Justiciary*). 67.

2. *Want of religion.*]—At common law, it is not necessary that a witness should be a Christian, or even believe in the Old Testament (as laid down in some of the older authorities; *see Co. Litt.* 6 *b*; *Gilb. Ev.* 142, 143). In order to render him competent to take an oath as a witness, it is sufficient if he believe in a God, in a future state of rewards and punishments, and in the moral obligation of the oath he is about to take. *Omichund* v. *Barker*, *Willes*, 538; 1 *Atk.* 21; 1 *Wils.* 84; *Bull.* (*N. P.*) 292: *R.* v. *Taylor*, *Peake* (3rd ed.), 14. Consequently it is permissible to accept the sworn evidence of Christians of all sects and denominations (*R.* v. *Mildrone*, 1 *Leach*, 412; 3 *R. R.* 708; *Mee* v. *Reid*, *Peake* (3rd ed.), 33; 3 *R. R.* 648: *R.* v. *McCarther*, *Peake* (3rd ed.), 211: *R.* v. *Serva*, 2 *C. & K.* 53); Jews (*Gilb. Ev.* 143; *Gomez Serra* v. *Nunez*, 2 *Str.* 821); Turks, Moors, and other Mussulmans (*R.* v. *Morgan*, 1 *Leach*, 54: *see* 2 *Str.* 1104); Hindoos or Gentoos (*Omichund* v. *Barker*, *ubi supra*); Chinese (*R.* v. *Entrehman*, *C. & Mar.* 248); and the like.

Until the passing of the *Evidence Further Amendment Act*, 1869 (32 *&* 33 *Vict. c.* 68, *s.* 4), a man wholly without religion was not a competent witness. *Maden* v. *Catanach*, 7 *H. & N.* 360: 31 *L. J. Ex.* 118. *S.* 4 was repealed by the *Oaths Act*, 1883 (51 *&* 52 *Vict. c.* 46), and *s.* 1 of that Act (*post*, pp. 407, 408) substituted. By *s.* 3 of the Act of 1888 (*post*, p. 406), where an oath has been duly administered and taken, the fact that the person taking it had no religious belief does not affect the validity of the oath. *S.* 1 (*post*, p. 407) does not provide for the case of a person called as a witness who does not object to be sworn, but who, although an adult and of sufficient intellect, has no belief in a future state of rewards and punishments, and no belief in a God, and it would seem that such a person might still be successfully objected to as a witness by the opposite party, although if he was actually sworn without objection, the oath would be valid under *s.* 3 (*post*, p. 406). The repealed *s.* 4 of 32 *&* 33 *Vict. c.* 68, provided not merely for the case of the person called as a witness objecting to take the oath, but also for the case of his being objected to as incompetent to take an oath.

It was held under the law as it stood before these statutes that the circumstance that a principal witness, although an adult and of sufficient intellect, had no idea of a future state of rewards and punishments, was not a sufficient ground for discharging the jury, though it appeared as soon as the jury was charged, and before any evidence was given. *R.* v. *Wade*, 1 *Mood. C. C.* 86. But if an application for that purpose be made before the jury are sworn, the judges have power to postpone important trials, if they have reason to believe that an adult, who is a necessary witness for the prosecution, can, within a reasonable time, be rendered competent to testify. *R.* v. *White*, 1 *Leach*, 430, *n.* (*a*).

3. *Infamy.*]—Formerly persons who had been *convicted* of certain

crimes which were regarded as *infamous* were incompetent as witnesses, unless they had been pardoned or had endured their punishment. This rule excluded the evidence of convicted accomplices. 2 *Hawk, c.* 46, *s.* 101.

It has been abolished by the *Evidence Act*, 1843 (6 *&* 7 *Vict. c.* 85, which enacts (*s.* 1) that "no person offered as a witness shall be excluded by reason of incapacity from *crime* or *interest* from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive and examine evidence; but every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence." Notwithstanding this enactment, it has been held that a person actually under sentence of death, is civilly dead, and is therefore incapable of being a witness. *R.* v. *Webb*, 11 *Cox*, 133, *Lush*, J. But this decision was prior to the passing of the *Forfeitures Act*, 1870 (33 *&* 34 *Vict. c.* 23), and seems to be inconsistent with the provisions of that Act. *See* 2 *Taylor, Ev.* (9th ed.), p. 877. The witness is liable to be questioned as to the fact of such conviction and to have it proved against him. (28 *&* 29 *Vict. c.* 18, *ss.* 1, 6, *post*, p. 404).

4. *Interest.*]—Until the *Evidence Act*, 1843 (6 *&* 7 *Vict. c.* 85, *s.* 1, *supra*), removed the incapacity, it was a general rule of evidence, not to admit the testimony of a witness who was necessarily to be a gainer or loser by the event of a cause, whether such advantage were direct and immediate, or consequential only.

Accomplices.]—Notwithstanding this general rule, an accomplice was always a competent witness before the grand jury and the petty jury, 2 *Hawk. c.* 46, *ss.* 94–100: *R.* v. *Dodd*, 1 *Leach*, 155; 2 *East, P. C.* 1003, and whether included in the indictment or not. *R.* v. *Tinckler*, 1 *East, P. C.* 354, 356, although his expectation of pardon depended upon the defendant's conviction. 1 *Hale*, 303; 2 *Hawk. c.* 46, *s.* 94. This expectation of pardon does not amount to a right, either as to the particular offence, question, or other offences committed. *R.* v. *Rudd*, 1 *Cowp.* 331; 1 *Leach*, 115: *R.* v. *Lee, R. & R.* 361: *R.* v. *Brunton, R. & R.* 454: *R.* v. *Garside*, 2 *A. & E.* 266. As to the circumstances under which an accomplice should be admitted as an approver, *see R.* v. *Dunne*, 5 *Cox*, 507 (*Ir.*): *R.* v. *Gallagher*, 15 *Cox*, 291. A police spy is not an accomplice. *R.* v. *Mullins*, 3 *Cox*, 526; 7 *St. Tr., N. S.* 1110. *See Bush* v. *Ralling* (1756), *Say.* 289: *Mead* v. *Robinson, Willes*, 422. If the accomplice is dead his depositions, if properly taken, may be read against the defendant. *R.* v. *Westbeer*, 1 *Leach*, 12. An accessory is a competent witness against his principal, and the principal against the accessory, *R.* v. *Patram*, 2 *East, P. C.* 782: *R.* v. *Haslam*, 1 *Leach*, 418; but the fact of the witness being an accomplice, accessory, or principal detracts very materially from his credit. 1 *Taylor, Ev.* (9th ed.), 632.

Corroboration.]—It is not a rule of law that the evidence of an accomplice

must be corroborated. *R.* v. *Atwood*, 1 *Leach*, 464; *re Meunier* [1894] 2 *Q. B.* 415; 18 *Cox*, 15: *R.* v. *Stubbs*, *Dears.* 555; 23 *L. J.* (*M. C.*) 16 (*C. C. R.*). But it is the general practice to require corroboration: and for the prosecution in order to induce the jury to credit his testimony, to give other evidence confirmatory of, at least, some of the leading circumstances of his story, from which the jury may be able to presume that he has told the truth as to the rest: and for the judge to direct the jury not to act on the uncorroborated testimony of an accomplice. *R.* v. *Rudd*, 1 *Cowp.* 331, 336: *R.* v. *Wells*, *M. & M.* 326: *R.* v. *Jenkins*, 1 *Cox*, 177, *Alderson*, B.: *R.* v. *Andrews*, *Id.* 183, *Coleridge*, J.: *R.* v. *Hastings*, 7 *C. & P.* 152: *R.* v. *Stubbs*, *ubi supra*: *R.* v. *Boyes*, 1 *B. & S.* 311; 30 *L. J.* (*M. C.*) 301. *Re Meunier*, *ubi supra*. If, upon an indictment against several, the accomplice be confirmed in the testimony he gives against some of the prisoners, but not as to the others, this has been held sufficient confirmation to warrant the conviction of all. *R.* v. *Dawber*, 3 *Stark.* (*N. P.*) 34, *and n.*: *but see R.* v. *Stubbs*, *ubi supra*. The enforcement of the rule varies in strictness according to the nature of the offence and the degree of complicity of the accomplice. *R.* v. *Boyes*, *ubi supra*; and in the case of misdemeanors it has been often relaxed. *R.* v. *Jones*, 2 *Camp.* 131, 132; 11 *R. R.* 680: *R.* v. *Hastings*, 7 *C. & P.* 152: *R.* v. *Avery*, 1 *Cox*, 206, *Erle*, J. Even in a case of manslaughter arising out of a prize-fight, the persons present aiding and abetting are not regarded as accomplices needing corroboration. *R.* v. *Hargrave*, 5 *C. & P.* 170: *R.* v. *Young*, 10 *Cox*, 371: *and cf. R.* v. *Coney*, 8 *Q. B. D.* 534; 33 *L. J.* (*M. C.*) 177. It has been said that if an accomplice be confirmed as to the particulars of the story, he does not require confirmation as to the persons charged. *R.* v. *Birkett*, *R. & R.* 251; but this doctrine has been rejected in later cases; inasmuch as the confirmation as to the circumstances proves only that the accomplice was participant in the felony, not that the particular party charged was his confederate. *R.* v. *Webb*, 6 *C. & P.* 595: *R.* v. *Wilkes*, 7 *C. & P.* 272: *R.* v. *Farler*, 8 *C. & P.* 106: *R.* v. *Dyke*, *Id.* 261: *R.* v. *Jellyman*, *Id.* 604: *R.* v. *Birkett*, *Id.* 732: *R.* v. *Stubbs*, *ubi supra*. And where, upon an indictment against principals and accessories, the case against the principal was proved by an accomplice, who was confirmed as to the accessories, but not as to the principal, the jury were directed to acquit the prisoners. *R.* v. *Wells*, *M. & M.*, 326: *R.* v. *Moores*, 7 *C. & P.* 270. A prisoner as a matter of prudence ought not to be convicted upon the evidence of any number of accomplices, unconfirmed by other testimony. *R.* v. *Noakes*, 5 *C. & P.* 326. Nor is the testimony of the wife of an accomplice such evidence as a jury ought to rely upon as confirmation of his statement. *R.* v. *Neal*, 7 *C. & P.* 168. And a prisoner, who employed another person to harbour a principal felon, has been convicted on the uncorroborated testimony of the person who actually harboured him. *R.* v. *Jarvis*, 2 *M. & Rob.* 40. Corroboration is not required as to every particular. *R.* v. *Gallagher*, 15 *Cox*, 291 (*Ir.*). Where a woman was accused of administering a noxious drug with a view to cause miscarriage, evidence of the father of the woman to whom it was administered, that he had accused the prisoner of administering it, and that she did not deny it, was held corroboration. *R.* v. *Cramp*, 14 *Cox*, 390, *Denman*, J. Until 1843 (6 *& 7 Vict. c.* 85, *s.* 1) a convicted or attainted accomplice could not testify. (*See ante*, p. 390.) Where it is proposed to call an accomplice for the crown, it is the practice: (A) not to include him in the indictment; or (B) to take his plea of guilty; *Winsor* v. *R.*, *L. R.* 1 *Q. B.* 289, 390; or before calling him either (C) to offer no evidence and permit his acquittal: *R.* v. *Owen*, 9 *C. & P.* 83; or (D) to enter a *nolle prosequi*: *R.* v. *Fergus O'Connor*, 4 *St. Tr., N. S.* 935. As we have

already seen, 6 & 7 *Vict. c.* 85, *s.* 1 (*ante*, p. 390), renders persons competent as witnesses, notwithstanding that they may have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding, whether civil or criminal, in which they may be offered as witnesses; subject, however, to certain exceptions, which will be presently stated.

Parties to the suit.]—In *civil* actions, until the *Evidence Act*, 1851 (14 & 15 *Vict. c.* 99), neither party to a suit was allowed to give evidence for or obliged to give evidence against himself. The rule as to the competence of parties to give evidence was never properly applicable to criminal proceedings.

Prosecutor.]—The indictment being at the suit of the Crown, the private prosecutor was always considered a competent witness.

Defendant.]—The defendant at common law was not a competent or compellable witness at any stage of the proceedings, on the ground of the maxim *nemo tenetur seipsum prodere*, which protected both the defendant and all witnesses in the case from liability to answer incriminating questions (*see post*, p. 399), and if the defendant were examined on oath any conviction would be bad. *R.* v. *Sullivan*, *Ir. Rep.*, 8 *C. L.* 404. Nor was he bound to answer questions put to him at the preliminary inquiry (*a*) or even when articles of the peace were sworn against him. *Lort* v. *Hutton*, 45 *L. J.* (*M. C.*) 95. On this last point the law has been altered as to summary proceedings by 42 & 43 *Vict. c.* 49, *s.* 25.

The position of the defendant has been gradually changed by a series of statutory provisions (*b*) culminating in the *Evidence Act*, 1877, and the *Criminal Evidence Act*, 1898, and the present law will be best shown by printing and annotating these two statutes.

40 & 41 *Vict. c.* 14 (*Evidence Act*, 1877), *s.* 1.]—"On the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant, shall be admissible witnesses and compellable to give evidence." [*These proceedings, even before the passing of this Act, had been regarded as in substance of a civil nature. R.* v. *Stephens*, *L. R.*, 1 *Q. B.* 702; 35 *L. J. Q. B.* 251.]

61 & 62 *Vict. c.* 36 (*Criminal Evidence Act*, 1898), *s.* 1. *Defendant and husband or wife of defendant competent witnesses for the defence.*]—"Every

(*a*) This is often inaptly called the "examination" of the prisoner. The expression is apt to describe the inquisitorial procedure by interrogating the accused derived from the Roman law and in use on the Continent and in the Star Chamber (*Baildon*, *Star Chamber Reports*).

(*b*) For an enumeration of these statutes, *see Official Index to the Statutes* (ed. 1904), *tit.* "*Witness*," 2 (*a*). Many of the statutes apply to Ireland, and as to that country are not affected by the Act of 1898. All of them except the Act of 1877 appear, *as to the evidence of the defendant*, to be superseded by the Act of 1898. *Charnock* v. *Merchant* [1900] 1 *Q. B.* 474; 69 *L. J. Q. B.* 221; 19 *Cox*, 443. And as to the evidence of the husband or wife of the defendant, all of them appear to be impliedly repealed as to England and Scotland by that Act, except the Act of 1877 and the enactments scheduled to the Act of 1898 (*post*, p. 397), and the *Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15) (*see post*, p. 398). Such of the enactments as come within the scope of this work are printed *post*, under the appropriate titles.

person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person." (*a*)

["Competent witness."—*This provision appears to supersede all prior enactments, which rendered the defendant a competent witness, except the Evidence Act*, 1877 (41 & 42 *Vict. c.* 14, *supra, p.* 392). *See Charnock* v. *Merchant* [1900] 1 *Q. B.* 474; 69 *L. J. Q. B.* 221; 19 *Cox*, 443; *and s.* 6 *of the Act, post, p.* 396.

As to its effect on enactments making the defendant's husband or wife a competent witness, see s. 6, *post, p.* 396. *The Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15), *s.* 12, *makes the defendant a competent but not compellable witness. It is submitted that the procedure under that Act is regulated by the Act of* 1898. *See Charnock* v. *Merchant, ubi supra.*

"For the defence."—*These words do not seem to limit a defendant to giving evidence on his own behalf if he is indicted and tried "jointly" with others. See post, p.* 395. *And sub-s. f.* (iii.), *post, p.* 395, *seems to contemplate the case of a defendant giving evidence against a co-defendant.*

"Every stage of the proceedings."—*These words do not include proceedings before the grand jury, but apply to proceedings at the preliminary inquiry and before the petty jury. R.* v. *Rhodes* [1899] 1 *Q. B.* 77; 68 *L. J. Q. B.* 83; 19 *Cox*, 182: *R.* v. *Saunders*, 63 *J. P.* 24. *In R.* v. *Hodgkinson*, 64 *J. P.* 808, *Darling, J., held that a defendant was not entitled, after pleading guilty, to give evidence on oath in mitigation of punishment. Evidence given by the defendant at the preliminary inquiry is admissible against him at the trial, even if he is not there called as a witness. R.* v. *Bird*, 19 *Cox*, 180; 62 *J. P.* 760 (*C. C. R.*). *In R.* v. *Humphries*, 67 *J. P. Rep.*, 396, *Wills, J., intimated that if the defendant did not exercise at the preliminary inquiry his right to give evidence, and was content there to reserve his defence, the value of his evidence at the trial was thereby lessened. This view has been indorsed by many judges: and where the defence is reserved it will be difficult to get a certificate for legal aid under the Poor Prisoners Defence Act*, 1903 (*ante, p.* 187).

"Solely or jointly."—*In* 1871 *it was decided that where two persons were indicted and tried together, one could not be called as a witness for the other. R.* v. *Payne, L. R.*, 1 *C. C. R.* 349: 41 *L. J.* (*M. C.*) 65. *The common law rule as laid down in this case is not directly affected by the Act of* 1898. *See R.* v. *Sheriff, Lewes Assizes, November*, 1900; 35 *L. J. Newsp.* 664, *Bruce, J. But as each defendant is entitled to be called "for the defence," and not merely "on his own behalf," he seems to be free to give evidence which may exculpate or inculpate a co-defendant. See R.* v. *Hadwen* [1902] 1 *K. B.* 882; 71 *L. J. K. B.* 581; 20 *Cox*, 206; 66 *J. P.* 456 (*C. C. R.*).

Where it appears to the court that the prosecutor has included one of the defendants in the indictment simply to shut him out from giving evidence for a co-defendant, and that there is no evidence affecting the defendant so unjustly joined, the court may direct his immediate acquittal. Davis v. *Living, Holt*, (*N. P.*) 275; *and see Gilb. Ev.* 132, 134: *Buller* (*N. P.*) 285: *R.* v. *Frazer*,

(*a*) The Act of 1898 does not affect the former law as to calling one defendant as a witness against a co-defendant; but if a defendant called on his own behalf by his evidence inculpates a co-defendant, he is subject to cross-examination on behalf of the defendant so inculpated. *R.* v. *Hadwen, ubi supra.*

In the case of an indictment against two or more defendants, one defendant may give evidence for the crown against a co-defendant in the following cases:—

1. Where a *nolle prosequi* has been entered. *R.* v. *Sherman, Case* (*K. B.*) *temp. Hardw.* 303.

(1797), *McNally Ev.* 56 (*Ir.*): *R.* v. *O'Donnell*, 7 *Cox*, 337 (*C. C. R. Ir.*): *R.* v. *Owen*, 9 *C. & P.* 83. *An alternative course in such a case is to direct that the defendants be separately tried: in which case the defendant not under trial is a competent witness for the defendant who is under trial. R.* v. *Payne* (*ubi supra*). *Such an order was made in R.* v. *Bradlaugh*, 15 *Cox*, 217: *and see R.* v. *Archer*, 3 *Cox*, 228, *Maule*, J.]

"Provided as follows:—

(*a*) *Defendant not compellable witness.*]—"A person so charged shall not be called as a witness in pursuance of this Act except upon his own application."

[*This appears to mean on the application of the defendant himself or by his counsel with his consent. The defendant ought to be informed of his right to give evidence, but failure to do so does not invalidate the trial. R.* v. *Saunders* [1899] 63 *J. P.* 24.]

(*b*) *Comment on failure to give evidence.*]—"The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution."

[*Though counsel may not comment on failure by the defendant to give evidence, the judge may comment if in his discretion he thinks it proper to do so. R.* v. *Rhodes* [1899] 1 *Q. B.* 77, 83 (*C. C. R.*), *and cf. Kops* v. *R.* [1894] *App. Cas.* 650. *The fact that the defendant did not give evidence before the justices may be matter for unfavourable comment. R.* v. *Humphries*, *ante*, *p.* 393. *And the jury are entitled to draw inferences unfavourable to the defendant where he is not called to establish an innocent explanation of facts proved by the prosecution, which without such explanation tell for his guilt. R.* v. *Corrie* [1904] 68 *J. P. Rep.* 294 (*C. C. R.*).]

(*c*) *Evidence of wife or husband of accused.*]—"The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged." *See post*, pp. 396, 397.

(*d*) *Communication between spouses privileged.*]—"Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage."

[*As to the effect of clause* (*d*) *see post, pp.* 396, 397.]

(*e*) *Incriminating questions.*]—"A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to the offence charged."

2. Where a verdict of acquittal has been given. *R.* v. *Rowland*, *Ry. & M.* 401.

3. Where the defendant in question has pleaded guilty. *R.* v. *George*, *C. & Mar.* 111: *R.* v. *Hinks*, 1 *Den.* 84; 2 *C. & K.* 462: *R.* v. *Drury*, 3 *C. & K.* 190, *Rolfe*, B.: *R.* v. *King*, 1 *Cox*, 282, *Platt*, B.: *R.* v. *Williams*, 1 *Cox*, 289: *R.* v. *Arundel*, 4 *Cox*, 260: *R.* v. *Gallagher*, 13 *Cox*, 61 (*C. C. R.*).

4. Where, though jointly indicted, he is not being tried with the defendant against whom he gives evidence. *Winsor* v. *R.*, *L. R.* 1 *Q. B.* 390; 35 *L. J. M.* 161.

In all these cases a defendant is also a competent witness for a co-defendant. It is said that a defendant who has pleaded guilty should be sentenced before being called in favour of a co-defendant: *R.* v. *Jackson*, 6 *Cox*, 525, *Erle*, J.; and if he is called for the crown, his evidence should be corroborated. *R.* v. *Sparks*, 1 *F. & F.* 388; *and see ante*, pp. 390, 391.

[*See R. v. Senior* [1899] 34 *L. J. Newsp.* 100; *Jelf, Cr. Ev.* 68, *and post, p.* 399.]

(*f*) *Questions as to other offences or character.*]—"A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

"(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

"(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution [*see R. v. Bridgwater,* 21 *Times L. R.* 69, *C. C. R.*] or

"(iii) he has given evidence against any other person charged with the same offence."

[(i) *As to cases in which evidence of other offences is admissible, see ante, pp.* 305–313, *and under the title "Receiving."*

(ii) *As to proving previous convictions where evidence of good character has been given on behalf of the accused, see ante, p.* 313. *It has been ruled that cross-examination of the prosecutrix on a charge of rape, with a view to prove consent, involves an imputation on her character within the second exception. R. v. Fisher, Day, J.,* 34 *L. J. Newsp.* 100: *Jelf on Criminal Evidence,* 70. *On an indictment for murder by stabbing, a suggestion on behalf of the defence that a witness for the crown committed the offence charged is such an imputation. R. v. Marshall,* 63 *J. P.* 36, *Darling, J., and see R. v. Holmes, Jelf, Criminal Evidence,* 69. *But merely to deny in strong terms a statement made by the prosecutor is not necessarily an imputation on the character of the prosecutor or her witnesses. R. v. Rouse* [1904] 1 *K. B.* 184; 68 *J. P. Rep.* 14 (*C. C. R.*). *In R. v. ——, Swansea Summer Assizes* [1898] 33 *L. J. Newsp.* 563, *Day, J., under this clause allowed cross-examination as to previous acquittals, presumably as falling within the word "charged."*

(iii) *Where one of the two defendants jointly indicted gives evidence on his own behalf, and in so doing incriminates the other defendant, counsel for the latter is entitled to cross-examine. R. v. Hudwen* [1902] 1 *K. B.* 882: 71 *L. J. K. B.* 581; 20 *Cox,* 206; 66 *J. P.* 456 (*C. C. R.*)].

(*g*) *Evidence from witness box.*]—"Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses gave their evidence."

[*The defendant is ordered to give evidence from the dock where there is reason to believe that he is likely to be violent.*]

(*h*) *Unsworn statements before justices and court of trial.*]—"Nothing in this Act shall affect the provisions of section 18 of the *Indictable Offences Act,* 1848 (11 & 12 *Vict. c.* 42), or any right of the person charged to make a statement without being sworn."

[*As to the provisions of* 11 & 12 *Vict. c.* 42, *s.* 18, *ante, p.* 325; *as to the right to make unsworn statements at the trial, see p.* 209.]

Sect. 2.—*Time for calling defendant.*]—"Where the only witness to the

facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution."

["*After the close of the evidence, etc.,*" *means before counsel for the prosecution sums up his case, and without prejudicing his right to do so.* *R.* v. *Rhodes* [1899] 1 *Q. B.* 77, 83. *The section does not affect the right of the defendant to call witnesses to character, but seems to require that the defendant be first called. As to whether he must be called before or after his counsel's speech, see ante, p.* 211. *Where the defendant calls witnesses to fact, the order in which he and these witnesses should be called appears to be in the discretion of his counsel. See the cases noted in Stone's Justices' Manual* (36*th ed.*), 227, *note* (*g*).]

Sect. 3.—*Right of reply.*]—"In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply."

[*See R.* v. *Gardner* [1899] 1 *Q. B.* 150 (*C. C. R.*) *and ante, pp.* 208, 211. *In R.* v. *Paget*, 64 *J. P.* 281, *Fulton, Recorder, held that where one defendant gave evidence hostile to a co-defendant, cross-examination on behalf of the latter did not give the prosecution a right to reply.*]

Sect. 4.—*Calling of wife or husband in certain cases.*]—"(1) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule of this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.

"(2) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

[*As to the effect of this section see post, p.* 397.]

Sect. 5.—*Application of the Act to Scotland.*]

Sect. 6.—*Provision as to previous Acts.*]—"(1) This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement of this Act, except that nothing in this Act shall affect the *Evidence Act*, 1877 (40 & 41 *Vict. c.* 14, *ante*, p. 392).

"(2) But this Act shall not apply to proceedings in courts martial unless so applied—

"(*a*) As to courts martial under the *Naval Discipline Act* (29 & 30 *Vict. c.* 109), by general orders made in pursuance of section 65 of that Act; and

"(*b*) As to courts martial under the *Army Act* (44 & 45 *Vict. c.* 58), by rules made in pursuance of section 70 of that Act.

[*The Act has been applied to courts martial in the navy and army. As to the Army, see Official Manual of Military Law* (1903), *p.* 641. *As to the navy, see King's Regulations, June* 7, 1899, *arts.* 626–665.]

Sect. 7.—*Extent, commencement, and short title.*]—"(1) This Act shall not extend to Ireland.

"(2) This Act shall come into operation on the expiration of two months from the passing thereof (Aug. 12, 1898).

(3) This Act may be cited as the *Criminal Evidence Act*, 1898.

SCHEDULE.

ENACTMENTS REFERRED TO.

Session and chapter.	Short title.	Enactments referred to.
5 *Geo.* 4 *c.* 83 -	*The Vagrancy Act*, 1824.	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family.
8 & 9 *Vict. c.* 83 -	*The Poor Law (Scotland) Act*, 1845.	*Sect.* 80.
24 & 25 *Vict. c.* 100	*The Offences against the Person Act*, 1861.	*Sects.* 48 to 55.
45 & 46 *Vict. c.* 75	*The Married Women's Property Act*, 1882.	*Sect.* 12 and *sect.* 16. [*Sect.* 12 *of this Act was held not to apply to proceedings under s.* 16. *R.* v. *Brittleton*, 12 *Q. B.* 266: 53 *L. J.* (*M. C.*) 83; *but the statute was amended by* 47 & 48 *Vict. c.* 14.]
48 & 49 *Vict. c.* 69	*The Criminal Law Amendment Act*, 1885.	The whole Act.
57 & 58 *Vict. c.* 41	*The Prevention of Cruelty to Children Act*, 1894.	The whole Act. [*See now* 4 *Edw.* 7, *c.* 15 *which repeals and re-enacts* 57 & 58 *Vict. c.* 41, *with amendments.*]

3. *Privilege.*

Doctor and patient.]—There is no privilege entitling a medical practitioner to refuse to give in evidence statements made to him by a patient, however confidential the communication may be. *Wilson* v. *Rastall*, 4 *T. R.* 753; 2 *R. R.* 515; *Duchess of Kingston's case*, 20 *St. Tr.* 355, 572; 2 *Smith, L.C.* (11th ed.), 731.

Husband and wife.]—Communications between husband and wife during the marriage are privileged from disclosure in evidence. This right is preserved as to civil proceedings by 16 & 17 *Vict. c.* 88, *s.* 3; and as to criminal cases by 61 & 62 *Vict. c.* 36, *s.* 1 (*d*) (*ante*, p. 394).

That statute has to a considerable extent altered the law as to evidence by the husband or wife of an accused person. And the present law appears to be as follows:—

1. The husband or wife of the prosecutor has always been a competent witness either for the crown or for the defence. 2 *Taylor, Ev.* (9th ed.), p. 889, citing *R.* v. *Houlton, Jebb* (*C.C. Ir.*), 24.

2. The husband or wife of a defendant to an indictment within the *Evidence Act*, 1877 (40 & 41 *Vict. c.* 14) is a competent and compellable witness for the crown or the defence (*see ante*, p. 392).

3. The husband or wife of a defendant is a competent witness *for the defence* in all criminal cases whether the accused is charged solely or jointly. 61 & 62 *Vict. c.* 36, *s.* 1, *ante*, p. 393. Except in the cases referred to in *s.* 6 (1), and in the schedule to that Act (*ante*, p. 397), and the *Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15), *s.* 12, the husband or wife can be called only on the application of such defendant (*s.* 1 (*c*), *ante*, p. 394).

4. At common law, as a general rule, the husband or wife of a defendant is not a competent witness for the crown against such defendant: 2 *Hawk. c.* 46, *s.* 70: *R.* v. *Cliviger*, 2 *T. R.* 263: *Davis* v. *Dinwoody*, 4 *T. R.* 678. This rule is subject to the following exceptions:—

(*a*) In cases of high treason. But this is very doubtful. *R.* v. *Griggs*, *Sir T. Raym.* 1; 2 *Hawk. c.* 46, *s.* 82; 1 *Hale*, 48, 301; 1 *Co. Litt.* 6 *b.*

(*b*) When husband is indicted for personal injury to the wife, or *vice versâ*: 2 *Hawk. c.* 46, *ss.* 77, 80, 81; 1 *Hale*, 301: *R.* v. *Azire*, 1 *Str.* 633: *R.* v. *Jagger*, 1 *East, P. C.* 455; 3 *Russ. Cr.* (6th ed.), 666: *R.* v. *Pearce*, 9 *C. & P.* 667: *R.* v. *Serjeant, Ry. & M.* 352: *R.* v. *Jellyman*, 8 *C. & P.* 604. In *Lord Audley's case*, 3 *St. Tr.* 401, a wife was held a competent witness to prove that her husband was present and aided and abetted another in committing a rape on her. And on an indictment of a husband for the murder of his wife, the dying declarations of the wife have been admitted. *R.* v. *Woodcock*, 2 *Leach*, 500; 1 *East, P. C.* 354, 356: *R.* v. *Johns*, 1 *East, P. C.* 357; 2 *Leach*, 504, *n.*

(*c*) On an indictment for forcible abduction and marriage the wife is a competent witness against the husband even though the marriage is valid, or if voidable has been annulled. 2 *Hawk. c.* 46, *s.* 78: *R.* v. *Wakefield*, 2 *Lewin*, 279: *Murray's Report*, 257; *M. & M.* 197, *n.*: *R.* v. *Perry*, 3 *Russ. Cr.* (6th ed.), 666. This rule is based by some on the view that the marriage, being under coercion, is null. 1 *Hale*, 301: *Buller* (*N. P.*), 286; *and see Scott* v. *Sebright*, 12 *P. D.* 21: *Cooper* v. *Crane* [1891] *Prob.* 369; by others on the view that the force used is a personal wrong to the wife. 2 *Taylor, Ev.* (9th ed.), p. 893.

(*d*) On an indictment for bigamy the second wife is a competent witness on the first marriage being proved. 1 *Hale*, 693: *R.* v. *Peat*, 2 *Lewin*, 288; 3 *Russ. Cr.* (6th ed.), 715, *n.* But this is only an apparent exception, and depends on the fact that the second marriage is void: for the common law rule only applies where there is a valid marriage. *R.* v. *Young*, 2 *Cox*, 291, *Erle*, J.; 2 *Taylor, Ev.* (9th ed.), 889; *and see R.* v. *Fuzil Deen*, 6 *Queensland L. J.* 302.

All these common law exceptions are preserved by *s.* 6 (2) of the Act of 1898, and by *s.* 6 (1) the husband or wife of a defendant is entitled to give evidence either for the crown or for the defence without the consent of such defendant in the case of proceedings under any of the enactments scheduled to that Act (*see ante*, p. 397); and under the *Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7. *c.* 15, *s.* 12). Under the last-mentioned enactment the husband or wife, though a competent, is not a compellable witness. On an indictment under 48 & 49 *Vict. c.* 69, it has been ruled by *Wills*, J., in *R.* v. *Ellis*, 34 *L. J. Newsp.* 646, that the husband or wife is compellable, the view of the learned judge apparently being that *s.* 20 of the Act was *pro tanto* repealed by the Act of 1898. *See also*

R. v. *Brazil*, 63 *J. P.* 138: 34 *L. J. Newsp.* 132: *R.* v. *Dunning*, 34 *L. J. Newsp.* 33. *Charnock* v. *Merchant* [1900] 1 *Q. B.* 474, *ante*, p. 393, does not appear to affect the construction of *s.* 4 of the Act of 1898.

5. Where two or more persons are indicted and tried *jointly*, the wives or husbands of such persons were at common law not competent witnesses either for or against their own spouses or their co-defendants. *R.* v. *Thompson*, *L. R.* 1 *C. C. R.* 377: 41 *L. J.* (*M. C.*) 112. That case is not directly overruled by the *Criminal Evidence Act*, 1898. The husband or wife cannot be called for the crown against any of the co-defendants except in cases within the schedule to the Act of 1898 (*ante*, p. 397), and the common law exceptions above stated. And the husband or wife cannot be called for the defence save as in the statute provided, except on the application of her own husband or his own wife. But if called it is submitted that the witness is free to give evidence for or against any of the defendants subject to cross-examination by the crown or the defendant inculpated. *R.* v. *Hadwen* (*ante*, p. 395).

The rules on this subject are substantially the same as in the case of evidence by co-defendants for or against each other. Thus a wife may give evidence for or against the co-defendants if her husband has been convicted (*R.* v. *Williams*, 8 *C. & P.* 284) or has pleaded guilty (*R.* v. *Thompson*, 3 *F. & F.* 824) or is not being tried with the persons indicted jointly with him. 2 *Taylor, Ev.* (9th ed.), p. 888; *and see ante*, p. 393 *n.*

Incriminating questions.]—A witness other than the defendant is privileged to refuse to answer any question which might tend to criminate him, *i.e.* to expose him to any punishment, penalty, or forfeiture. After some former difference of opinion among the judges it is now settled that for the purpose of impeaching the credit of a witness he may always be asked on cross-examination questions with regard to alleged crimes or other improper conduct on his part. 2 *Taylor, Ev.* (9th ed.), p. 947; 3 *Russ. Cr.* (6th ed.) 612, and the cases there cited; but the witness cannot be compelled to answer such questions where the answers would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture of any nature. *R.* v. *Slaney*, 5 *C. & P.* 213; 38 *R. R.* 205: *R.* v. *Garbett*, 1 *Den.* 236; 2 *C. & K.* 474: *Mexborough* (*Earl*) v. *Whitwood* [1897] 2 *Q. B.* 111: *Allhusen* v. *Labouchere*, 3 *Q. B. D.* 654; 2 *Taylor, Ev.* (9th ed.), p. 960, and cases there cited; 3 *Russ. Cr.* (6th ed.), 613 *et seq.* And the *Evidence Act*, 1851 (14 *& 15 Vict. c.* 99), expressly provides (*s.* 3) that nothing in that Act contained shall render any person compellable to answer any question *tending to criminate* himself or herself. The objection is for the witness to take, and he is presumed to know the law sufficiently to enable him to take it. *R.* v. *Coote*, *L. R.* 4 *P. C.* 599; 42 *L. J.* (*P. C.*) 45. Counsel for the opposite side cannot argue the question; *R.* v. *Adey*, 1 *M. & Rob.* 94: *Thomas* v. *Newton*, *M. & M.* 48, *n.*; and if he answers without objection, his answer is admissible on a charge as to the offence admitted. *R.* v. *Sloggett*, *Dears.* 656; 25 *L. J.* (*M. C.*) 93. But the witness may claim the protection of the court at any stage of the inquiry; although he may already have answered without objection some questions tending to criminate him. *R.* v. *Garbett*, 2 *C. & K.* 474. The witness is not himself the sole judge whether his evidence will bring him into danger; the court must be satisfied, from the circumstances of the case and the nature of the evidence which the witness is called upon to give, whether there really is reasonable ground to apprehend danger to him from his being compelled to answer. *Ex parte Reynolds*, 20 *Ch. D.* 294 (*C. A.*): *Osborn* v. *London Dock Co.*, 10 *Ex.* 698; 24 *L. J.* (*Ex.*) 140: *Sidebottom* v. *Adkins*, 27 *L. J.* (*Ch.*) 152: *R.* v. *Boyes*, 1 *B. & S.* 311; 30 *L. J.* (*Q. B.*)

301; *Ex parte Fernandez*, 10 *C. B.* (*N. S.*) 3, 39, 40; 30 *L. J.* (*C. P.*) 321; *Spokes* v. *Grosvenor Hotel Co.* [1897] 2 *Q. B.* 124. But if it is once made to appear that the witness is in danger, great latitude should be allowed to him in judging for himself of the effect of any particular question. Subject, however, to that reservation, the judge is bound to insist on the witness answering, unless he is satisfied that the answer will tend to place him in peril. *Ex parte Reynolds*, *ubi supra*. The privilege of refusing to answer questions on the ground that the answers may tend to criminate him is that of the witness alone, and neither party to the suit can take any advantage therefrom. *Boyle* v. *Wiseman*, 10 *Ex.* 647; 24 *L. J.* (*Ex.*) 160: *R.* v. *Kinglake*, 11 *Cox*, 499; 18 *W. R.* 805. Therefore, where a witness, called on the part of the crown to prove bribery against the defendant, refused to give evidence on the ground that his evidence would tend to criminate himself, but on the objection being overruled by the judge, gave his evidence, the court of Queen's Bench held, that the defendant could not object that such evidence had been improperly received. *R.* v. *Kinglake*, *ubi supra*.

Where a witness, being interrogated as to his conduct on a particular occasion, refuses to answer on the ground that his evidence may render him liable to prosecution, the production to him of a pardon under the great seal for all offences committed by him on the occasion referred to takes away his privilege, and makes him compellable to answer. Thus, on the trial of an information filed by the attorney-general, by direction of the House of Commons, against A. for bribery at a parliamentary election, B., a witness for the crown, on being asked whether he had not received money for his vote, refused to answer the question. Counsel for the crown then produced and tendered to him a pardon under the great seal for all offences which he might have committed at or in relation to such election. The court held that after tender of the pardon the witness was bound to answer all questions relating to what he did at the election; and overruled a further objection on his part that he was still liable to impeachment by parliament, from which the pardon would have been no protection (*see* 12 *&* 13 *W.* 3, *c.* 2, *s.* 3), holding that this possibility was too remote and improbable a contingency to affect the case, or to give the witness any privilege. *R.* v. *Boyes*, 1 *B. & S.* 311; 30 *L. J.* (*Q. B.*) 301; 2 *F. & F.* 157. *See R.* v. *Reading*, 7 *St. Tr.* 259, 296: *R.* v. *Kinglake*, *ubi supra*.

The rule against incriminating questions does not apply to a defendant who is called as a witness on his own behalf under the *Criminal Evidence Act*, 1898, so far as relates to the offence then charged against him; *see s.* 1 (*e*) *ante*, p. 394. But a defendant when so called may not be asked and shall not be required to answer as to having committed or having been charged with or convicted of any offence not charged in the indictment, except in the cases provided by *s.* 1 (*f*) of the Act (*ante*, p. 395).

Judges and jurors.]—*Hawkins* (*bk.* 2, *c.* 46, *s.* 83) says that it is no exception against a person as a witness that he is one of the judges or jurors who are to try the case. But the functions of judge and juror would now be regarded as wholly incompatible with that of a witness. A grand juror is debarred by his oath and privileged from giving evidence on matters which occurred in proceedings before the grand jury (*see ante*, p. 103, *and* 1 *Taylor*, *Ev.* (9th ed.), p. 614). The same rule appears to apply to petty jurors, *Id.*, p. 616.

Lawyer and client.]—"For the perfect administration of justice, and for the protection of the confidence which exists between a solicitor and his

client, it has been established as a principle of public policy that those confidential communications shall not be subject to production. But to that of course this limitation has been put, and justly put, that no court can be called upon to protect communications which are in themselves part of a criminal or unlawful proceeding." *Bullivant* v. *Att.-Gen. for Victoria* [1901] *App. Cas.* 196, 200, *Halsbury*, L.C. (The earlier authorities are collected in *Archbold Cr. Pl.* (22nd ed.), p. 369, and the authorities as to civil cases in the *Annual Practice* (1905), p. 388.) This privilege, therefore, does not extend to communications made to a solicitor by his client before the crime for the purpose of being guided or helped in the commission of it. *R.* v. *Cox and Railton*, 14 *Q. B. D.* 153; 54 *L. J.* (*M. C.*) 41: *R.* v. *Jones*, 1 *Den.* 166: *R.* v. *Farley*, *id.* 197; 2 *C. & K.* 313; 2 *Cox*, 82: *R.* v. *Hayward*, 2 *C. & K.* 234; 2 *Cox*, 23: and *cf. Williams* v. *Quebrada Rail., etc., Co.* [1895] 2 *Ch.* 751. In *R.* v. *Haydn* [1825] 2 *Fox & Sm.* 379 (*Ir.*), on an indictment for libel, a witness for the Crown testified that the defendant consulted him about certain MS., and asked whether it was safe to publish it. *Bushe*, C.J., ruled that the communication was privileged, and that the person asking advice must be considered as seeking how to avoid and not how to commit a crime. In *Bullivant* v. *Att.-Gen. for Victoria*, *ubi supra*, it was held that there must be some proof, or at least definite allegation, of fraud or illegality to take away the privilege. The privilege is strictly confined to counsel, and to solicitors and their clerks and agents, including interpreters between them and their clients. *Parkins* v. *Hawkshaw*, 2 *Stark.* (*N. P.*) 239; 19 *R. R.* 711: *Taylor* v. *Forster*, 2 *C. & P.* 195: *Foote* v. *Hayne*, *Ry. & M.* 165: *du Barre* v. *Livette*, *Peake* (3rd ed.) 108; 3 *R. R.* 655. It does not extend to stewards or other agents of the party; *Vaillant* v. *Dodemead*, 2 *Atk.* 524: *Wilson* v. *Rastall*, 4 *T. R.* 753; 2 *R. R.* 715. The privilege depends on the existence of the relation of lawyer and client at the time when the lawyer acquired the information, not on its existence at the time when the lawyer is called on to give evidence. *Minet* v. *Morgan*, *L. R.* 8 *Ch. App.* 361: *R.* v. *Brewer*, 6 *C. & P.* 363: *R.* v. *Farley*, 1 *Den.* 197; 2 *C. & K.* 313; 2 *Cox*, 82: *R.* v. *Hankins*, 2 *C. & K.* 823; 3 *Cox*, 434. And information acquired by a solicitor to a bank has been held not to be rendered privileged by his subsequent retainer by directors of the bank for their defence. *R.* v. *Brown*, 7 *Cox*, 442; *S. C.*, *sub nom.*, *R.* v. *Esdaile*, 1 *F. & F.* 213. And where, on a trial for forgery, a witness who had been served with a *subpœna duces tecum* objected that the documents came into his possession as the solicitor of the prisoner in a previous prosecution instituted by him, it was held that the documents must be produced. *R.* v. *Brown*, 9 *Cox*, 281, *Willes*, J. *Cf. R.* v. *Tylney*, 1 *Den.* 319; 18 *L. J.* (*M. C.*) 36: *R.* v. *Avery*, 8 *C. & P.* 596. And where an attorney refuses, and is justified in refusing, to produce documents, secondary evidence may be given of the contents. *Coates* v. *Birch*, 2 *Q. B.* 252. If, being solicitor for the defendant, he holds papers in another capacity, he must produce them; as, for instance, a solicitor and steward of a lord of a borough is bound to produce public documents relating to the borough, but he is not bound to produce documents relating to the lord's interest in the borough. *R.* v. *Woodley*, 1 *M. & Rob.* 390. The privilege has been held not to apply to the contents of a notice served upon him by the solicitor on the other side, requiring him to produce at the trial a certain paper belonging to his client in his hands, *Spenceley* v. *Schulenburgh*, 7 *East*, 357, or the like. *See Kennedy* v. *Lyell*, 23 *Ch. D.* 387, 405; 9 *App. Cas.* 81: *Foakes* v. *Webb*, 28 *Ch. D.* 287, 289. And where a solicitor was present at the time his client swore to an answer in Chancery, it was held that he could be compelled to give evidence of that fact, on an indictment against his client

for perjury. *Bull.* (*N. P.*) 284: *sed contrà*, *R.* v. *Watkinson*, 2 *Str.* 1122. So he may be called to prove his client's handwriting, though the knowledge was obtained from witnessing his execution of a bail-bond in the action; *Hurd* v. *Moring*, 1 *C. & P.* 372; and he may be called to prove his client's identity. *Studdy* v. *Sanders*, 2 *D. & R.* 347; *contrà Parkins* v. *Hawkshaw*, *ubi supra*. And if he be a subscribing witness to a deed of his client, he may be examined as to his execution of it. *Doe* v. *Andrews*, 2 *Cowp.* 845; *Robson* v. *Kemp*, 4 *Esp.* 233; 5 *Esp.* 52; 8 *R. R.* 831: *Doe* v. *Roe*, 6 *Dowl.* 518. A letter written by a solicitor for a client is not inadmissible on the ground of privilege as evidence against the client in a prosecution against the latter, but to make it evidence against the client, it must be shown that the letter was written in pursuance of the client's instructions, and it is not sufficient to prove merely that it was written by the solicitor *in consequence* of an interview with his client. *R.* v. *Downer*, *Cox*, 486 (*C. C. R.*).

Master and servant.]—A servant may be a witness for or against the master or mistress; *Gilb. Ev.* 135; a master or mistress for or against the servant.

Parent and child.]—A father or mother may be a witness for or against their child. *R.* v. *Oakhampton* (*Mayor of*), 1 *Wils.* (*K. B.*) 332; *and see R.* v. *Bramley* [1795] 6 *T. R.* 330: *Stapleton* v. *Stapleton* [1736] *Cas.* (*K. B.*) *temp. Hardwicke*, 277; *Anon.*, 1 *Salk.* 289: *Goodright* v. *Moss* [1777] 2 *Cowp.* 591; and a child, for or against the father or mother; *Gilb. Ev.* 135.

Priest and Penitent.]—The question whether ministers of religion, and in particular Roman Catholic priests, have any privilege from giving evidence of confessions has not been authoritatively decided. *Steph. Dig. Evidence* (5th ed.), 204. The canons of the English Church contemplate that confessions should be under the seal of secrecy. The tendency of judicial *dicta* is that while in strict law the privilege does not exist, the minister should not be required to give evidence as to a confession made to him. *Butler* v. *Moore*, *McNally Ev.* 253 (*Ir.*): *R.* v. *Sparkes*, *Peake* (3rd ed.), 109, *cit.*; 3 *R. R.* 656, *cit.*; *Broad* v. *Pitt*, 3 *C. & P.* 518, *Best*, C.J.; 3 *Russ. Cr.* (6th ed.) 579: *R.* v. *Gilham*, 1 *Mood C. C.* 186, 233. *R.* v. *Griffin*, 6 *Cox*, 219: *R.* v. *Hay*, 2 *F. & F.* 4.

State privilege or public policy.]—Where the disclosure of a particular fact, not bearing directly upon the matter in question, may be of detriment to the public service, the court will not compel a witness to disclose it. Documents or information received officially are privileged if the officer declares it to be injurious in the public interest to produce or disclose them. *Home* v. *Bentinck*, 2 *B. & B.* 130, 162: *Att.-Gen.* v. *Briant*, 15 *M. & W.* 169: *R.* v. *Fergus O'Connor*, 4 *St. Tr., N. S.* 935, 1050: *Hennessy* v. *Wright*, 57 *L. J.* (*Q. B.*) 594: 1 *Taylor*, *Ev.* (9th ed.), pp. 612-20: *Roscoe*, *Nisi Prius*, *Evidence* (17th ed.), p. 174. In *R.* v. *Watson*, 2 *Stark.* (*N. P.*) 116, 136: 32 *St. Tr.* 1, 98, a witness for the crown was held entitled to refuse to say through whom he made a disclosure to the Government. In *R.* v. *Smith O'Brien*, 7 *St. Tr., N. S.* 1, an informer was held entitled to refuse to disclose the source of his information when its disclosure would expose his informant to the risk of assassination; and in *R.* v. *Hardy*, 24 *St. Tr.* 199, 753, a witness who was employed to obtain information of the proceedings at a meeting of one of the corresponding societies was not allowed to disclose the name of his employer. It is the

usual practice not to press a police witness for the names of persons on whose information he has acted in the detection of crime, unless the evidence is directly material or necessary in the interests of the prisoner. *R.* v. *Richardson*, 3 *F. & F.* 693; and *cf. Marks* v. *Beyfus*, 25 *Q. B. D.* 494; 59 *L. J.* (*Q. B.*) 579, where the Director of Public Prosecutions was held to be entitled to refuse to disclose the names of persons on whose information he instituted a prosecution.

4. *Credit of Witnesses.*

The credibility of a witness depends upon (1) his knowledge of the facts he testifies; (2) his disinterestedness; (3) his integrity; (4) his veracity; and (5) his being bound to speak the truth by such an oath as he deems obligatory, or by such affirmation or declaration as may by law be substituted for an oath (*post*, p. 407, 408). Proportioned to these is the degree of credit his testimony deserves from the court and jury.

From knowledge.]—Although a witness be perfectly disinterested, although he be a man of integrity and veracity, and have a just sense of the moral obligation of the oath he has taken, still the degree of credit to be given to his testimony depends upon his real knowledge of the facts he testifies. A man may be deceived in a fact, from deriving his knowledge of it through a false medium; from his attention being occupied more by the circumstances accompanying it than by the fact itself at the time of its occurrence; or from a thousand other circumstances, which, if candidly stated, might be satisfactorily answered and accounted for by the other party, so as to convince the witness himself that he laboured under a mistake. Where there is a doubt, therefore, whether the evidence given by a witness be not founded on some misconception, it is the duty of the counsel who cross-examines him to question him as to the sources of his knowledge; his reasons for believing the fact to be as he has stated; his reasons for recollecting it; the circumstances attending its occurrence; whether it was light or dark, and whether he was near or distant at the time it occurred, and the like; so that the jury may be able to judge of the degree of confidence they should place in the witness's testimony. If a witness refuse to answer such questions, or do not answer them satisfactorily, it should have the effect of detracting considerably from his credit in the estimation of the jury.

From disinterestedness.]—A witness, to be perfectly credible, must not be in the slightest degree biassed or partial to one party or the other. Therefore, if it appear that the witness is prejudiced against the party against whom he appears, or has before expressed sentiments indicative of such prejudice, or if it appear that a prosecution is pending against him for the same or a similar offence, and he come to disprove some of the facts charged in the indictment against the defendant—all these are circumstances which detract proportionably from his credit. Where the prosecutor is to derive an advantage from a conviction of the defendant, this, we have seen (*ante*, p. 390), is no objection to his competency; it goes to his credit merely. A father is a competent witness for his son, and a son for his father; and husband and wife for each other (*see ante*, p. 402); but the interest arising from the relationship detracts proportionately from the credit of the witness. *See* 2 *Hale*, 276; *Gilb. Ev.* 149, 155.

From integrity.]—Since the *Evidence Act*, 1843 (6 *& 7 Vict. c.* 85, *s.* 1

(*ante*, p. 390)), the fact that a witness has been convicted of crime affects only his credit, and not his competency. As to prior law, *see R.* v. *Teal*, 11 *East*, 307: 11 *R. R.* 516. Whether a witness has or has not been convicted, witnesses may be called to speak as to his general character, although not as to any particular offence of which he may be guilty. 2 *Hawk*, *c.* 46, *s.* 207; *R.* v. *Rookwood*, 13 *St. Tr.* 139, 211: *R.* v. *Watson*, 2 *Stark.* (*N. P.*) 116, 149; 32 *St. Tr.* 1. In order to impeach the credit of a witness for veracity, witnesses may be called by the other side to prove that his general reputation is such that they would not believe him upon his oath. *R.* v. *Brown*, *L. R.* 1 *C. C. R.* 70; 36 *L. J.* (*M. C.*) 59. They need not have heard him on oath. *R.* v. *Bispham*, 4 *C. & P.* 392. As to cross-examination, *see post*, p. 419.

All other questions (not being questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture, as to which *see ante*, p. 399) for the purpose of impeaching a witness's character not only may be put, but must be answered, although the answer may degrade the witness's character. *Cundell* v. *Pratt*, *M. & M.* 108. And a witness may not refuse to produce a document kept by him under the authority of an Act of parliament, on the ground that it may criminate himself. *Bradshaw* v. *Murphy*, 7 *C. & P.* 612. If the witness be examined as to the offence or improper conduct imputed to him, and deny it, his denial is conclusive, if the question is merely collateral to the point in issue, and it is not permissible to call witnesses or offer other evidence to contradict him. *R.* v. *Watson*, 2 *Stark.* (*N. P.*) 116, 149; 32 *St. Tr.* 1: *Harris* v. *Tippett*, 2 *Camp.* 637; 11 *R. R.* 767: *R.* v. *Burke*, 8 *Cox*, 44 (*Ir.*): *R.* v. *Cracknell*, 10 *Cox*, 408, *Willes*, J. But if the question is relevant to the point at issue, and the witness deny the thing imputed, he may be contradicted. *Yewin's case*, 2 *Camp.* 638. In that case the witness was asked whether he had not said that he would be avenged on his master, and would fix him in gaol. This he denied, but he was allowed to be contradicted. So where a witness for the prosecution denied on cross-examination that he had had a quarrel with the prisoner and had threatened to be revenged on him, evidence was allowed to be given to contradict him. *R.* v. *Shaw*, 16 *Cox*, 503, *Cave*, J. By *s.* 6 of *Denman's Act* (28 & 29 *Vict. c.* 18, which by *s.* 1 extends to all courts of criminal judicature), "a witness may be questioned as to whether he has been *convicted* of any felony or misdemeanor, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the *cross-examining* party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of 5*s.* and no more shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same."

This enactment seems to apply where a defendant, giving evidence on his own behalf, denies previous convictions lawfully put to him under *s.* 1 *f* (iii.) of the *Criminal Evidence Act*, 1898 (*ante*, p. 395).

Where general evidence is given of the bad character of a witness, the opposite party may cross-examine the witnesses as to the grounds of their opinion, if he think it prudent to do so; or he may call witnesses who can speak to the general good conduct of the witness, or contradict any particular facts the other witnesses may have disclosed in their cross-

examination. It has been held that where a witness refuses to answer a question, his not answering ought not, legally, to have any effect with the jury. *R.* v. *Watson*, 2 *Stark.* (*N. P.*) 116, 157; 32 *St. Tr.* 1: *Rose* v. *Blakemore, Ry. & M.* 382: *Lloyd* v. *Passingham*, 16 *Ves.* 59; *sed quære: see* 2 *Tayl. Ev.* (9th. ed.), 970.

In *Queen Caroline's case*, 2 *B. & B.* 284, 311; 1 *St. Tr., N. S.* 1348, it was held, that where a witness for a prosecution had been examined in chief, the defendant could not afterwards give evidence of any declaration by such witness, or of acts done by him to procure persons corruptly to give evidence in support of the prosecution, unless he had previously cross-examined such witness as to such declarations or acts.

From veracity.]—The character of a witness for habitual veracity is an essential ingredient in his credibility; for a man who is capable of uttering a deliberate falsehood is in most cases capable of doing so under the solemn sanction of an oath. If, therefore, it appear that he has formerly said or written the contrary of that which he has now sworn (unless the reason of his having done so be very satisfactorily accounted for), his evidence should not have much weight with a jury; and if he have formerly sworn the contrary, the fact (although no objection to his competency, *R.* v. *Teal*, 11 *East*, 309; 10 *R. R.* 516) is almost conclusive against his credibility. As to the modes of testing veracity, *see post*, p. 419, cross-examination.

A consideration of the probability of a fact also may aid us in forming a judgment of the credit that should be given to a witness for veracity. If he tells us of a fact having occurred which is contrary to common experience and observation, it will require that his integrity, veracity, and means of knowledge should be indisputable to induce us to believe it: but if, on the contrary, the fact stated by him be very likely to have happened, we may be induced to believe it, without very scrupulously inquiring into his character for integrity, veracity, etc. The strength of the evidence should always be great in proportion to the improbability of the fact to be established by it.

From their being sworn to speak the truth.]—The general common law rule is that the testimony of a witness to be examined *vivâ voce* in a court of common law in this country shall not be received unless he has previously been *sworn* to speak the truth. Counsel has no privilege from being sworn, even if he acts only as interpreter. *R.* v. *Kelly* [1848] 3 *Cox*, 75, *Patteson*, J. Even a peer, who in a court of equity was allowed to give in his answer to a bill without oath, merely pledging his honour for the truth of it, must be sworn if examined as a witness. *Earl of Lincoln's case, Sir W. Jones*, 152, 154; *Cro. Car.* 64: *Meers* v. *Lord Stourton* [1711], 2 *Salk.* 513; 1 *P. Wms.* 146; 24 *Eng. Rep.* 332; *and see* 2 *Mod.* 99. It will be seen (*post*, pp. 407, 408) that this general common law rule is now subject to important statutory exceptions. The witness must be sworn in open court by the judge, or, as is the usual course, by the clerk of the court or the crier or some other officer. *R.* v. *Tew, Dears.* 429; 24 *L. J.* (*M. C.*) 62 (*C. C. R.*). But it is for the court and not for such officers to ascertain the mode in which the oath or affirmation or declaration should be administered. *R.* v. *Moore*, 61 *L. J.* (*M. C.*) 80; 17 *Cox*, 458 (*C. C. R.*).

Form of Oath.]—The form of the oath, where the witness is sworn, varies according to the religion or country of the witness. *See R.* v. *Mildrone*,

1 *Leach*, 412; 3 *R. R.* 708. Christians are sworn on the New Testament; Jews, on the Old Testament; Mahometans, on the Koran; and persons of other religions according to the form prescribed for that purpose by the religion they profess. *Bull.* (*N. P.*) 292. Christians are sworn with their hats off; Jews, with their hats on. As to swearing in Christian form, a man born a Jew and married according to Jewish rites and unbaptized, but professing to be a member of the Established Church, *see R.* v. *Gilham* [1775] 1 *Esp.* 285. As to the mode of swearing Chinamen, *see R.* v. *Entrehman*, *C. & Mar.* 248; *Stringer on Oaths* (2nd ed.), 86, 124. Even among the different sects of Christians there may be different modes of taking the oath; *R.* v. *Mildrone*, 1 *Leach*, 412: *and see R.* v. *M'Carther*, 1 *Peake* (3rd ed.), 211. Each witness, in short, swears in the particular form prescribed by his religion. The only general rule that can be laid down upon the subject is, that the oath must be such as the witness deems obligatory upon his conscience. *See R.* v. *Taylor*, 1 *Peake* (3rd ed.), 14. *S.* 5 of the *Oaths Act*, 1888 (51 *&* 52 *Vict. c.* 46), which enacts that "if any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, (*a*) he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question," appears only to be declaratory of the common law. *R.* v. *Mildrone*, *ubi supra*. And it is expressly declared, by 1 *&* 2 *Vict. c.* 105, that, in all cases in which an oath may lawfully be administered, the party is bound by the oath administered, provided it have been administered in such form and with such ceremonies as he may declare to be binding; and that, in case of wilful false swearing, he may be convicted of the crime of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted. And by the *Oaths Act*, 1888 (51 *&* 52 *Vict. c.* 46), "where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, shall not for any purpose affect the validity of such oath." *S.* 3. The cases immediately following were decided before the passing of 51 *&* 52 *Vict. c.* 46 (*Oaths Act*, 1888). A witness may be asked, after he is sworn, whether he considers the oath he has taken obligatory upon his conscience; but if he answer in the affirmative his answer is conclusive, and he cannot further be asked whether there be any other mode of swearing more binding upon his conscience than that which has been used. *Queen Caroline's case*, 2 *B. & B.* 284; 1 *St. Tr.* (*N. S.*) 1348. The more correct and proper way is to ask the witness, before he is sworn, whether he considers the oath he is about to take obligatory upon his conscience. *Id.* A witness, however, may, either before he is sworn, or after he has been sworn upon the *voire dire* (*Maden* v. *Catanach*, 7 *H. & N.* 360; 21 *L. J.* (*Ex.*) 118), or, *semble*, even after he has been sworn in the cause (*Queen Caroline's case*, *ubi supra*), be asked whether he believes in the being of a Deity, and in a future state of rewards and punishments; *Maden* v. *Catanach*, *ubi supra*: but he cannot be questioned as to the particular tenets of his religion. *See R.* v. *Taylor*, 1 *Peake* (3rd ed.), 14: *R.* v. *White*, 1 *Leach*, 430: *R.* v. *Serva*, 2 *C. & K.* 53. As to whether when the witness does not object to be sworn on the ground of his having no religious belief, an objection to him on

(*a*) In Scotland the oath is usually administered by the presiding judge and taken in the form following:—"I swear to Almighty God (as I shall answer to God at the great day of judgment) that I will speak the truth, the whole truth, and nothing but the truth" (*see Home Office Circular*, 31st May, 1893). Both judge and witness stand, and the witness repeats the oath with his right hand uplifted. He neither holds nor kisses any book. The words in brackets are now often omitted in the Scotch courts.

that ground may successfully be made by the opposite party, notwithstanding 51 & 52 *Vict. c.* 46, *s.* 1 (*infra*), *see ante*, p. 406. If through mistake a witness is allowed to affirm instead of being sworn, his evidence is inadmissible, and a conviction founded on it is bad. *R.* v. *Moore*, 61 *L. J.* (*M. C.*) 80. In *R.* v. *James*, 6 *Cox*, 5, it was held that where the mistake is discovered before the end of the case the jury may be directed to disregard the unsworn evidence. But it is submitted that this decision is inconsistent with and overruled by *R.* v. *Moore*, *ubi supra*, and *R.* v. *Gibson*, 18 *Q. B. D.* 537.

Affirmation in lieu of oath.—1. *Quakers and Moravians.*]—Formerly, in civil cases, instead of an oath, a Quaker was allowed to make an affirmation, 7 & 8 *W.* 3, *c.* 34 (*rep.*); 22 *G.* 2. *c.* 46, *ss.* 36, 37 (*rep.*) (*see Atcheson* v. *Everitt* [1776] 1 *Cowp.* 383), and a Moravian a declaration, 22 *G.* 3, *c.* 30 (*rep.*); but it was expressly provided by those statutes that a Quaker or Moravian should not thereby be enabled to give evidence in *criminal* cases, or to serve on juries, unless he were actually sworn. But by 3 & 4 *W.* 4, *c.* 49, a Quaker or Moravian, required to give evidence in a *criminal* case, instead of taking an oath in the usual form, was permitted to make a solemn affirmation or declaration, in these words: "I, A. B., do solemnly, sincerely, and truly declare and affirm," etc., which has the same force and effect in all courts of justice and other places where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form. And if any person making such affirmation or declaration shall be convicted of having wilfully, falsely, and corruptly affirmed or declared any matter or thing, which if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such offender shall be subject to the same pains, penalties and forfeitures to which persons convicted of wilful and corrupt perjury are subject. The same rule was, by 1 & 2 *Vict. c.* 77, extended to any person who *shall have been* a Quaker or Moravian; it having been held that a person formerly a Quaker, who had seceded from that sect on some points of doctrine, retaining their opinions on the unlawfulness of swearing, but refusing to affirm under the form given in 3 & 4 *W.* 4, *c.* 49, was not admissible as a witness in a criminal case on making the affirmation under 9 *G.* 4, *c.* 32 (*rep.*). *R.* v. *Doran*, 2 *Mood. C. C.* 37. 3 & 4 *W.* 4, *c.* 49, *and* 1 & 2 *Vict. c.* 77, are not repealed: but their effect is equally attained by *s.* 1 of the *Oaths Act*, 1888 (51 & 52 *Vict. c.* 46), *infra*.

The form of the affirmation of a Quaker or Moravian is as follows:—

"*I*, A. B., *being one of the people called Quakers* [or, *one of the persuasion of the people called Quakers*, or *of the United Brethren, called Moravians*], *do solemnly, sincerely, and truly declare and affirm that*, etc. (3 & 4 *W.* 4, *c.* 49, *s.* 1.)

The affirmation of a person formerly a Quaker or Moravian is as follows:—

"*I*, A. B., *having been one of the people called Quakers* [or, *one of the persuasion of the people called Quakers*, or *of the United Brethren called Moravians*], *and entertaining conscientious objections to the taking of an oath do solemnly, sincerely, and truly declare and affirm that*," etc. (1 & 2 *Vict. c.* 77.)

2. *Affirmation in lieu of oath where witness objects to be sworn on religious or other grounds.*]—"Every person *upon objecting to being sworn*, and

stating, as the ground of such objection, either that he has *no religious belief*, or that *the taking of an oath is contrary to his religious belief*, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath; and if any person making such affirmation shall wilfully, falsely, and corruptly affirm any matter or thing which, if deposed on oath, would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence and punishment in all respects as if he had committed wilful and corrupt perjury." 51 & 52 *Vict. c.* 46 (*Oaths Act*, 1888), *s.* 1.

The form of affirmation to be taken under this section instead of an oath is as follows:—

"*I*, A.B., *do solemnly, sincerely, and truly declare and affirm*," then proceeding with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness. (51 & 52 *Vict. c.* 46, *s.* 2.)

Where a witness desires to make an affirmation under this section instead of taking an oath, it is the duty of the judge himself to ascertain that the witness objects to be sworn on one of the grounds mentioned in the section, and if the judge does not do so, and the witness being a witness for the prosecution, is allowed to affirm and his evidence left to the jury, and a conviction ensues, such conviction will be quashed, even although no objection was taken before verdict. *R.* v. *Moore*, 61 *L. J.* (*M. C.*) 80; 17 *Cox*, 458 (*C. C. R.*).

Unsworn evidence of a child of tender years.]—The cases in which a child of tender years can be examined without being sworn are stated *ante*, pp. 388, 389.

Witness under subpœna duces tecum.]—A witness producing documents under a *subpœna duces tecum* need not be sworn, if the party who calls him does not wish to examine him. *Perry* v. *Gibson*, 1 *A. & E.* 48: *Summers* v. *Moseley*, 2 *Cr. & M.* 477: *Davis* v. *Dale*, *M. & M.* 514.

5. *The Number of Witnesses requisite.*

General rule—One witness sufficient.—At common law, one witness is sufficient in all cases (with the exception of perjury), at the trial. 2 *Hawk. c.* 46, *ss.* 2, 10; *Fost.* 233. As to evidence by accomplices, *see ante*, p. 390. As to witnesses before the grand jury, *see ante*, pp. 99, 100.

Exceptions—1. *Treason.*]—In high treason or misprision of treason two witnesses are in general required, both before the grand jury and at the trial; both of the witnesses to the same overt act, or one of them to one overt act, and another of them to another overt act of the same species of treason; unless the defendant willingly, and without violence, confesses the same. 7 & 8 *W.* 3, *c.* 3, *ss.* 2, 4; 2 *Hawk. c.* 46, *ss.* 3-9. And if the jury do not give credit to both of the witnesses, the defendant must be acquitted. *R.* v. *Palmer*, 7 *St. Tr.* 1067, *Scroggs*, C.J. But where the overt act is composite, made up of several circumstances and passing through several stages, it is not necessary that there should be two witnesses to each circumstance and at each stage. It is enough if the joint testimony of two or more witnesses establish the act as a whole. *R.* v. *M'Cafferty*, 10 *Cox*, 603; *Ir. Rep.*, 1 *C. L.* 363. And one witness

is sufficient to prove a collateral fact; *Fost.* 242; as, for instance, to prove that the defendant is a natural-born subject, *R.* v. *Vaughan*, 13 *St. Tr.* 485, or the like.

But where the overt act alleged is the assassination of the King, or any direct attempt against his life, or person, one witness is sufficient. 39 & 40 *G.* 3, *c.* 93; 5 & 6 *Vict. c.* 51, *s.* 1. *See post, tit.* "*Treason.*"

2. *Perjury.*]—Upon an indictment for perjury there must be two witnesses; one alone is not sufficient, because there is in that case only one oath against another. *R.* v. *Muscot*, 10 *Mod.* 192, 194. The rule is not like that as to corroboration of accomplices, a precautionary practice, but is a rule of law. *R.* v. *Yates, C. & Mar.* 132, 139, *Coleridge*, J. But if the assignment of perjury be directly proved by one witness, and strong circumstantial evidence be given by another, or be established by written documents, this would be sufficient it seems. *R.* v. *Lee*, 1 *Russ. Cr.* (6th ed.), 368: *R.* v. *Shaw, L. & C.* 579; 34 *L. J.* (*M. C.*) 169 (*C. C. R.*): *see R.* v. *Boulter*, 2 *Den.* 396; 21 *L. J.* (*M. C.*) 57 (*C. C. R.*). And although every assignment of perjury must be proved by two witnesses (*see R.* v. *Parker, C. & Mar.* 639), it is not necessary that every fact which goes to make the assignment of perjury should be so proved. *R.* v. *Gardiner*, 8 *C. & P.* 637: 2 *Mood. C. C.* 95: *R.* v. *Roberts*, 2 *C. & K.* 607. And, therefore, where an assignment of perjury was that the defendant had falsely sworn that he had not on a certain day treated one W. with any brandy or other spirit, this was held to be sufficiently proved by the evidence of one witness that on the day in question the defendant had treated W. with brandy in one public-house, and by the evidence of another witness that on the same day in another public-house the defendant had asked W. if he would have two pennyworth, and that the witness shortly afterwards saw W. drinking something of the colour of brandy or rum. *R.* v. *Hare*, 13 *Cox*, 174, *Denman*, J. Also, if the perjury consist in the defendant's having sworn contrary to what he had before sworn on the same subject, this is not within the rule above mentioned; for the effect of the defendant's oath in the one case is neutralized by his oath in the other; and proof by one witness will, therefore, make the evidence against the defendant preponderate. *R.* v. *Knill*, 5 *B. & Ald.* 929, *n.* And where the defendant had on several occasions made statements (not on oath), to different persons, contradictory to what he swore on the occasion on which the perjury was imputed to him, and there was also independent evidence tending indirectly to show that the latter statements were true, the defendant was held to be properly convicted. *R.* v. *Hook, Dears. & B.* 606; 27 *L. J.* (*M. C.*) 222 (*C. C. R.*). On these two cases *see R.* v. *Cleland* [1901], 20 *N. Z. L. R.* 509, where it is suggested that *R.* v. *Knill* is not good law. But the mere contradiction of the one oath of the defendant by the other is not enough. *R.* v. *Harris*, 5 *B. & Ald.* 926: *R.* v. *Wheatland*, 8 *C. & P.* 238. Where the perjury was assigned on an affidavit of the defendant that he had paid all the debts under his bankruptcy, it was held that the non-payment of *each* debt must be proved by two witnesses. *R.* v. *Parker, ubi supra.*

3. *Personation.*]—Upon a charge of personation at a parliamentary or municipal election it is necessary, in order to justify committal for trial, that not less than two creditable witnesses shall testify that the accused has knowingly personated, and falsely assumed to vote in the name of, another; 6 & 7 *Vict. c.* 18, *s.* 88: 35 & 36 *Vict. c.* 33, *s.* 24; and this provision seems equally applicable to the trial.

4. *Blasphemy and offences against religion.*]—Two witnesses are necessary on a prosecution for blasphemy under 9 *W.* 3, *c.* 35 (*see s.* 1), or for offences under 1 *Eliz. c.* 1 (*see s.* 21).

5. *Certain offences against women and children.*]—The 2nd section of 48 & 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), which makes it a misdemeanor to procure women or girls for the purposes of prostitution, and the 3rd section of the same statute, which makes it a misdemeanor to procure the defilement of women or girls by threats or fraud, or administering drugs, contain provisoes, that no person shall be convicted of any offence under such sections upon the evidence of one witness, unless such witness be corroborated in some material particular by evidence implicating the accused.

The 4th section of the same Act, which makes it a felony to unlawfully and carnally know any girl under the age of thirteen years, and a misdemeanor to attempt to have carnal knowledge of a girl under that age, after rendering admissible under such circumstances as in that section mentioned, the evidence of such girl or other child of tender years, though not given upon oath, provides that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of that section, and given on behalf of the prosecution, shall be corroborated by some other material evidence in support thereof implicating the accused. And *s.* 15 of the *Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15), which renders admissible under such circumstances as in that section mentioned, the evidence of a child of tender years, though not given upon oath, in any proceeding for an offence under that Act, or any of the offences specified in the first schedule thereto (*vide ante*, pp. 388, 389), contains a proviso requiring the corroboration of such evidence similar to that contained in the above cited *s.* 4 of 48 & 49 *Vict. c.* 69.

6. *Process against Witnesses.*

In cases of felony or misdemeanor, where there has been a preliminary inquiry under the *Indictable Offences Act*, 1848, followed by a committal for trial, the witnesses are generally, and ought always to be, bound over by recognizance to appear at the trial and give evidence (*see* 11 & 12 *Vict. c.* 42, *s.* 20), except where from infancy or other cause they are incompetent to enter into a recognizance. *See R.* v. *Smith*, 17 *Cox*, 601. As to cases where the indictment is removed for trial at the Central Criminal Court under that Act, *see* 19 & 20 *Vict. c.* 16, *ss.* 8, 10. A magistrate has no power to issue a warrant for the apprehension of a person to attend to find bail for his appearance as a witness in a civil or criminal case. *Evans* v. *Rees*, 12 *A. & E.* 55; 9 *L. J.* (*M. C.*) 83.

Subpœna ad testificandum.]—In all cases where the witnesses have not been so bound over, but are in England, if it is not certain that they will attend voluntarily, their appearance at the trial may be compelled by *subpœna*. In ordinary cases the common *subpœna* is sufficient. It may be sued out either at the Crown Office of the High Court, at the Royal Courts of Justice, in London (*R.* v. *Ring*, 8 *T. R.* 585; 5 *R. R.* 478); or from the clerk of the peace, or clerk of assize of the court in which the defendant is to be tried. It is sometimes more advisable to sue it out at the crown office, on account of the readiness with which the witness may be subjected to attachment in case of his non-attendance. *R.* v. *Ring*, *ubi supra*. *See the form of the subpœna*, 5 *Burn's J.* 384 (30th ed.), and *Cr. Off.*

Rules, 1886, *Appendix, Forms* 151 *et seq.* The names of four witnesses may be inserted in one writ. 2 *Cowp.* 846. In a crown office *subpœna* the names of three witnesses only can be inserted. *Short & Mellor's Cr. Off. Pract.* 452. As soon as you have obtained the writ, make out a copy of it for each witness, and serve it upon him personally, at the same time showing him the writ. The service should be personal: for otherwise if he disobeys the *subpœna*, he cannot be proceeded against as for a contempt. *Smalt* v. *Whitmill*, 2 *Str.* 1054. And it should be served a reasonable time before the trial; *Hammond* v. *Stewart*, 1 *Str.* 510; but if the witness be in court at the time of the trial, a service of the *subpœna* ticket upon him there would perhaps be deemed sufficient if he were subpœnaed on the part of the defendant, *see* 2 *Cowp.* 845; 1 *W. Bl.* 36, and would certainly be sufficient if he were subpœnaed on the part of the prosecution. Indeed, in a criminal case, a person who is present in court when called as a witness, is bound to give his evidence, although he has not been subpœnaed. *R.* v. *Sadler*, 4 *C. & P.* 218: *Blackburn* v. *Haygreave*, 2 *Lewin*, 259.

By the *Writ of Subpœna Act*, 1805 (45 *G.* 3, *c.* 92), *ss.* 3, 4, the service of a writ of *subpœna* in any one part of the United Kingdom, is as effectual to compel the appearance of a witness in any other part of the same, as if the *subpœna* were served in that part of the kingdom in which the defendant is required to appear; and in case of non-attendance the court from which the *subpœna* issued may transmit a certificate thereof in the manner pointed out in the statute; *i.e.*, in the case of an English court to the High Court of Justiciary in Scotland, or the King's Bench Division of the Supreme Court in Ireland; and the court to which it is so transmitted may punish the party for his default, in like manner as if he had refused to appear to a *subpœna* issuing out of that court, provided it appear that a reasonable and sufficient sum of money to defray the witness's expenses of coming, attending to give evidence, and returning, were tendered to him at the time he was served with the *subpœna*.

Where the *subpœna* is served in England, a tender of expenses does not seem to be necessary either on the part of the crown or of the prisoner; 2 *Hawk. c.* 46, *s.* 173; *R.* v. *Cooke*, 1 *C. & P.* 321; yet if the witness be so poor as not to be able to go to the assizes or sessions at his own cost, the fact of the expenses not having been tendered would probably be deemed by the court a sufficient excuse for his non-attendance.

Provision is made by 13 *G.* 3, *c.* 63, *ss.* 40, 44, as to witnesses resident in India, and by 42 *G.* 3, *c.* 85, as to witnesses abroad in prosecutions of public officers for offences. 1 *W.* 4, *c.* 22, applies only to civil proceedings. *See ante*, p. 377. *S.* 689 of the *Merchant Shipping Act*, 1894, 57 & 58 *Vict. c.* 60, provides for the taking of evidence abroad in cases of offences at sea, or by British seamen; and *s.* 691 appears to give power to take depositions abroad as to any criminal offence whatever committed outside Great Britain subject to the conditions there stated, including the presence of the accused. *See ante*, p. 377.

Subpœna duces tecum.]—If any person (not being the defendant) have in his possession a written instrument which may be requisite as evidence in the cause, then, instead of the common *subpœna*, he should be served with a *subpœna duces tecum*, commanding him to bring it with him, and produce it at the trial. *See the form, Cr. Off. Rules*, 1886, *Appendix, forms*, 151 *et seq.* It is sued out and served in the same manner as the common *subpœna*. Upon being served with this *subpœna* the witness must attend at the trial with the instrument required, and produce it in evidence, unless he have some lawful and reasonable excuse for withholding it; of

the validity of which excuse the court, and not the witness, is to judge. *Amey* v. *Long*, 9 *East*, 473; 6 *Esp.* 116; 1 *Camp.* 14, 180, *n.*; *and see* 5 *Esp.* 90. As to swearing such witness, *see ante*, p. 403. It is no excuse that the legal custody of the instrument belongs to another, if it be in the actual possession of the witness; *Id.*: *Amey* v. *Long*, *ubi supra*: *Corsen* v. *Dubois*, *Holt* (*N. P.*) 239. But the court will not compel him to produce it, if it tend to criminate himself (*see* 1 *Esp.* 105, and *ante*, p. 399), or his client (if the witness be a solicitor, *R.* v. *Dixon*, 3 *Burr.* 1687); or if it be his title-deed, *Pickering* v. *Noyes*, 1 *B. & C.* 262; 2 *D. & R.* 386: *R.* v. *Hunter*, 3 *C. & P.* 591. If the witness, instead of bringing the papers, etc., required, deliver them to the opposite party, by whom they are withheld, the court will allow secondary evidence of the contents of them to be given, without a notice to produce the originals. *Leeds* v. *Cook*, 4 *Esp.* 256; 6 *R. R.* 855. A witness so producing documents need not be sworn. *See ante*, p. 408.

Habeas corpus ad testificandum.]—If the witness at the time of the trial be in *civil custody or under process in a civil* action suit or proceeding, he may be brought into court to give evidence. The application for *habeas corpus* must be made on affidavit to a Judge at Chambers, *Cr. Off. Rules*, 1886, *r.* 246. For forms of affidavit, *see Appendix to Crown Office Rules*, 1886, *Nos.* 181, 182, and for form of writ, *Id.*, *No.* 183, and as to the preparation and indorsement of the writ, *see Cr. Off. Rules*, 1886, *r.* 230. It is not necessary, where the evidence of the witness is required on a criminal trial, that the affidavit should state that he is willing to attend. *Short & Mellor Cr. Off. Pract.* 367. *Engross the writ; see the forms ubi supra. It must be directed to the person in whose custody the witness is. As soon as you get the writ signed, etc., leave it with the officer to whom it is directed; pay or tender to him his reasonable charges for bringing up the witness, and he will bring him into court on the day of trial, according to the exigency of the writ.* A prisoner in execution may be brought up in this manner to give evidence; *Geery* v. *Hopkins*, 2 *Ld. Raym.* 851; *R.* v. *Burbage*, 3 *Burr.* 1440, although it was formerly held otherwise. *Barnes*, 222; *Comb.* 17, 48. So, a sailor on board a king's ship may be brought up by this writ, if he have been previously subpœnaed. *R.* v. *Roddam*, 2 *Cowp.* 672. But the court will not grant the writ to bring up a prisoner of war; the proper way of proceeding in that case is by application to the Secretary of State. *Furly* v. *Newnham*, 2 *Doug.* 419. So, where the application appeared to be a mere contrivance to remove a prisoner in execution, the court refused to grant it. *R.* v. *Burbage*, 3 *Burr.* 1440.

4. *Judge's Order.*]—With regard to witnesses in *criminal custody* at the time of the trial, by the *Criminal Procedure Act*, 1853 (16 *&* 17 *Vict. c.* 30) *s.* 9, any judge of the superior courts has the power, on application by affidavit, to issue a warrant or order under his hand for bringing up any prisoner or person confined in any gaol, prison, or place, under any sentence, or under commitment for trial, or otherwise (except under process in any civil action, suit, or proceeding), before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal; to be so brought under the same care and custody, and to be dealt with in the like manner in all respects, as a prisoner brought up for the like purpose under a writ of *habeas corpus*. The application, if made to a judge under this section, may be made on affidavit for an order. *Cr. Off. Rules*, 1886, *r.* 247. For forms of affidavit *see Appendix to Cr. Off. Rules*, 1886, *Nos.* 181, 182, and for form of order, *Id.* 184.

5. *Secretary of State's Order.*]—The powers of the Secretary of State under 16 & 17 *Vict. c.* 30, *s.* 9, are repealed and superseded by *s.* 11 of the *Prisons Act*, 1898 (61 & 62 *Vict. c.* 41), which appears to apply to prisoners in civil or criminal custody, and to be available in all cases in which a *habeas corpus testificandum* or a judge's order could be issued. The section provides that "(1) A Secretary of State on proof to his satisfaction that the presence of any prisoner at any place is required in the interest of justice, or for the purpose of any public inquiry may, by writing under his hand, order that the prisoner be taken to that place. (2) A prisoner taken from a prison in pursuance of an order made under this section, or of a warrant issued under *s.* 9 of the *Criminal Procedure Act*, 1853 (*ante*, p. 412), shall whilst outside the prison be kept in such custody as the Secretary of State may by general rules prescribe, and whilst in that custody shall be deemed to be in legal custody. (3) For the purposes of this section the expression 'prisoner' shall include any person lawfully confined under any sentence, or under commitment for trial or otherwise, and the expression 'prison' shall include any place in which any such prisoner is lawfully confined."

Privilege of witnesses from arrest.]—A person subpœnaed as a witness, or bound over by recognizance, either to prosecute or give evidence, enjoys a privilege from arrest on civil process whilst attending the court, not only on the day mentioned in the *subpœna*, etc., but also on every day of the same sittings, assizes, or sessions, until the cause is tried; he is also privileged in like manner during a reasonable time before and after the trial, while coming to or returning from the place where the sittings, assizes, or sessions are held. *See Lightfoot* v. *Cameron*, 2 *W. Bl.* 1113: *Arding* v. *Flower*, 8 *T. R.* 534: *Re Freston*, 11 *Q. B. D.* 545; 2 *Taylor, Ev.* (9th ed.), 868. And this privilege has also been held to extend to witnesses attending voluntarily, and not subpœnaed. *See Meekins* v. *Smith*, 1 *H. Bl.* 629, 636. If a witness, under these circumstances, be arrested, the court out of which the *subpœna* issued, or the judge of the court in which the cause has been or is to be tried, will, upon application, order him to be discharged. *See* 3 *Stark.* (*N. P.*) 132.

Penally for non-attendance.]—Where a witness wilfully neglects to attend at the sessions or assizes, etc., in obedience to a Crown Office *subpœna*, the High Court (K. B. D.), upon application, will grant an attachment against him (*R.* v. *Ring*, 8 *T. R.* 585; 5 *R. R.* 478), if the witness was served personally with the *subpœna* (*Smalt* v. *Whitmill*, 2 *Str.* 1054; *Wakefield's case*, *Cas.* (*K. B.*) *temp. Hardw.* 313), and was served a reasonable time before the trial; *Hammond* v. *Stewart*, 1 *Str.* 510: *and see* 1 *Marshall*, 410. It is immaterial whether the cause was in fact called on or not, if it satisfactorily appear that the witness would not have been forthcoming when called on to give evidence. *Barrow* v. *Humphreys*, 3 *B. & Ald.* 598: *Mullett* v. *Hunt*, 1 *Cr. & M.* 752: *Dixon* v. *Lee*, 1 *Cr. M. & R.* 646: *R.* v. *Stretch*, 3 *A. & E.* 503: *Lamont* v. *Crook*, 6 *M. & W.* 615. It is doubtful whether a court of quarter sessions has authority to issue an attachment; the only mode of proceeding against the witness in such a case seems to be by indictment. As to the mode of proceeding where the *subpœna* has been served in Ireland or Scotland, *see* 45 *G.* 3, *c.* 92, *ante*, p. 411. Where a witness does not attend at the court and time specified in his recognizance, the recognizance may be estreated and the penalty levied in the manner stated, *ante*, pp. 117–120.

Improper interference with witnesses.]—Any person preventing a witness

duly summoned from attending court is liable to attachment or committal for contempt of court. *R.* v. *Hall*, 2 *W. Bl.* 1110; *Commonwealth* v. *Feely*, 2 *Virg. Cas.* 1. As to other offences which may be incurred by interfering with witnesses, *see ante*, pp. 146 and *post*, *Book II. Part II. ch. III.*, *s.* 8.

7. *Witnesses' Expenses, etc.*

At common law, a witness in criminal cases is not entitled to his expenses; 2 *Hawk. c.* 46, *s.* 173; at least, if he attend on the part of the prosecution. A witness subpœnaed for the defence cannot refuse to give evidence until his expenses are paid. *R.* v. *Cooke*, 1 *C. & P.* 321. The present statutory provisions as to expenses of witnesses in criminal cases are stated, *ante*, p. 246, *et seq.*

8. *Examination of Witnesses.*

Ordering witnesses out of court.]—When the case is called on, or at any other period during the trial, the court, at the request of the defendant (*R.* v. *Vaughan*, *cas. temp. Holt*, 689; 13 *St. Tr.* 485, 491: *Peter Cook's case*, 13 *Str.* 311, 318): or indeed at the request of either party, will order such of the witnesses of the opposite party as have not yet been examined, or are not under examination, to leave the court until they shall be called for in their order, so that each witness may be examined out of the hearing of the other witnesses on the same side who are to be examined after him. *Southey* v. *Nash*, 7 *C. & P.* 632. This rule has been applied when a legal argument arises as to the witnesses' evidence. *R.* v. *Murphy*, 8 *C. & P.* 297 (*and see post*, p. 416, *n.*). The solicitor for either party is said not to be within this rule. *Pomeroy* v. *Baddeley*, *Ry. & M.* 430. It has been said that if, after such an order, a witness be present during the examination of the other witnesses, he cannot be examined; *Attorney-General* v. *Bulpit*, 9 *Price*, 4; 23 *R. R.* 637: *R.* v. *Webb*, 1 *Stark. Ev.* (3rd ed.), 189; but the conduct of the witness seems to be no ground for depriving the crown, or the defendant, of a witness, and the practice is to allow him to be examined, subject to observation as to his conduct in disobeying the order; *R.* v. *Colley*, *M. & M.* 329: *R.* v. *Brown*, 4 *C. & P.* 588, *n.* This was formerly held to be a matter for the discretion of the judge. *Parker* v. *M'William*, 6 *Bing.* 683: *Beamon* v. *Ellice*, 4 *C. & P.* 585: *R.* v. *Wylde*, 6 *C. & P.* 380: *Cook* v. *Nethercote*, 6 *C. & P.* 741; 40 *R. R.* 855: *Thomas* v. *David*, 7 *C. & P.* 351. It seems now, however, to be the better opinion, that the judge has no right to reject the testimony of a witness who has remained in court after an order to withdraw; *Chandler* v. *Horne*, 2 *M. & Rob.* 423: *Cobbett* v. *Hudson*, 1 *E. & B.* 11, 14; except, perhaps, in revenue cases. 2 *Taylor*, *Ev.* (9th ed.), p. 916.

Witness on back of indictment.]—Although in strictness it is not necessary for the prosecutor to call every witness whose name is on the back of the indictment, it has been usual to do so, that the defendant may cross-examine them; *R.* v. *Simmonds*, 1 *C. & P.* 84: *R.* v. *Beezley*, 4 *C. & P.* 220: *R.* v. *Bull*, 9 *C. & P.* 22: *R.* v. *Vincent*, 9 *C. & P.* 91: *R.* v. *Barley*, 2 *Cox*, 191. If the counsel will not call the witness, the judge in his discretion may. *R.* v. *Simmonds*, *ubi supra*: *R.* v. *Bodle*, 6 *C. & P.* 186: *R.* v. *Holden*, 8 *C. & P.* 606: *R.* v. *Stroner*, 1 *C. & K.* 650: *R.* v. *Thompson*, 13 *Cox*, 181, *Lush*, J.: *R.* v. *Edwards*, 3 *Cox*, 82. In the last-mentioned case, *Erle*, J., referred to *R.* v. *Belany* (*unrep.*) where, the judge refusing to interfere, the defendant had to call some of the witnesses on the back of the indictment. Where a witness called before the coroner

was not called for the crown at the trial, the court has refused to require him to be called. *R.* v. *Wiggins*, 10 *Cox*, 562. However, the prosecutor is not *bound* to call them all; though he ought, it has been said, to have them in court, that they may be called for the defence, if the prisoner chooses. *R.* v. *Woodhead*, 2 *C. & K.* 520: *R.* v. *Cassidy*, 1 *F. & F.* 79: *R.* v. *Thompson*, *ubi supra*. If the counsel for the prosecution, at the instance of the prisoner's counsel, calls a witness, but does not ask him a question, the former is entitled to re-examine the witness after he has been examined by the prisoner's counsel. *R.* v. *Beezley*, 4 *C. & P.* 220: *R.* v. *Harris*, 7 *C. & P.* 581; *and see post*, p. 424. The defendant is entitled to inspect the indictment to see the names of the witnesses. *R.* v. *Lacy*, 3 *Cox*, 517, *Erle*, J. But the court cannot compel the prosecution to give their descriptions or addresses. *R.* v. *Gordon*, 12 *L. J.* (*M. C.*) 84, *Patteson*, J.

Witnesses not on depositions.]—Witnesses may be called for the crown whose depositions were not taken before the committing magistrate, and whose names are not on the back of the indictment. *R.* v. *Ward*, 2 *C. & K.* 759. But notice of intention to call such additional witnesses with a copy of the evidence which it is proposed that they should give, ought to be given to the prisoner and sent to the court. In *R.* v. *Connor*, 1 *Cox*, 233, *Patteson*, J., said, that he had no power to interfere in a case in which, after the prisoners were committed, a great body of additional evidence had been obtained, copies of which had been refused to the prisoners. In *R.* v. *Flannagan*, 15 *Cox*, 403, *Butt*, J., offered the defence an adjournment on a trial of murder to give time to rebut new evidence, of which notice had not been given, and the tendency of the latest decisions is to reject new evidence if tendered without notice of intention to give it and without giving the defence a copy of the proof. Thus in *R.* v. ——, *Cent. Crim. Ct.*, Oct. 1893, *Charles*, J., refused to admit new evidence unless the prosecution could prove service of the proof on the defence. In *R.* v. *Hawkins* (*Q. B. D.* 1896), *Russell*, L.C.J., also required proof of notice of new evidence. In *R.* v. *Stiginani*, 10 *Cox*, 552, *Willes*, J., is said to have ruled that the evidence of a witness, whose deposition had not been taken before the committing magistrate, and in respect of whom the prosecution had given no notice to the prisoner that it was their intention to call him, was not admissible when tendered on the part of the prosecution. The same point, however, having been raised in *R.* v. *Greenslade*, 11 *Cox*, 412, *Brett*, J., after consulting *Willes*, J., said that he had the authority of the latter for saying that his ruling in *R.* v. *Stiginani*, *ubi supra*, was incorrectly reported, and that evidence tendered under the circumstances above mentioned, if relevant, ought to be received, although the fact of notice of its intended production not having been given to the prisoner or his solicitor was a subject of strong comment.

Questions by the judge.]—During the progress of the trial, the judge may, of course, question the witnesses; and, even though the counsel for the prosecution has closed his case, and the counsel for the defendant has taken an objection to the evidence, the judge may make any further inquiries of the witness that he thinks fit, in order to answer the objection. *R.* v. *Remnant*, *R. & R.* 136.

Witness called by the judge.]—Where the judge calls a witness not called by either party, which he is entitled to do (*Coulson* v. *Disborough* [1894] 2 *Q. B.* 316), neither party is entitled to examine or cross-examine as of

right. *Id.*, *R.* v. *Cliburn*, 62 *J. P.* 232 (*Fulton*, Recorder); but if the evidence is adverse to either party, such leave should be given. *Id.*

Rebutting evidence.]—In *R.* v. *Haynes*, 1 *F. & F.* 666, the court refused to call a new witness for the crown after the close of the case. But rebutting evidence is certainly admissible at the discretion of the court to meet a case unexpectedly set up by the defence. *R.* v. *Frost*, 4 *St. Tr.* (*N. S.*) 85; 9 *C. & P.* 129: *R.* v. *Whelan*, 8 *L. R.* (*Ir.*) 314; 14 *Cox*, 595 (*Ir.*): *R.* v. *Coyle*, 7 *Cox*, 74, *Erle*, J.: *R.* v. *McGavaran*, 6 *Cox*, 64: or to meet evidence of good character given for the defence. *R.* v. *Rowton*, *L. & C.* 520; 34 *L. J.* (*M. C.*) 57; 10 *Cox*, 25 (*C. C. R.*): *R.* v. *Hughes*, 1 *Cox*, 44, *Rolfe*, B. *Contra*, *R.* v. *Burt*, 5 *Cox*, 284, *Martin*, B. Where the defendant is called this class of evidence may be rendered unnecessary by the result of his cross-examination under 61 & 62 *Vict. c.* 36, *s.* 1 (*f*). Where after the examination of witnesses as to facts on behalf of a prisoner, the judge (there being no counsel for the prosecution) called back and examined a witness for the prosecution, it was held that the prisoner's counsel had a right to cross-examine again if he thought it material. *R.* v. *Watson*, 6 *C. & P.* 653.

Reswearing witnesses.]—Where there are two prosecutions against the same party for felony, the judge can not, even by consent, take the evidence on the first trial as given in the second. Sometimes witnesses have been re-sworn in the second case, and their evidence read over to them from the judge's notes; *R.* v. *Foster*, 7 *C. & P.* 495; and a similar course was adopted in a case of misdemeanor. *R.* v. *Lovett*, 3 *St. Tr.*, *N. S.* 1177, 1179, 9 *C. & P.* 462. Where, however, on the trial of a prisoner, the jury, not being able to agree, were discharged, and the prisoner was again tried before another jury, and the judge, at the request of the prisoner and of his counsel, and with the consent of the counsel for the crown, instead of again taking the evidence *vivâ voce*, read over to the witnesses the evidence taken by himself at the first trial, asking each witness if he had anything to add or alter in his evidence, and also informing the counsel for the prisoner and the counsel for the crown that if either of them wished to ask the witness any question he could do so, this mode of taking the evidence on the second trial was strongly disapproved by the Judicial Committee of the Privy Council. *R.* v. *Bertrand*, *L. R.*, 1 *P. C.* 520; *L. J. P. C.* 51 (*and see ante*, p. 214). A trial on admissions is not allowed unless they are made in open court by defendant or his advocate with his authority. *R.* v. *Thornhill*, 8 *C. & P.* 575 (*ante*, p. 325).

Examination in chief.]—After the witness has been sworn or has made the necessary affirmation or declaration (*see* pp. 406 *et seq.*), the counsel for the party who calls him proceeds to examine him. In doing this, two things are principally to be attended to: 1stly, that the questions be pertinent to the matter immediately in issue (*a*); and 2ndly, that they be not leading questions.

Firstly. The questions must be pertinent to the matter immediately in issue. No question may be asked of a witness upon a direct examination, the probable answer to which cannot have a tendency to prove the offence or defence, or other matter put in issue by the pleadings. In the case of

(*a*) In the United States it is common practice to send the jury out when objections to the admissibility of evidence are being argued. In *R.* v. *Freeman* [1895] 6 *Queensland*, *L. J.* 281, it was held by the *Rt. Hon. Sir S. Griffith*, C.J., that under the English practice the jury must be present throughout the proceedings. But in *R.* v. *Hicks*, at the Central Criminal Court, July 30, 1904, on a trial for abortion, *Ridley*, J., sent the jury out of Court while objections to admissibility of evidence were being argued.

circumstantial evidence the courts of necessity allow of a greater latitude in this respect; but still, in this case, the questions must be such as are likely to elicit evidence of facts from which the jury may reasonably presume the guilt or innocence of the prisoner. Upon an indictment for a conspiracy, general evidence of a conspiracy charged may be received in the first instance, although it cannot affect the defendant, unless afterwards brought home to him or to an agent employed by him. *Queen Caroline's case*, 2 *B. & B.* 284, 302; 1 *St. Tr., N. S.* 1348. (*See ante*, p. 306.) And the same rule applies where a defendant seeks, by such general evidence, in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of the defence (provided the proposed evidence be previously opened to the court), as in the case of a prosecution for a conspiracy. *Id.* So, if A commit a burglary, and B stay outside the house for the purpose of preventing an interruption; upon the trial of B, the prosecutor first proves the offence committed by A, and then brings the guilt home to B by proving his share in it. In these cases, however, the matter to be proved naturally branches itself into two propositions, that a certain conspiracy existed, and that the defendant was engaged in it; that A committed the burglary, and that B. aided and assisted him in the commission of it.

Secondly. It is a general rule, that, in a direct examination of a witness, he shall not be asked leading questions, or, in other words, questions framed in such a manner as to suggest to the witness the answers required of him. To this rule, however, there are a few exceptions. To identify a person whom the witness has already described, the person may be pointed out to him, and he may be asked, in direct terms, if that be the person he meant. *R.* v. *Watson*, 2 *Stark.* (*N. P.*) 116; 32 *St. Tr.* 1: *R.* v. *De Berenger*, *Stark. Ev.* (4th ed.) 167, *n.* As to the proper questions to be asked to prove identification, *see R.* v. *Blackburn*, 6 *Cox*, 333. Where a witness swears to a certain fact, and another witness is called for the purpose of contradicting him, the latter may be asked, in direct terms, whether that fact ever took place. *Courteen* v. *Touse*, 1 *Camp.* 43; 10 *R. R.* 627.

And, *lastly*, questions which are merely introductory to others that are material are in general allowed to be asked in direct terms, without objection. *R.* v. *Robinson*, 61 *J. P.* 520.

If an irrelevant or leading question be put, the counsel on the other side should immediately interpose and object to it. So, if a witness be asked whether a certain representation was made, the opposite counsel may interpose, and ask him whether the representation in question were by parol or in writing; for, if the latter, the writing must be produced. *Queen Caroline's case*, 2 *B. & B.* 284; 1 *St. Tr., N. S.* 1348.

Hostile witness.]—By *s.* 3 of *Denman's Act* (28 & 29 *Vict. c.* 18), which, by *s.* 1, is applied to all courts of criminal judicature), "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." To be consistent within the meaning of the section the statements need not be directly or absolutely at variance. *Jackson* v. *Thompson*, 31 *L. J.* (*Q. B.*) 11. The word "adverse" in this section means "hostile," and not merely

"unfavourable." *Greenough* v. *Eccles*, 5 *C. B.* (*N. S.*) 786; 28 *L. J.* (*C. P.*) 160, decided on *s.* 22 of the *Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125. The discretion of the judge is absolute: *Rice* v. *Howard*, 16 *Q. B. D.* 681. 28 & 29 *Vict. c.* 18, *s.* 3, appears to get rid of what was supposed to be the former rule that a party could not show that his own witness had at any time given a different account of the same transaction. *Ewer* v. *Ambrose*, 3 *B. & C.* 746: *R.* v. *Farr*, 8 *C. & P.* 768: *R.* v. *Ball*, 8 *C. & P.* 745. Before the Act of 1854, if a witness called to prove a fact proved the contrary, his credit could not be impeached by general evidence; *Bull.* (*N. P.*) 297; *Ewer* v. *Ambrose*, 3 *B. & C.* 746, 751; but the party was at liberty to make out his case by other and contradictory evidence, for the other witnesses were not called directly to impeach the credit of the first. *Id.* *R.* v. *Ball*, *ubi supra.* If the witness appear evidently to be hostile to the party who has called him, the counsel may put leading questions to him, having first obtained permission of the court to do so. *Clarke* v. *Saffery*, *Ry. & M.* 126; *and see Bastin* v. *Carew*, *Id.* 127: *R.* v. *Chapman*, 8 *C. & P.* 558: *R.* v. *Ball*, *ubi supra.*

Where on a trial for rape a witness for the prosecution, to whom the prosecutrix had made a communication shortly after the commission of the alleged offence, being asked on cross-examination as to the particulars of such communication, gave an answer different from that which the prosecuting counsel was instructed was the truth, it was held by *Day*, J. (after consulting *Cave*, J.), that it was competent for the prosecuting counsel, on re-examination, to ask the witness, under 28 & 29 *Vict. c.* 18, *s.* 3, whether she had not at another time made a statement inconsistent with her present testimony to a person named, and also to call such person to give evidence of the statement so made to him. *R.* v. *Little*, 15 *Cox*, 319. In that case the prisoner's counsel objected that there was nothing in the demeanor of the witness to show that she was hostile, and the report does not state whether the learned judges considered her to be so. In one case, before 28 & 29 *Vict. c.* 18, *s.* 3, where a judge called a witness upon the back of the indictment, who gave evidence in form against the defendant, and the judge ordered the deposition of the witness before the coroner to be read, to show its inconsistency with the testimony then given, the twelve judges thought him right in so doing, and Lord *Ellenborough* and Sir J. *Mansfield*, C.J., thought that the prosecutor had the same right. *R.* v. *Oldroyd*, *R. & R.* 88. *See also R.* v. *Beardmore*, 8 *C. & P.* 260: *R.* v. *Williams*, 6 *Cox*, 343 (*post*, p. 422).

Refreshing memory.]—We have seen (*ante*, p. 403) that a witness can be allowed only to speak of facts within his own knowledge and recollection, except in matters of science, in which case his opinion is admissible evidence. *See R.* v. *Wright*, *R. & R.* 456. He cannot, therefore, be admitted to read his evidence. But he will be allowed to refresh his memory from any book or paper made by himself, or seen and examined by him shortly after the fact occurred to which it relates, if he can afterwards swear to the fact from his recollection. *Doe* v. *Perkins*, 3 *T. R.* 749: *Kensington* v. *Inglis*, 8 *East*, 273, 289; 9 *R. R.* 438: *Burrough* v. *Martin*, 2 *Camp.* 112; 11 *R. R.* 679: *Bolton* (*Lord*) v. *Tomlin*, 5 *A. & E.* 856. *See R.* v. *Guinea* [1841], *Ir. Circ. Rep.* 167: *R.* v. *Laidler*, 19 *Cox*, 360: *R.* v. *Robinson*, 61 *J. P.* 520; 2 *Taylor Ev.* (9th ed.), 925. If he knew the fact, however, *only* from seeing it in the book or paper, the original book or paper must be given in evidence, and proved by other means. *Doe* v. *Perkins*, *ubi supra.* In like manner, depositions made by an old witness have been allowed to be read to him, for the purpose of refreshing his memory as to dates, etc. *Vaughan* v. *Martin*, 1 *Esp.* 440. A witness may

not refresh his memory with a *copy* of an instrument which might itself be used for refreshing his memory, unless the copy were made by himself, or in his presence, and he knew it to be correct. *Burton* v. *Plummer*, 2 *A. & E.* 341; 4 *Nev. & M.* 315. And where upon an indictment for forgery it was sought to prove the numbers of the notes given in payment for the forged instrument by a witness, whose memory it was proposed to refresh by a written memorandum made by himself of the numbers of the notes, the material for which memorandum had been supplied by an entry made by himself at the time he paid the notes, the original entry itself not being produced, *Blackburn*, J., refused to allow the witness so to refresh his memory, saying that the original entry must be produced. *R.* v. *Harvey*, 11 *Cox*, 546. The prisoner was a timekeeper, and T. C. was pay-clerk, in the employment of the prosecutor. It was the prisoner's duty every fortnight to give a list of the days worked by the prosecutor's workmen to a clerk, who entered the days and the wages due in respect of them in a time-book. At pay-time it was the prisoner's duty to read from the time-book the number of days worked by each workman to T. C., who paid the wages accordingly. T. C. saw the entries in the time-book while the prisoner was reading them out. Upon the trial of an indictment charging the prisoner with obtaining money by false pretences, it was held that T. C. might refresh his memory by referring to the entries in the time-book, in order to prove the sums paid by him to workmen. *R.* v. *Langton*, 2 *Q. B. D.* 296; 46 *L. J.* (*M. C.*) 136; 13 *Cox*, 345 (*C. C. R.*); *and see R.* v. *Mullins*, 3 *Cox*, 526; 7 *St. Tr., N. S.* 1110.

When a witness is under the examination of a junior counsel, the leading counsel may interpose, take the witness into his own hands, and finish the examination; but after one counsel has brought his examination to a close, no other counsel on the same side can put a question to the witness. *Doe* v. *Roe*, 2 *Camp.* 280; 11 *R. R.* 711.

Cross-examination generally.]—When the direct examination is finished, the witness may then be cross-examined by counsel for the opposite party. Or, if the party calling a witness do not think proper to examine him after he is called and sworn, the witness may nevertheless be cross-examined by the counsel for the opposite party. *R.* v. *Brooke*, 2 *Stark.* (*N. P.*) 472. *See Morgan* v. *Brydges*, *Id.* 314: *Phillips* v. *Eamer*, 1 *Esp.* 355. (*See ante*, pp. 414, 415.) Where a witness was called, and had only answered an immaterial question, when he was stopped by the judge, *Gurney*, B., ruled that the opposite party had no right to a cross-examination. *Creevy* v. *Carr*, 7 *C. & P.* 64.

Where two prisoners are jointly indicted and evidence is called on behalf of one prisoner which tends to criminate the other, the latter is entitled to cross-examine the witness. *R.* v. *Woods*, 6 *Cox*, 224. So where A, B, and C were jointly indicted, and separately defended, and at the close of the case for the prosecution C was acquitted, and was then called as a witness for A, and gave evidence tending to criminate B, it was held that B's counsel had a right to cross-examine C, and to reply. *R.* v. *Burdett*, *Dears.* 431; 24 *L. J.* (*M. C.*) 63; 6 *Cox*, 458 (*C. C. R.*). The reason for the rule is that such evidence, though given in defence of one prisoner, becomes in fact evidence for the prosecution against the other.

The rule is equally applicable where one of the prisoners is called in his own defence under the *Criminal Evidence Act*, 1898, and gives evidence incriminating his fellow-prisoner. *R.* v. *Hadwen* [1902], 1 *K. B.* 882 (*C. C. R.*), and to this extent *s.* 1 (*f*) (iii.) of the Act has the effect of abrogating the common law rule expressed in *R.* v. *Payne*, *L. R.* 1 *C. C.*

R. 349; *and Allen* v. *Allen* [1894], *Prob.* 248, 253, that the evidence of one defendant on a criminal trial cannot be received for or against another defendant.

When a witness is produced, the first thing that claims the attention of the counsel for the opposite party is, whether the witness be competent, and if not, then in what manner the objection to his competency must be made. (*See ante*, p. 387 *et seq.*)

The next thing that claims the opposite counsel's attention, in the course of the examination, is, whether parol evidence be the best evidence of the facts to which the witness deposes; and if not, whether grounds have been laid for its admission as secondary evidence; whether the questions be relevant and pertinent to the matter in issue; and whether they be leading questions. If the evidence of the witness be objectionable in any of these respects, the counsel should immediately interpose and make his objection.

Supposing, however, the witness and his evidence not open to these preliminary objections, the opposite counsel must then proceed to cross-examine him, if, in his judgment, a cross-examination be necessary or advisable. In giving his evidence a witness tells the truth, wholly or partially, or tells a falsehood. If he tells the whole truth, cross-examination may be dangerous, as it may have the effect of rendering his story more circumstantial, and impressing the jury with a stronger opinion of its truth; and it is better, in such a case, either not to cross-examine him at all, or to confine your questions to his credibility, by impugning his means of knowledge, his disinterestedness, or his integrity. (*See ante*, pp. 403, 404.)

If the witness tell only part of the truth, then the opposite counsel, if the residue be favourable to his client, will immediately proceed to cross-examine him as to it; but, if unfavourable, the counsel will either refrain altogether from cross-examining him, or will confine his questions to the witness's credibility, as above mentioned.

If, on the other hand, the evidence of the witness be false, then the whole force of the cross-examination must be directed to his credibility (*see ante*, p. 403); and you may afterwards prove the truth by other witnesses.

In cross-examining a witness, the counsel may ask him leading questions; that is, he may lead the witness, so as to bring him directly to the point in which he requires the answer; and this whether the witness be a willing or an adverse one; *see Parkin* v. *Moon*, 7 *C. & P.* 408; but he will not be allowed to put into the witness's mouth the very words he is to echo back again. *R.* v. *Hardy*, 24 *St. Tr.* 199, 755, *Buller*, J.; *and see* 2 *Taylor, Ev.* (9th ed.), p. 944. Cross-examination of witnesses for the crown is not permitted as to matters involving state secrets. *R.* v. *Watson*, 2 *Stark.* (*N. P.*) 116; 32 *St. Tr.* 1. (*See ante*, p. 402.) As to the mode of suggesting, in cross-examination of a witness, that he is a spy, *see R.* v. *Bernard*, 1 *F. & F.* 240; 8 *St. Tr., N. S.* 887. As to incriminating questions, *see ante*, p. 399.

Questions put in cross-examination must be either relevant and pertinent to the matter in issue, or calculated to elicit the witness's title to credit. It is not usual to cross-examine witnesses to character, unless the counsel cross-examining have some distinct charge on which to cross-examine them; *see R.* v. *Hodgkiss*, 7 *C. & P.* 298; and it is improper to examine as to mere circumstances of suspicion occurring on the day when the offence is charged. *R.* v. *Rogan*, 1 *Cox*, 291, *Erle*, J. If the only evidence called on the prisoner's part is evidence as to character, though the counsel for the prosecution is in strictness entitled to a reply, it is not

usual to exercise it, except in extreme cases. *See R.* v. *Stannard*, 7 *C. & P.* 673 : *R.* v. *Whiting*, *Id.* 771, and *ante*, p. 211.

Cross-examination as to documents.]—The practice as to cross-examination as to documents is now regulated by *s.* 5 of *Denman's Act* (28 *& 29 Vict. c.* 18), which is in the following terms:—"A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit."

Under *s.* 5 you may cross-examine a witness upon a letter or other statement made by him in writing without reading it or putting it in as evidence. If a witness refresh his memory from entries in a book, the opposite counsel may cross-examine on those entries without making them his evidence, and the jury may see them if they think fit; but, if the opposite counsel cross-examine as to *other* entries in the same book, he makes them his evidence. *Gregory* v. *Tavernor*, 6 *C. & P.* 281. If the cross-examining counsel put a paper into the witness's hands, and put questions on it, and anything comes of those questions, the opposite counsel has a right to see the paper, and re-examine on it; but if the cross-examination founded on the paper entirely fails and nothing comes of it, the opposite counsel cannot demand to see the paper. *R.* v. *Duncombe*, 8 *C. & P.* 369 : *R.* v. *Ramsden*, 2 *C. & P.* 603; 31 *R. R.* 703.

Depositions.]—Prior to 28 *& 29 Vict. c.* 18 the judges had laid down the following rules (*see* 7 *C. & P.* 676: 6 *L. J.* (*M. C.*) 37) as to the mode of cross-examining witnesses for the crown with respect to what they had previously sworn before the magistrate, and which had been *reduced into writing* in their depositions:—I. That where a witness for the crown has made a deposition before a magistrate, he cannot, on his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein; and that such deposition must be read as part of the evidence of the cross-examining counsel. II. That, after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which the counsel for the prosecution may re-examine the witness, and, after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments upon any supposed variance or contradiction, without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it. III. That the witness cannot, in cross-examination, be compelled to answer whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event, the counsel for the prisoner may proceed with his cross-examination; and if the witness admit such statement to have been made, he may comment upon such omission, or

upon the effect of it upon the other part of his testimony; or, if the witness denies that he made such statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

The first of these rules appears to be superseded by 28 & 29 *Vict. c.* 18, *s.* 5 (*ante*, p. 421). They were binding on the prisoner's counsel; but the judge who tried the case, might, notwithstanding, if he thought fit, himself look at the depositions, and question a witness as to any discrepancy which appeared between his deposition and his evidence. And, by the judge's permission, the prisoner's counsel might, "as his mouthpiece," do the like. *R.* v. *Peel*, 2 *F. & F.* 21, *Willes*, J. Whether, if such examination introduced new facts in evidence, that would give the counsel for the prosecution the right of reply, was not settled. *See R.* v. *Edwards*, 8 *C. & P.* 26. The witness could not be asked whether he did or did not state a particular fact before the magistrate, without first allowing him to read, or have read to him, his depositions. *R.* v. *Taylor*, 8 *C. & P.* 726. Where an accomplice who could not read gave evidence falling very short of what he had stated before the magistrate, the judge allowed his deposition, signed with his mark, to be shown to him, but would not allow it to be read to him, in order that the prosecuting counsel might examine upon it. *R.* v. *Beardmore*, 8 *C. & P.* 260. Where a witness examined for the crown gave an answer different from what was expected, counsel for the prosecution was allowed to show the witness his deposition to refresh his memory; and on his persisting in the answer was also allowed to put the question in a leading form. *R.* v. *Williams*, 6 *Cox*, 343. Except as above mentioned, the prosecution cannot use or refer to the depositions taken before the magistrate, without putting them in as their evidence. *R.* v. *Muller*, 10 *Cox*, 43. If the witness denies his signature or mark to the deposition, it may be proved by the evidence of any competent person who heard it taken; and it is not necessary to prove it by the magistrate or his clerk, any more than in the case of a confession. *R.* v. *Hallett*, 9 *C. & P.* 748, *Coleridge*, J.: *R.* v. *Hearn*, *C. & Mar.* 109, *Coltman*, J.: *see ante*, p. 336, 337.

Under *Rule* 1 the prisoner's counsel was not permitted, in cross-examining a witness for the prosecution, to put his deposition into his hand that he might read it, and then to ask him whether, having read it, he still persevered in the statement which he had made in court; the proper course was to read the deposition to him at the time, and to cross-examine him upon it, or to put it in afterwards as evidence for the prisoner. *R.* v. *Ford*, 2 *Den.* 245; 20 *L. J.* (*M. C.*) 171 (*C. C. R.*): *R.* v. *Brewer*, 9 *Cox*, 409, *Blackburn*, J. In *R.* v. *Ford*, *Campbell*, C.J., said, "the proper course to be pursued is that pointed out in *Queen Caroline's case*, 2 *B. & B.* 284, at p. 289." *R.* v. *Ford* seems not now to be an authority, having regard to the change in practice effected by 28 & 29 *Vict. c.* 18, *s.* 5 (*ante*, p. 421). Under that section, although a witness may be cross-examined as to what he said before the magistrate, and the deposition may be put into his hand for that purpose, without reading it as a part of the evidence of the cross-examining party, yet the latter is bound by the answer of the witness, unless the deposition is put in to contradict him, and it is not admissible to state that the deposition does contradict him unless it is so put in. *R.* v. *Riley*, 4 *F. & F.* 964: *R.* v. *Wright*, *Id.* 967, *Channell*, B.

As to variations between a witness's deposition and his evidence at the trial, *Cockburn*, C.J., said in *R.* v. *Wainwright*, 13 *Cox*, 171, 173, that

he did not attach much importance to the accordance between what a witness said at the trial and what he was reported in his deposition to have said before the magistrate. He knew, from his own experience, how difficult it was to take down a witness's exact words. A witness expressed himself in a long sentence, the magistrate's clerk struck out a particular word, and with that omission it went down on the notes, and was not the whole sentence. The whole meaning of the sentence which the witness had uttered might thereby be entirely altered. Too much importance ought not, therefore, to be attached to such variations, and if there were a substantial agreement between the evidence at the preliminary inquiry and that adduced at the trial, that was sufficient.

Former statements not in writing.]—It is provided by *s.* 4 of *Denman's Act* (28 *&* 29 *Vict. c.* 18, which by *s.* 1 applies to all courts of criminal judicature), "if a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

This enactment is wide enough to cover all statements, but is specially applicable to a statement not in writing. You may cross-examine the witness on such statement; and if he deny it, you may call another witness to prove it. So, if a witness admit that when before a magistrate he was cross-examined for the prisoner, and it appears that such cross-examination is not returned with the depositions, he may be questioned by the prisoner's counsel as to the answers he gave. *R.* v. *Edwards*, 8 *C. & P.* 26: *R.* v. *Curtis*, 2 *C. & K.* 763, *Erle*, J. So, if it appear that a statement of the witness before the magistrate, although written down by him, was not read over to the witness, nor signed by him or by the magistrate, the witness may be cross-examined as to such statement without producing the writing. *R.* v. *Griffiths*, 9 *C. & P.* 746, *Coleridge*, J.: *see Jeans* v. *Wheedon*, 2 *M. & Rob.* 486, *and the note.* Witnesses for the prosecution were duly sworn and examined before the magistrate, and cross-examined by the prisoner; minutes thereof were duly made by the magistrate's clerk, and then sent to his office to be copied as draft depositions. The witnesses attended there also. T., the copying clerk, while copying the minutes, asked the witnesses some questions, for the purpose of making the depositions more correct, clear, and complete, and inserted their answers to such questions in the depositions. The prisoner was not then present. The depositions thus written were sent back to the magistrate; and the witnesses, in the presence of the prisoner, after being resworn, and after hearing the depositions read over to them, and full opportunity for cross-examination being given to the prisoner, signed them. At the trial, a material question was put to one of the witnesses as to something which he had said to T., in answer to one of the questions so put to him by T. It was held that such answer formed no part of the depositions, but was wholly independent of them, and therefore that the question might be asked without putting in the depositions. *R.* v. *Christopher*, 1 *Den.* 536; 2 *C. & K.* 994, 995; 19 *L. J.* (*M. C.*) 103. So a witness may be cross-examined as to his statement before the grand jury in the same case. *R.* v. *Gibson*, *C. & Mar.* 672, *Parke*, B. But cross-examination as to the state of his recollection when examined before the magistrate has been rejected as inadmissible, and as an attempt by a

side-wind to evade putting in the deposition. *R.* v. *Newton*, 4 *Cox*, 262, *Patteson*, J. If, however, a witness, when examined in chief as to the occurrence of a fact, answer that he does not remember it, the counsel on the opposite side cannot give evidence of a former declaration by the witness of the fact having occurred, unless he have in cross-examination questioned the witness as to such a declaration; for the fact may have occurred, and the witness have formerly declared his knowledge of it, and yet he may not recollect it at the time of his examination. *Queen Caroline's case*, 2 *B. & B.* 284, 292; 1 *St. Tr., N. S.* 1348.

Collateral facts.]—As a general rule, a witness cannot be cross-examined as to any distinct collateral fact, not relevant to the matter in issue, for the purpose of disproving the truth of the expected answer by other witnesses, in order to discredit the whole of his testimony. *Spenceley* v. *De Willott*, 7 *East*, 108.

Previous convictions.]—As to the cross-examination of a witness as to whether he has been convicted of felony or misdemeanor, and proof of such conviction, *see* 28 *&* 29 *Vict. c.* 18, *s.* 6 (*ante*, p. 404); 61 *&* 62 *Vict. c.* 36, *s.* 1 (*f.*) (*ante*, p. 395).

If, upon the trial of an indictment, it appear, on cross-examination of one of the witnesses for the prosecution, that J. S. was employed by the prosecutor for the purpose of procuring and examining evidence and witnesses in support of the indictment, the defendant cannot give evidence of J. S.'s having offered a bribe to a certain person, to induce him to give evidence touching the matter of the indictment, unless such person have been examined as a witness. *Queen Caroline's case*, 2 *B. & B.* 284, 302; 1 *St. Tr., N. S.* 1348.

Cross-examination of prisoners.]—(*See ante*, p. 419.) Prisoners called as witnesses on their own behalf may be cross-examined like any other witness, subject to the limitations imposed by *s.* 1 (*f.*) of the *Criminal Evidence Act*, 1898. (*See* that section, *ante*, p. 395.) Where a police sergeant, who was called for the prosecution, was asked in cross-examination in effect whether the prisoner in committing the act with which he was charged was not acting under the sergeant's instructions, and the prisoner afterwards stated in the witness-box that he considered that he was so acting, it was held that such cross-examination and evidence did not involve imputations within that section. *R.* v. *Bridgwater*, 21 *Times*, *L. R.* 69 (*C. C. R.*).

Recalled witness.]—If a witness for the crown is recalled, the prisoner's counsel is entitled to cross-examine him on the new evidence given. *R.* v. *Watson*, 6 *C. & P.* 653.

Re-examination.]—If any new fact arise out of the cross-examination, the witness may be examined as to it by the counsel who first examined him. In the same manner he may be re-examined when necessary, in order to explain any part of his cross-examination. In *Queen Caroline's case* (*ubi supra*) it was held, that if a witness, upon his cross-examination, admits having used certain expressions in a conversation with a person not a party to the cause, the opposite counsel, in re-examining the witness, is confined to such questions as may elicit the meaning of the expressions, and the motives of the witness for using them. But where a witness deposes to

certain expressions being used by a party to the cause, the counsel for that party is entitled to re-examine the witness as to the whole of the conversation in which the expressions occurred; because the expressions are given in evidence, in such a case, as an admission of the party, and the whole of his admission should be taken together. 2 *B. & B.* 284, 294; 1 *St. Tr., N. S.* 1348. If a witness whose name is on the back of the indictment be called merely to allow the prisoner to cross-examine him, any question put by the prosecutor's counsel afterwards must be considered as a re-examination, and nothing can be asked which does not arise out of the cross-examination. *R.* v. *Beezley*, 4 *C. & P.* 220, *Littledale*, J.

In re-examination questions tending to prove the commission by the defendant of an offence other than that charged in the indictment have been allowed where the object was to explain away an apparently contradictory fact elicited by cross-examination. *R.* v. *Chambers*, 3 *Cox*, 92. *Rolfe*, B.

BOOK II.

PLEADING, PRACTICE, AND EVIDENCE IN PARTICULAR CASES.

PART I.

OFFENCES AGAINST INDIVIDUALS.

CHAPTER I.

OFFENCES AGAINST THE PROPERTY OF INDIVIDUALS.

SECT. 1. *Larceny*, p. 426.
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SECT. 1.—LARCENY.

Statutes.

14 & 15 *Vict. c.* 100 (*Criminal Procedure Act*, 1851), *s.* 5—*How stolen instrument may be described in indictment.*]—*Ante*, p. 74.

Sect. 18—*How money and bank notes may be described in indictment—Not necessary to prove particular species of coin or particular nature of bank note.*]—*Ante*, p. 77.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 1—*Interpretation of terms—Document of title to goods.*]—In the interpretation of this Act:—"the term 'document of title to goods' shall include any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, *bought and sold note*, or any other document used in the ordinary course of business as the proof of the possession or control of goods, or authorizing or purporting to authorize either by indorsement or by delivery, the possessor of such

document to transfer or receive any goods thereby represented *or therein mentioned or referred to. . . .*" [*This definition re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 23, *with the additions italicized.*]

Document of title to lands.]—The term "document of title to lands" shall include any *deed, map,* paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title or any part of the title to any real estate, *or to any interest in or out of any real estate.* [*This definition re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 23, *with the additions italicized.*]

Trustee.]—*See post,* p. 583.

Valuable security.]—The term "valuable security" shall include any order, Exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, *whether within the United Kingdom or in any foreign state or country,* or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, *and any document of title to land or goods as hereinbefore defined.* [*This definition re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 5, *with the additions italicized. As to postal orders, see* 43 & 44 *Vict. c.* 33, *s.* 4, *sub-s.* 4, *post,* p. 432. "*Valuable security*" *has been held to include a transfer of shares in a limited liability company. R.* v. *Smith,* 62 *J. P.* 231.]

Property.]—The term "property" shall include every description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include, not only such property as shall have been *originally in the possession or under the control of any party,* but also any property into or for which the same may have been converted or exchanged, and anything acquired by *such conversion or exchange, whether immediately or otherwise.* [*This definition re-enacts* 20 & 21 *Vict. c.* 54, *s.* 17, *with the modifications italicized.*]

Night.]—*See post,* p. 620.

Sect. 2—*Distinction between grand and petty larceny abolished.*]—Every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the 21st day of June, 1827; and every court, whose power as to the trial of larceny was before that time limited to petty larceny, shall have power to try every case of larceny, the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try accessories to such larceny. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 2, *passed on June* 21, 1827.]

Sect. 3—*Larceny by bailees.*]—Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof,

although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, *and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction.* [*This section re-enacts* 20 & 21 *Vict. c.* 54, *s.* 4, *with the additions italicized. As to larceny by partners or joint owners of the partnership or joint property, see* 31 & 32 *Vict. c.* 116, *s.* 1 (*post*, p. 432). *As to larceny by servants, see post*, p. 464. *As to larceny by tenants and lodgers, see post*, p. 516. *As to fraudulent misappropriation by agents, bankers, or factors, see* 24 & 25 *Vict. c.* 96, *ss.* 77–79 (*post*, p. 576): *by trustees, s.* 80 (*post*, p. 583): *by directors, etc., of public companies, ss.* 81–84 (*post*, p. 585). *As to fraudulent conversion of property by persons intrusted with the same since December* 31, 1901, *see* 1 *Edw.* 7, *c.* 10 (*post*, p. 575).

Sect. 4—*Punishment for simple larceny.*]—Whosoever shall be convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable, at the discretion of the court, to be kept in penal servitude . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section is taken from* 7 & 8 *G.* 4, *c.* 29, *ss.* 3, 4, & 12 & 13 *Vict. c.* 11, *s.* 1.]

Sect. 5—*Several counts for different larcenies.*]—It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for all or any of them. [*This section re-enacts* 14 & 15 *Vict. c.* 100, *s.* 16. *It does not extend to indictments for receiving only, though under s.* 92 (*post*, p. 546), *a count for receiving may be added to each of the three larceny counts.*]

Sect. 6—*Election.*]—If, upon the trial of any indictment for larceny, it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings. [*This section re-enacts* 14 & 15 *Vict. c.* 100, *s.* 17.]

Sect. 7—*Larceny after previous conviction for felony.*]—Whosoever shall commit the offence of simple larceny after a previous conviction for felony, *whether such conviction shall have taken place upon an indictment, or under the provisions of the Act passed in the session held in the eighteenth and nineteenth years of Queen Victoria, chapter one hundred and twenty-six,* shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 28, *s.* 11, *with the additions in italics.* 18 & 19 *Vict. c.* 126 *is repealed as to England and Wales, and replaced by* 42 & 43 *Vict. c.* 49.]

Sect. 8—*Larceny after conviction of an indictable misdemeanor under*

this Act.]—Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been previously convicted of any indictable misdemeanor punishable under this Act, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section was new law in* 1861.]

Sect. 9—*Larceny after two summary convictions.*]—Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been twice summarily convicted of any of the offences punishable upon summary conviction, under the provisions contained in [7 *&* 8 *G.* 4, *c.* 29: 7 *&* 8 *G.* 4, *c.* 30: 9 *G.* 4, *c.* 55: 9 *G.* 4, *c.* 56: 10 *&* 11 *Vict. c.* 82: 11 *&* 12 *Vict. c.* 59:] 14 *&* 15 *Vict. c.* 92, *ss.* [3, 4, 5], 6, or in this Act or in the *Malicious Damage Act*, 1861 (24 *&* 25 *Vict. c.* 97), (whether each of the convictions shall be in respect of an offence of the same description or not . . .), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section was framed from* 12 *&* 13 *Vict. c.* 11, *s.* 3. *The enactments included in square brackets are repealed, and as to summary convictions are replaced by* 42 *&* 43 *Vict. c.* 49, *as to England and Wales.*]

Sect. 72—*No acquittal of larceny if embezzlement proved.*]—*Post, tit.* "*Embezzlement*," p. 557.

Sects. 88–90—*Obtaining, etc., by false pretences.*]—*See post*, pp. 593, 594.

Sects. 91–96—*Receiving goods stolen, etc.*]—*See post*, p. 546.

Sect. 100—*Restitution of stolen goods on conviction of offender.*]—*See ante*, p. 265.

Sect. 103—*Apprehension of offenders.*]—Any person found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of this Act, except only the offence of angling in the daytime, may be immediately apprehended without a warrant *by any person*, and forthwith taken, together with such property, if any, before some neighbouring justice of the peace to be dealt with according to law; and if any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever on or with respect to which any offence, punishable either upon indictment or upon summary conviction by virtue of this Act, shall have been committed, the justice may grant a warrant to search for such property as in the case of stolen goods: and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorized, and, if in his power, is required to apprehend and forthwith to take before a justice of the peace the party offering the same, together with such property, to be dealt with according to law. [*This section is taken from* 7 *&* 8 *G.* 4, *c.* 29, *s.* 63, *with the alteration italicized.*]

Sect. 104—*Apprehension by peace officer for certain offences.*]—Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed, or being about to commit, any felony against this Act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law. [*This section was new law in* 1861.]

Sect. 109—*Summary conviction a bar to other proceedings.*]—In case any person convicted of any offence punishable upon summary conviction by virtue of this Act shall be paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the crown, or from the lord-lieutenant in Ireland (*see* 52 & 53 *Vict.* c. 63, *s.* 12, *sub-s.* 9), or shall have suffered the imprisonment awarded for non-payment thereof, or the imprisonment adjudged in the first instance, or shall have been so discharged from his conviction by any justice as aforesaid, in every such case he shall be released from all further or other proceedings for the same cause. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 70. *As to its effect, see ante*, p. 174.]

Sect. 114—*Provisions as to receiving, etc., goods stolen in other parts of the United Kingdom.*]—If any person shall have in his possession in any one part of the United Kingdom any chattel, money, valuable security, or other property whatsoever, which he shall have stolen or otherwise feloniously taken in any other part of the United Kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the United Kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing such property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the United Kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 76. *As to Venue, see ante*, pp. 48, 49.]

Sect. 115—*Offences committed within jurisdiction of Admiralty.*]—All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in which the offender shall be apprehended or be in custody; and in any indictment for any such offence or for being an accessory to any such offence the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence itself shall be averred to have been committed "on the high seas;" Provided, that nothing herein contained shall alter or affect any of the laws relating to the government of his Majesty's land or naval forces. [*This section was framed from* 7 & 8 *G.* 4, *c.* 29, *s.* 77. *As to Admiralty jurisdiction, see ante*, pp. 39-43.]

Sect. 116—*Indictment for offences committed after previous convictions.*]—In any indictment for any offence punishable under this Act, and committed after a previous conviction or convictions for any felony,

misdemeanor, or offence or offences punishable upon summary conviction (*see ss.* 7, 8, 9, *supra*), it shall be sufficient, *after charging the subsequent offence*, to state that the offender was at a certain time and place or at certain times and places, convicted of felony, or of an indictable misdemeanor, or of an offence or offences punishable upon summary conviction (as the case may be), without otherwise describing the previous felony, misdemeanor, offence, or offences; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanor, or a copy of any such summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or to which such summary conviction shall have been returned, or by the deputy of such clerk or officer (for which certificate or copy a fee of five shillings and no more shall be demanded or taken), shall upon proof of the identity of the person of the offender, be sufficient evidence of such conviction, without proof of the signature or official character of the person appearing to have signed the name;

And the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows; (that is to say), the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only: and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted, as alleged in the indictment, and if he answer that he had been so previously convicted, the court may proceed to sentence him accordingly, but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last mentioned inquiry:

Provided, that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence. [*This section was framed from* 7 & 8 *G.* 4, *c.* 28, *s.* 11, *with the addition of the words in italics, and the provisions as to the mode of arraignment, as to which see ante*, p. 185; *post, Book II. Part V., "Offences committed after previous convictions;" and Greaves, Crim. Law Cons. Acts, p.* 157.]

Sect. 117—*Fine and sureties.*]—Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behaviour (*see ante*, p. 240);

And in case of any felony punishable under this Act the court may, if it shall think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized (*see ante*, p. 240):

Provided, that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year. [*The provisions of this section as to felonies were new law in* 1861, *except as to the particular cases provided for by* 3 & 4 *Vict. c.* 111 (*joint stock banks*), *infra, and* 17 & 18 *Vict. c.* 112, *s.* 26 (*literary and scientific institutions*).]

Sect. 119—*Whipping.*] . . . Whenever whipping may be awarded for any indictable offence under this Act, the court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence. [*The part of this section relating to solitary confinement was repealed by* 56 & 57 *Vict. c.* 54 (*S. L. R.*). *See ante*, p. 239.]

Sect. 121—*Costs.*]—The court before which any indictable misdemeanor against this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony. (*See ante*, p. 246.)

3 & 4 *Vict. c.* 111 (*Joint Stock Companies Act*, 1840), *s.* 2: *Punishment of members of certain banking companies.*]—If any person or persons being a member or members of any banking co-partnership within the meaning of the said Act 1 & 2 *Vict. c.* 96 (*which relates to banking partnerships under* 6 *G.* 4, *c.* 42, *and* 7 *G.* 4, *c.* 46), or of any other banking co-partnership formed under or in pursuance of the *Bank of England Act*, 1833 (3 & 4 *W.* 4, *c.* 98) shall commit any fraud, forgery, crime, or offence against, or with intent to injure or defraud any such co-partnership, such member or members shall be liable to indictment, information, prosecution, or other proceeding in the name of any of the officers for the time being of the said co-partnership, in whose name any action or suit might be lawfully brought against any member or members of such co-partnership, for every such forgery, fraud, crime, or offence, and may thereupon be lawfully convicted as if such person or persons had not been, or was or were not a member or members of such co-partnership: any law, usage, or custom to the contrary notwithstanding.

31 & 32 *Vict. c.* 116 (*Larceny Act*, 1868), *s.* 1—*Larceny or embezzlement by partners or joint owners of the partnership or joint property.*]—If any person, being a member of any co-partnership, or being one of two or more beneficial owners of any money, goods, or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods, or effects, bills, notes, securities, or other property of or belonging to any such co-partnership or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership or one of such beneficial owners. [*As to the former law, see post*, p. 443.]

35 & 36 *Vict. c.* 93, *s.* 30—*Restitution of stolen property pawned.*]—*See ante*, p. 266.

42 & 43 *Vict. c.* 22, *s.* 7—*Restitution.*]—*See ante*, p. 267.

43 & 44 *Vict. c.* 33 (*Post Office* (*Money Orders*) *Act*, 1880), *s.* 4, *sub-s.* 4—*Postal Orders.*]—An order under this Act shall be deemed to be an "order for the payment of money" and a "valuable security" within

the meaning of the *Post Office Acts* and of the *Forgery Act*, 1861 (24 & 25 *Vict. c.* 98), and of *s.* 1 of the *Larceny Act*, 1861 (*ante*, p. 427), and of any other law relating to forgery or stealing, which is for the time being in force in any part of the United Kingdom, the Channel Islands, or Isle of Man.

59 & 60 *Vict. c.* 52 (*Larceny Act*, 1896), *s.* 1.—*Receiving in England or Ireland property stolen, etc., outside United Kingdom, Venue.*]—(1) If any person without lawful excuse receives, or has in his possession, any property stolen outside the United Kingdom, knowing such property to have been stolen, he shall be liable to penal servitude for any term not less than three years, and not more than seven years; or to imprisonment for a term not exceeding two years, with or without hard labour, and may be indicted in any county or place in which he has, or has had the property. (2) For the purposes of this section, property shall be deemed to have been stolen where it has been taken, extorted, obtained, embezzled, converted, or disposed of under such circumstances that if the act had been committed in the United Kingdom the person committing it would have been guilty of an indictable offence according to the law for the time being of the United Kingdom. (3) An offence under this section shall be a felony or misdemeanor, according as the act committed outside the United Kingdom would have been a felony, or misdemeanor if committed in England or Ireland. (4) This section shall be construed and have effect as part of the *Larceny Act*, 1861 (24 & 25 *Vict. c.* 96). [*See ante*, p. 427. *This section is retrospective in cases of receiving (after it came into force) property stolen abroad before it came into force. R.* v. *Pansè*, 61 *J. P.* 536. *As to its scope, see R.* v. *Graham*, 65 *J. P.* 248.]

Indictment for Simple Larceny.

SUFFOLK, to wit: The jurors for our lord the King upon their oath present, that J. S., on the 1st day of June, in the year of our Lord ——, three pairs of shoes, and one waistcoat, of the goods and chattels of J. N., feloniously did steal, take, and carry away; against the peace of our lord the King, his crown and dignity.

As to form of indictment against a married woman for stealing the goods of her husband when leaving him, see R. v. *James* [1902] 1 *K. B.* 540 (*C. C. R.*); 71 *L. J.* (*K. B.*) 211; 20 *Cox*, 156.

If the defendant has been guilty of other distinct acts of stealing (not exceeding three), committed by him against the same person within the space of six calendar months, one or two other counts (as the case may be), in the following form, may (under 24 & 25 *Vict. c.* 96, *s.* 5, *ante*, p. 428), *be added.* And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, and within the space of six calendar months from and after the time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on the first day of August, in the year aforesaid, six silver tea-spoons, of the goods and chattels of the said J. N., feloniously did steal, take, and carry away; against the form of the statute in such case made and provided, etc. *As to adding a count for receiving to each larceny count, see post*, p. 547.

Felony: penal servitude for not less than three years and not exceeding five years, or imprisonment not exceeding two years, with or without hard labour; 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235); *and, if a male under sixteen years, with or without whipping;* 24 & 25 *Vict. c.* 96, *s.* 4 (*ante*, p. 428); *the offender if sentenced to whipping, to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted, to be*

specified in the sentence. Id. s. 119 (*ante*, p. 432.) *The defendant may also be required to enter into his own recognizances, and to find sureties, both or either, for keeping the peace. Id. s.* 117 (*ante*, p. 431). *If the defendant have previously been twice convicted summarily under* 24 & 25 *Vict. cc.* 96, 97, *he may be sentenced to penal servitude for a term not exceeding seven nor less than three years, or imprisonment for not more than two years, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping.* 24 & 25 *Vict. c.* 96, *s.* 9 (*ante*, p. 429); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to the punishment of simple larceny after a previous conviction for felony, see* 24 & 25 *Vict. c.* 96, *s.* 7 (*ante*, p. 428); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235); *and as to the punishment of simple larceny after a previous conviction of an indictable misdemeanor punishable under the Larceny Act, see* 24 & 25 *Vict. c.* 96, *s.* 8 (*ante*, p. 428); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235); *and see post, Book II., Part V., Offences after Previous Convictions. As to the statement and proof of the former convictions, see* 24 & 25 *Vict. c.* 96, *s.* 116 (*ante*, p. 430).

As to the sentence where the defendant is already under sentence for another crime, see 7 & 8 *G.* 4, *c.* 28, *s.* 10 (*ante*, p. 231).

If it be proved that the defendant took the property in such manner as to amount in law to embezzlement, he shall not by reason thereof be entitled to be acquitted, but the jury may return as their verdict that the defendant is not guilty of larceny, but is guilty of embezzlement, 24 & 25 *Vict. c.* 96, *s.* 72 (*post*, p. 557), *and he may be punished accordingly. But a general verdict of guilty cannot be sustained upon evidence of embezzlement only. R. v. Gorbutt, Dears. & B.* 166; 26 *L. J.* (*M. C.*) 47 (*C. C. R.*).

Evidence (*a*).

J. S.]—It is immaterial whether this be the correct name of the defendant or not. (*See ante*, pp. 55, 163.) The prosecutor has only to prove that the defendant is the person who actually committed the offence; which is done either by identifying him as the party who committed it, or by circumstantial evidence. (*See ante*, p. 339.)

"*On the* 1*st day of June*," *etc.*]—The time here stated need not be proved as laid: if the offence be proved to have been committed at any time before or after, provided it be some day before the finding of the indictment (*ante*, p. 297). Where a larceny is committed in one county and the thief at any distance of time (*R. v. Parkin*, 1 *Mood. C. C.* 45) carries the goods into another county, in contemplation of law he is guilty not only of a carrying away but also of a taking in every county through or into which he has carried the goods. 1 *Hale*, 507; 1 *Hawk. c.* 33, *s.* 52; 3 *Co. Inst.* 113: *R. v. Fenley* [1903] 20 *Cox*, 252, *Jelf*, J. (*and see ante*, p. 298). If it be proved that the larceny was actually committed by the defendant in another part of the United Kingdom, and that he carried the goods at any distance of time through or into the county or other extent of the court's jurisdiction, it will be sufficient (*ante*, pp. 48, 49); unless the nature of the property be changed, and the indictment be for stealing the article in its original state (*ante*, p. 48). So it will be sufficient if the offence be either begun or completed in the county in which the defendant is indicted; or be committed within five hundred yards of the boundary of such county (*ante*, p. 43). And where a larceny is

(*a*) The evidence is considered, throughout this book, with reference to principal offenders: it is always, however, to be remembered that accessories before the fact are now triable in all respects as principals: 24 & 25 *Vict. c.* 94, *s.* 1 (*ante*, p. 18).

committed on a person, or with respect to property in or upon any coach, etc., or vessel, during a journey or voyage, it will be sufficient if the coach or vessel in the progress of the journey or voyage, passed through the county or by the boundary of the county in which the defendant is indicted. (*See ante*, p. 43). As to proceedings in respect of property stolen in a foreign country, *see* 59 & 60 *Vict. c.* 52, *s.* 1 (*ante*, p. 433).

"*Three Pairs of Shoes*," *etc.*]—The species of goods must be proved as laid; for instance, upon this indictment, if the prosecutor were to fail in proving that shoes, or a waistcoat, were stolen, the defendant must be acquitted, although there were indisputable evidence of his having stolen other articles (*ante*, p. 76), unless the indictment were amended according to the evidence, under 14 & 15 *Vict. c.* 100, *s.* 1. (*See ante*, pp. 52, 296, 305.) It is not necessary to enumerate all the articles stolen at one time unless a restitution order is desired. (*See ante*, p. 269). And it is not necessary that the prosecutor should prove all the articles mentioned in the indictment to have been stolen; if he prove the defendant to have stolen any one of them (as, for instance, if he prove that the defendant stole the waistcoat, or one pair of the shoes), it will be sufficient. (*Ante*, p. 300.) Goods may be described by the name by which they are known in trade; as, for instance, a set of new handkerchiefs in the piece may be described as so many handkerchiefs, though they are not separated from each other, if the pattern designates each, and they are considered in trade as so many handkerchiefs. *R.* v. *Nibbs*, 1 *Mood. C. C.* 25. Ingots of tin, or a bar of iron, may be described as so many pounds weight of tin or iron; but where an article has obtained, in common parlance, a name of its own, it would be wrong to describe it by the name of the material of which it is composed. *R.* v. *Mansfield, C. & Mar.* 140, *Coleridge*, J. Coin may be described simply as money, without specifying any particular coin, and the allegation will be sustained by proof of any amount of coin, though the particular species of coin of which such amount was composed shall not be proved. 14 & 15 *Vict. c.* 100, *s.* 18 (*ante*, pp. 52, 57), where the cases are collected and discussed. As to the proper description of live or dead animals, see the cases collected, *ante*, p. 76. Where an indictment charged a defendant with stealing "one bushel of chaff, one bushel of oats and one bushel of beans," and the evidence was that the articles were mixed together, *Bayley*, J., held the description insufficient, and said that it should have been "a certain mixture, consisting of one bushel of chaff, etc." *R.* v. *Kettle*, 3 *Chit. Cr. L.* 947, *a.* But in a subsequent case, *Alderson*, B., doubted the propriety of this ruling, and expressed an opinion, that although substances *chemically* mixed ought to be so described, substances *mechanically* mixed ought to be described by the names applicable to them before the mixture. *R.* v. *Bond*, 1 *Den.* 517; 19 *L. J.* (*M. C.*) 138 (*C. C. R.*). An indictment against A. for stealing, and B. for receiving a mixture of grain, is not sustained by evidence which shows that two sorts of grain, then separate, were stolen by A., mixed by him, and afterwards sold by him to B. *R.* v. *Robinson*, 4 *F. & F.* 43, *Pollock*, C.B. Although it is necessary to prove that the prosecutor's goods have been taken, that may be proved by circumstances, although the witnesses for the prosecution cannot swear to the loss of the articles said to have been stolen, nor that the property found upon the prisoner and alleged to have been stolen is the prosecutor's. *R.* v. *Burton*, *Dears.* 282; 23 *L. J.* (*M. C.*) 52 (*C. C. R.*) (*ante*, p. 341). *See also R.* v. *Mockford*, 11 *Cox*, 16 (*C. C. R.*).

Distinct takings—How charged.]—By 24 & 25 *Vict. c.* 96, *s.* 5 (*ante*, p. 428),

it is lawful to insert several counts in the same indictment against the same person, for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for any or all of them. *See R.* v. *Lonsdale*, 4 *F. & F.* 56, *Pollock*, C.B. (*ante*, p. 90). And by 24 *&* 25 *Vict. c.* 96, *s.* 6 (*ante*, p. 428), "if upon the trial of any indictment for larceny it appears that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings." Before 1851 (14 *&* 15 *Vict. c.* 100, *s.* 17) the practice was otherwise; *R.* v. *Smith, Ry. & M.* 295: *R.* v. *Ellis*, 6 *B. & C.*, 145; except where it was not impossible that all the goods might have been stolen at one time. *R.* v. *Dunn*, 1 *Mood. C. C.* 146: *R.* v. *Hinley*, 2 *M. & Rob.* 524, *Maule*, J. But both before and since 24 *&* 25 *Vict. c.* 96, *s.* 6, where the acts constitute a continuous taking, the prosecutor ought not to be put to his election. *R.* v. *Bleasdale*, 2 *C. & K.* 765, *Erle*, J.: *R.* v. *Shepherd, L. R.* 1 *C C. R.* 118; 37 *L. J.* (*M. C.*) 45: *R.* v. *Firth, L. R.* 1 *C. C. R.* 172; 38 *L. J.* (*M. C.*) 54: *cf. R.* v. *Henwood*, 11 *Cox*, 526 (*C. C. R.*): (*and see ante*, pp. 88–91). In *R.* v. *Wright, Dears. & B.* 431; 27 *L. J.* (*M. C.*) 65; 7 *Cox*, 413 (*C. C. R.*), where a bank clerk had misappropriated a large sum of money during a considerable period of his employment, and admitted the amount, it was held that it was not necessary for the jury to find that a specific amount was stolen on a particular day.

What can be stolen.]—The goods taken must, in the absence of any express statutory enactment, appear in evidence to be *personal goods*; for none other can be the subject of larceny *at common law.*

Larceny at common law.]—1. *Things real, or which savour of the realty*, cannot be the subject of larceny *at common law*; and so strict was the rule in this respect that a larceny could not be committed of title-deeds, 1 *Hale*, 510; 1 *Hawk. c.* 33, *s.* 35; or of any other charter or writing concerning the realty, *R.* v. *Westbeer*, 1 *Leach*, 12; 2 *Str.* 1133, 1137: *R.* v. *Walker*, 1 *Mood. C. C.* 155, or even of the box in which they were kept. 1 *Hale*, 510; 3 *Co. Inst.* 109. Larceny of title-deeds is now punishable under 24 *&* 25 *Vict. c.* 96, *s.* 28 (*post*, p. 497).

Lands, tenements and hereditaments (either corporeal or incorporeal), cannot, in their nature, be the subject of larceny. Of things, also, which adhere to the freehold, as corn, grass, trees, and the like, or lead or other thing attached to a house, no larceny can be committed at common law; but the severance of them was, and in many cases still is, a mere trespass, and the subject of a civil action only. 1 *Hawk. c.* 33, *s.* 34. The *Forester's case*, *Y. B.* 11 *&* 12 *Edw.* 3, *f.* 641. In *R.* v. *Clinton, Ir. Rep.* 4 *C. L.* 6, it was held not larceny to appropriate drifted and ungathered seaweed lying between high and low water mark on the shore exclusively owned by A. But it was always held at common law, that if the owner or a stranger sever things real, and another man come and steal them—or if the thief sever them at one time, and at another come and take them away—it is larceny. 3 *Co. Inst.* 109; 1 *Hale*, 510; *Lee* v. *Risdon*, 7 *Taunt*, 188, 191; 17 *R. R.* 484, 486: *R.* v. *Foley*, 17 *Cox*, 142; 26 *L. R.* (*Ir.*)

299: (*C. C. R. Ir.*). It would appear, however, that the mere severance by the wrongdoer at one time and the taking away by him at another, are not sufficient to constitute larceny, unless he had, between the severance and the taking away, intended to abandon his wrongful possession of the article severed. If the wrongdoer did not intend to abandon his possession, but merely left the article concealed on the land after severance until he could conveniently return and carry it away, then the severance and carrying away are one continuous act, although a considerable time may have elapsed between the severance and taking away, and there is no larceny at common law. *R.* v. *Townley*, *L. R.*, 1 *C. C. R.* 315; 40 *L. J.* (*M. C.*) 144. The carcass of a diseased pig, which has been buried in the land three feet below the surface, and which is dug up the same day by the prisoner, has not become so attached to the soil as to prevent its being the subject of larceny in an indictment against the prisoner for stealing it. *R.* v. *Edwards*, 13 *Cox*, 384 (*C. C. R.*). Larceny of ore from mines is now punished by 24 & 25 *Vict. c.* 96, *s.* 38 (*post*, p. 482); larceny of certain materials affixed to buildings, by *s.* 31 (*post*, p. 491); and of vegetable products, by *ss.* 32–37 (*post*, pp. 483–491).

2. Bonds, bills, etc., being mere *choses in action*, are not the subject of larceny *at common law*, for they are of no intrinsic value. *Calye's case*, 8 *Co. Rep.* 33: 1 *Hawk. c.* 33, *s.* 35; 1 *Hale*, 510, *n.* So, it was held by ten judges [*Parke*, B., dissenting), that, even on an indictment for stealing *a piece of paper* the defendant could not be convicted of stealing an agreement though unstamped, for building certain cottages, the work under which agreement was actually in progress, *R.* v. *Watts*, *Dears.* 326; 23 *L. J.* (*M. C.*) 56 (*C. C. R.*). Larceny of such documents is now punishable under 24 & 25 *Vict. c.* 96, *s.* 27 (*post*, p. 500), and in the case of theft by persons in the public service, or the police, under 24 & 25 *Vict. c.* 96, *ss.* 69, 70 (*post*, p. 467), and in the case of theft of postal packets by officers of the post office, under 7 *W.* 4 and 1 *Vict. c.* 36, *s.* 26 (*post*, p. 503). Documents cannot properly be described in the indictment as "goods and chattels." *R.* v. *Powell*, 2 *Den.* 403; 21 *L. J.* (*M. C.*) 78 (*C. C. R.*).

3. Larceny at common law cannot be committed of *things which are not the subject of property*, as of a *corpse*; *R.* v. *Haynes*, 12 *Co. Rep.* 113; and *see* 2 *East*, *P. C.* 652; 1 *Hawk. c.* 33, *s.* 46. As to offences with respect to human bodies, *see post*, *Book II. Part II. ch. vi. s.* 2 (*c*). But the carcass of a diseased pig, which had been killed and buried by the owner in his own land, and of which he intended to make no further use, was held still to remain his property, so as to support an indictment for larceny against a person who afterwards disinterred and sold the carcass. *R.* v. *Edwards*, 13 *Cox*, 384 (*C. C. R.*). Of things in which no person has any determinate property, as *treasure trove*, *wreck*, etc., till seized, it has been said that larceny cannot be committed; 1 *Hale*, 510; 1 *Hawk. c.* 33, *s.* 38; but it would seem that the true owner, though unknown, has still a property in them, before seizure by the lord, unless there be circumstances to show an intended dereliction of the property. 2 *East*, *P. C.* 606, 607. The same has been said of *wreck*. But theft from wrecks is now punishable under 24 & 25 *Vict. c.* 96, *s.* 64 (*post*, p. 515).

Animals.]—At common law larceny cannot be committed with respect to animals *feræ naturæ* (unless they are dead, tamed, or in confinement) as of deer, hares and conies in a forest, chase or warren; fish in an open river or pond; or wild fowls at their natural liberty. 1 *Hale*, 511; *Fost.* 366; 1 *Hawk. c.* 33, *ss.* 39, 40; *Y. B.* 18 *Edw.* 4, *f.* 8, *pl.* 7; *R.* v. *Rough*, 2 *East*, *P. C.* 607. Deer stealing is now punishable by statute 24 & 25 *Vict. c.* 96, *ss.* 12–15 (*post*, p. 474), and the taking of hares and rabbits by night in

warrens or grounds used for breeding or keeping them is punishable under 24 & 25 *Vict. c.* 96, *s.* 17 (*post*, p. 476). Theft, etc., of fish in private waters is punished under 24 & 25 *Vict. c.* 96, *s.* 24 (*post*, p. 474), and of oysters, etc., from beds or fisheries under *s.* 26 (*post*, p. 479). As to property in oysters and mussels, *see also* 31 & 32 *Vict. c.* 45, *ss.* 51, 52, 55 (*post*, p. 475). Animals *feræ naturæ* when killed upon the soil by a wrongdoer, become the absolute property of the owner of the soil: *Blades* v. *Higgs*, 11 *H. L. C.* 621; 34 *L. J., C. P.* 286: *Lord Lonsdale* v. *Rigg*, 1 *H. & N.* 923: 26 *L. J., Ex.* 196. If the wrongdoer kills them on the soil and leaves them there, *intending to abandon the possession of them*, but *afterwards* returns and takes them away, such taking amounts to larceny. But if the wrongdoer after killing them, leaves them concealed on the soil, *not with the intention of abandoning the possession*, but intending, on the other hand, to return and take them away when it should be convenient for him to do so, and afterwards does take them away, such taking away is not larceny, as the killing and taking away are one continuous act, although a considerable time may have elapsed between the killing and taking away. *R.* v. *Townley*, *L. R.* 1 *C. C. R.* 315; 40 *L. J.* (*M. C.*) 144. Poachers, of whom the prisoner was one, wrongfully killed a number of rabbits upon the land belonging to the Crown. They placed the rabbits in a ditch upon the same land, some of the rabbits in bags, and some strapped together. They had no intention to abandon the wrongful possession of the rabbits which they had acquired by taking them, but placed them in a ditch as a place of deposit till they could conveniently remove them. About three hours afterwards the prisoner came back and began to remove the rabbits. It was held that the taking of the rabbits and the removal of them were one continuous act, and that the removal was therefore not larceny. *Id.* Prisoner was employed to trap wild rabbits, which he did, but, contrary to his duty, took them to another part of the land and placed them in a bag, intending to appropriate them to his own use, which a fellow servant observing, went and took some of the rabbits out of the bag during prisoner's absence, nicked them, and replaced them in the bag, his reason for nicking them being that he might know them again. Prisoner afterwards took away the bag and the rabbits. It was held that the act of the fellow servant in nicking the rabbits was no reduction of them into the possession of the master, so as to make the prisoner guilty of stealing them by carrying them away after they had been so nicked. *R.* v. *Petch*, 14 *Cox*, 116 (*C. C. R.*). It seems that the mere killing of an animal *feræ naturæ* by a sportsman is not such a reduction of it into his possession as to make it his property, so as to sustain a charge of larceny against a person who takes it fraudulently and with intent to deprive the owner of it, before the sportsman has picked it up. *R.* v. *Roe*, 11 *Cox*, 554, 557, *Willes*, J. Fish taken at sea are in the possession of the owner of the smack by which they are taken, and are therefore the subject of larceny. *R.* v. *Mallison*, 20 *Cox*, 204; 66 *J. P.* 503.

If animals *feræ naturæ* are reclaimed or confined, or are practically under the care and dominion of the prosecutor, and may serve for food, they may be the subjects of larceny. So larceny may be committed of deer so enclosed in a park that they may be taken at pleasure (*see* 24 & 25 *Vict. c.* 96, *s.* 13, *post*, p. 473), fish in a trunk or net, pheasants or partridges in a mew or coop: 1 *Hale*, 511; 1 *Hawk. c.* 33, *s.* 41: *R.* v. *Garnham*, 8 *Cox*, 451, *Pollock*, C.B.; *R.* v. *Head*, 1 *F. & F.* 350, *Campbell*, C.J.; young pheasants hatched by a hen, and under the care of the hen in a coop, although the coop is in a field at a distance from the dwelling-house, and although the pheasants are designed ultimately to be turned out and to

become wild; *R.* v. *Cory*, 10 *Cox*, 23, *Channell*, B.; partridges about three weeks old and able to fly a little, which have been hatched and reared under a common hen, and afterwards remain about the prosecutor's premises with the hen as her brood and sleep under her wings at night, although neither the hen nor the partridges are in a coop or otherwise confined; *R.* v. *Shickle*, *L. R.*, 1 *C. C. R.* 158; 38 *L. J.* (*M. C.*) 21; or pigeons which, though they have free access to the open air, are tame and reclaimed, and return to their house or box. *R.* v. *Howell*, 2 *Den.* 362, *n.*: *R.* v. *Brooks*, 4 *C. & P.* 131: *R.* v. *Cheafor*, 2 *Den.* 361; 21 *L. J.* (*M.C.*) 43 (*C. C. R.*) *See Smith* v. *Dear*, 67 *J. P. Rep.* 244. Where the taking of pigeons does not amount to larceny, it is summarily punishable under 24 & 25 *Vict. c.* 96, *s.* 23. Swans, it is said, if lawfully marked, are the subject of larceny at common law, although at large in a public river; *Dalt. Just. c.* 156; and whether marked or not, if they be in a private river or pond. *Case of Swans*, 7 *Co. Rep.* 16. Their eggs seem not to be the subjects of larceny (*see* 2 *Russ. Cr.* (6th ed.), 247), but persons taking or destroying them out of the nest can be summarily punished under *s.* 24 of the *Game Act*, 1831. As to rooks, *see Hannan* v. *Mockett*, 2 *B. & C.* 934; 4 *D. & R.* 518: as to hawks, 1 *Hawk. c.* 32, *s.* 36. All valuable domestic animals, as horses, and all animals *domitæ naturæ*, which serve for food, as swine, sheep, poultry, turkeys (*Roberts* v. *Williams*, 12 *East*, 33, 34: *Carleton* v. *Brightwell*, 2 *P. Wms.* 462; 24 *Eng. Rep.* 815; peacocks (*Y. B.* 18 *Hen.* 8, *pl.* 11), and the like, and the product of any of them, as eggs, milk from the cow while at pasture, wool pulled from the sheep's back; *R.* v. *Martin*, 1 *Leach*, 171; 2 *East*, *P. C.* 618; and the flesh of such as are *ferœ naturæ*, may be the subject of larceny. 1 *Hale*, 511: *see R.* v. *Gallears*, 1 *Den.* 501; 2 *C. & K.* 981, 982; 19 *L. J.* (*M. C.*) 13 (*C. C. R.*). But it is not larceny at common law to steal animals which do not serve for food, such as dogs, ferrets, though tame and salcable; *R.* v. *Searing*, *R. & R.* 350; and other creatures kept for whim and pleasure. 1 *Hale*, 512; *Lamb. Eiren.* 267; *Dalt. Just. c.* 156; 1 *Hawk. c.* 33, *s.* 36: *R.* v. *Robinson*, *Bell*, 34; 28 *L. J.* (*M. C.*) 58 (*C. C. R.*). But theft of such animals, if ordinarily kept in confinement, is summarily punishable under 24 & 25 *Vict. c.* 96, *ss.* 21, 22 (*post*, p. 471), subject to the election of the accused to be tried on indictment. *R.* v. *Sherriff*, 20 *Cox*, 384. And the theft of dogs, or possession of stolen dogs, is punishable under *ss.* 18, 19 (*post*, p. 470).

Gas, water, and electricity.]—Gas passing through the consumer's pipes is the subject of larceny by him, if he fraudulently appropriate it at a point before that at which by his contract he is entitled to use it. *R.* v. *White*, *Dears.* 203; 22 *L. J.* (*M. C.*) 123 (*C. C. R.*): *R.* v. *Firth*, *L. R.*, 1 *C. C. R.* 172; 38 *L. J.* (*M. C.*) 54. Water supplied by a water company to a consumer, and standing in his pipes, may be the subject of a larceny at common law. *Ferens* v. *O'Brien*, 11 *Q. B. D.* 21; 52 *L. J.* (*M. C.*) 70. Any person who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes or uses any electricity is guilty of simple larceny, and punishable accordingly, 45 & 46 *Vict. c.* 56, *s.* 23. *R.* v. *Armanni*, *Cent. Crim. Ct.*, 1899; 130 *C. C. C. Sess. Pap.*, p. 707.

Value.]—Since the abolition of the distinction between grand larceny and petty larceny (24 & 25 *Vict. c.* 96, *s.* 2, *ante*, p. 427, which re-enacts 7 & 8 *G.* 4, *c.* 29, *s.* 2), no statement need be made as to the value of the property stolen except in those cases where value or price is of the essence of the offence (14 & 15 *Vict. c.* 100, *s.* 24, *ante*, p. 54). And although, to make a thing the subject of larceny, it must be of *some* value, yet it need not be of the value of any coin known to the law, that is to say, of a

farthing at the least. *R.* v. *Morris*, 9 *C. & P.* 349. *Cf. R.* v. *Edwards*, 13 *Cox*, 384 (*C. C. R.*), *ante*, p. 437. Where value is the essence of the offence sufficient articles must be named in the indictment to amount in value to the sum necessary to constitute the offence. *R.* v. *Forsyth*, *R. & R.* 274.

Ownership—"*Of the goods and chattels of J. N.*"]—It must be proved upon the trial, that the goods stolen are the absolute or special property of the person thus named in the indictment. Formerly it was of the utmost importance that he should not be misnamed; misnomer is, however, now immaterial, owing to the powers of amendment now possessed by the court (14 & 15 *Vict. c.* 100, *s.* 1: *ante*, p. 52). See the cases collected, *ante*, p. 58, as to the description of property where there is a bailment: and as to various special cases, *see ante*, pp. 61–66.

"*Feloniously did steal.*"]—In all cases of larceny, the question whether the defendant took the goods knowingly or by mistake—whether he took them *bonâ fide* under a claim of right, or otherwise—and whether he took them with an intent to return them to the owner, or fraudulently, with an intent to deprive the owner of them altogether, and to appropriate or convert them to his own use—are questions entirely for the consideration of the jury, to be determined by them upon a view of the particular facts of the case. *R.* v. *Farnborough* [1895] 2 *Q. B.* 484: 64 *L. J.* (*M. C.*) 270 (*C. C. R.*). Where a man was charged with stealing three hare-wires and a pheasant it was ruled that if he really believed that the wires and pheasant belonged to him he was not guilty of larceny even though he might have committed an offence against the *Game Acts*. *R.* v. *Hall*, 3 *C. & P.* 409, and *cf. R.* v. *Boden*, 1 *C. & K.* 395. The taking and carrying away must be *felonious*, that is, done *animo furandi*; 4 *Bl. Com.* 232. This indeed, is not very definite; but larceny (at common law) may correctly be defined thus: the wrongful or fraudulent taking and carrying away the personal goods of another, from any place, with a felonious intent to convert them to the taker's own use, and make them permanently his own property, without the consent of the owner; 2 *East*, *P. C.* 553; the word "felonious" being explained to mean that there is no colour of right to excuse the act; and the "intent" being to deprive the owner, not temporarily, but permanently of his property. *R.* v. *Thurborn*, 1 *Den.* 387; 2 *C. & K.* 831; 18 *L. J.* (*M. C.*) 140: *R.* v. *Guernsey*, 1 *F. & F.* 394, *Martin*, B. If the sheep of A. stray into the flock of B., and B., not knowing it, drive them home along with his own flock, and shear them, this is no felony; but it would be otherwise if he did any act for the purpose of concealing them, for that would indicate his knowledge of their being the sheep of another. 1 *Hale*, 507. If, under colour of arrear of rent, although none be actually due, I distrain or seize my tenant's cattle, this may be a trespass, but is no felony. 1 *Hale*, 509. If I take an estray, upon a claim of right to it as lord of the manor, it is no felony, however groundless my claim may be. *Id.* 506. So, if a man having done work upon a chattel, returns it to the owner, and, a dispute afterwards arising between him and the owner as to the price to be paid for the work, he seizes and carries off the chattel, against the will of the owner honestly intending to hold it as a security for the amount which he alleges to be due to him, this is no felony, although, in fact, nothing may be due to him. *R.* v. *Wade*, 11 *Cox*, 549, *Blackburn*, J. A creditor who violently assaults his debtor, and so forces him then and there to pay him his debt, cannot be convicted of robbery, there being no felonious intent. *R.* v. *Hemmings*, 4 *F. & F.* 50, *Erle*, C.J. If a servant take his master's horse without his knowledge, and bring him home again; if a man take his neighbour's plough that is left in the

field, and use it upon his own land, and then return it; these may be trespasses, but are not felonies, 1 *Hale*, 509, because the returning the thing taken sufficiently evinces that the party, when he took it, had no intention to deprive the owner of it, or to convert it to his own use. Returning the goods, however, can be considered merely as evidence of the defendant's intention when he took them; for if it appear that he took them originally with the intent of depriving the owner of them, and of appropriating them to his own use, his afterwards returning them will not purge the offence. *See* 1 *Hawk. c.* 34, *s.* 2; 1 *Hale*, 533. In *R.* v. *Phillips*, 2 *East, P. C.* 662, 663, it was proved that the defendants took two horses out of the prosecutor's stable at night without his leave, and having ridden them about thirty miles, left them at an inn, desiring care to be taken of them, and saying that they should return in three hours; the defendants were taken on the same day at the distance of fourteen miles from the inn, walking in a direction from it: the jury found the defendants guilty, but at the same time found specially that the defendants meant merely to ride the horses thirty miles, and to leave them there, without an intention to return for them, or otherwise dispose of them: and ten of the judges held that this was no felony, as there was no intention in the prisoners to change the property, or make it their own. So, where the servant of a tanner took out of his master's warehouse dressed skins of leather, with intent to bring them in and charge them as his own work (which they were not), and to get paid by his master for them, this was held to be no larceny. *R.* v. *Holloway*, 1 *Den.* 370; 2 *C. & K.* 942; 18 *L. J.* (*M. C.*) 60 (*C. C. R.*): *see R.* v. *Webb*, 1 *Mood. C. C.* 431: *R.* v. *Poole*, *Dears. & B.* 345; 27 *L. J.* (*M. C.*) 53 (*C. C. R.*). *Cf. R.* v. *Richards*, 1 *C. & K.* 532 (*post*, p. 442). But where the jury found the defendant guilty of larceny in stealing plate, but recommended him to mercy on the ground that they believed he ultimately intended (not saying *when* he so intended) to return the property, this statement was held not to qualify the verdict, so as to bring the case within the principle of the above decisions. *R.* v. *Trebilcock*, *Dears. & B.* 453; 27 *L. J.* (*M. C.*) 103 (*C. C. R.*). And where A. took B.'s goods wrongfully, and offered them for sale to B., as the goods of another, he was held guilty of larceny. *R.* v. *Hall*, 1 *Den.* 381; 2 *C. & K.* 917; 18 *L. J.* (*M. C.*) 62 (*C. C. R.*): *see R.* v. *Manning*, *Dears.* 21; 22 *L. J.* (*M. C.*) 21 (*C. C. R.*). Where, upon an indictment for larceny, it appeared that the prisoner had clandestinely taken the goods alleged to have been stolen from a young woman, for the mere purpose of inducing her to call for them, that he might have an opportunity of soliciting her to commit fornication with him, the judges held this not to be a felonious taking. *R.* v. *Dickinson*, *R. & R.* 420. The prisoner's goods having been seized under warrants of execution of a county court, and being in possession of the bailiff, the prisoner, with intent to deprive the bailiff of his authority, and so defeat the execution, forcibly took the warrants from him. On these facts it was held that the prisoner was not guilty of larceny of the warrants, but that he was guilty of taking the warrants for a fraudulent purpose within the meaning of 24 & 25 *Vict. c.* 96, *s.* 30 (*post*, p. 493). *R.* v. *Bailey*, *L. R.* 1 *C. C. R.* 347; 41 *L. J.* (*M. C.*) 61. *Cf. R.* v. *Jones*, 1 *Den.* 188; 2 *C. & K.* 236 (*post*, p. 443). So where the captain of a ship, taken as a prize, secreted some of the cargo, and clandestinely removed it from the ship, it being doubtful whether he did so for his own benefit or for that of his owners, he was recommended for a free pardon; but the majority of the judges were of opinion that if the goods had been secreted for his own benefit, it would have amounted to larceny. *R.* v. *Van Muyen*, *R. & R.* 118. And where a person stole certain articles, and also took a horse, not with an intention to steal it, but merely to get off more conveniently with

the property, this was held not to be a felonious stealing of the horse. *R.* v. *Crump*, 1 *C. & P.* 658. The Roman law recognized *furtum usûs* as an offence. *See R.* v. *Fortuin* [1883] 1 *Buchanan* (Cape Colony), 290. Where the prosecutor met the prisoner, whom he knew to be a poacher, and seized him, and the prisoner, being rescued, seized the gun of the prosecutor, and ran away with it, and subsequently was heard to say that he would sell it, and the gun was never afterwards heard of, *Vaughan*, B., upon an indictment for stealing the gun, told the jury that it would not be felony if the prisoner took the gun under an impression at the time that it might be used so as to endanger his life, and not with an intention of disposing of it, although he might afterwards have determined to dispose of it; and the jury, being of opinion that he had no intention of disposing of the gun at the time he took it, acquitted the prisoner. *R.* v. *Holloway*, 5 *C. & P.* 524. Where A., at the instigation of a police officer, concerted with three persons to commit a felony, in order that the officer might apprehend them, and upon their conviction receive the reward, which was to be divided between the officer and A., and A. with the others did commit the felony, it was held by the majority of the judges, that A. had not the felonious intention necessary to make him the principal, although he acted from a bad motive, namely, the reward, because he was present, not to aid and assist, but to detect, and had no intention that the felony should be successful. *R.* v. *Dannelly*, *R. & R.* 310; 2 *Marsh.* 571 (*Ex. Ch.*).

There are cases which go to establish that it is not necessary that the taking should be *lucri causâ*, if it be fraudulent, and with intent wholly to deprive the owner of the property. Thus, where a prisoner, to screen his accomplice, who was indicted for horse stealing, broke into the prosecutor's stable, and took away the horse, which he backed into a coal-pit and killed, and it was objected at the trial that this was not larceny, because the taking was not with an intention to convert the horse to the use of the taker, *animo furandi et lucri causâ*; seven of the judges held that it was larceny, and six of that majority were of opinion that, to constitute larceny, it was not essential that the taking should be *lucri causâ*, if it be fraudulent and with intent wholly to deprive the owner of the property; but some of this majority thought that the object of the prisoner might be deemed a benefit, and the taking *lucri causâ*. *R.* v. *Cabbage*, *R. & R.* 292. Again, where the prisoners, servants in husbandry, opened the granary of their master by means of a false key, and took thereout two bushels of beans to give to their master's horses, in addition to the quantity usually allowed, this was held larceny by a majority of the judges; but it was alleged by some of the judges that the additional quantity of beans would diminish the work of the men who had to look after the horses; and therefore the *lucri causâ*, to give themselves ease, was an ingredient in the offence. *R.* v. *Morfit*, *R. & R.* 307. *See R.* v. *Gruncell*, 9 *C. & P.* 365; *R.* v. *Handley*, *C. & Mar.* 547: *R.* v. *Privett*, 1 *Den.* 193; 2 *C. & K.* 114; which latter cases established that this was larceny, even if the intent of obtaining a private benefit be negatived. The law was altered by 26 & 27 *Vict. c.* 103, *s.* 1 (*post*, p. 464).

Where the defendant was supplied by his master with pig-iron to be put into a furnace to be melted, being paid according to the weight of the metal which ran out of the furnace into bars, and he put in also other iron belonging to his master, whereby the weight of the melted iron, being thus increased, he gained a larger remuneration, it was held that if he did this with the felonious intent of converting the iron to a purpose for his own profit, it was a larceny. *R.* v. *Richards*, 1 *C. & K.* 532, *Tindal*, C.J.: *cf. R.* v. *Holloway*, 1 *Den.* 370; 18 *L. J.* (*M. C.*) 60 (*ante*, p. 441). So, the secreting and destroying of a post-letter in the hope of suppressing

inquiries supposed by the defendant to be made in it respecting her character, was held to be larceny. *R.* v. *Jones*, 1 *Den.* 188; 2 *C. & K.* 236 (*C. C. R.*). *Cf. R.* v. *Bailey*, *L. R.*, 1 *C. C. R.* 347; 41 *L. J.* (*M. C.*) 61 (*ante*, p. 441). Money was given to the prisoner by the prosecutor, his master, for the purpose of paying a turnpike toll on his journey about his master's business. Some days afterwards the prisoner was asked by his master if he had paid the toll. He said that he had not, having gone by another road by which he had evaded the turnpike, and that he had spent the money on beer for himself and his mates. The prisoner was convicted of larceny of the money, but it not appearing, on a case reserved as to whether these facts proved a larceny, that the question of felonious intent had been distinctly left to the jury, the conviction was quashed. *R.* v. *Deering*, 11 *Cox*, 298 (*C. C. R.*). *Cockburn*, C.J., *Bramwell*, B., and *Montague Smith*, J., seemed to be of opinion that the facts did not disclose any felonious intent. *Id.* 300, 301.

"*Take.*"]—There must be a *taking* of the goods, either actual or constructive, in order to constitute larceny. At common law it was not larceny for a wife to carry away and convert to her own use the goods of her husband, for husband and wife were regarded as one person in law, and consequently there could be no taking so as to constitute larceny; 1 *Hale*, 514; 1 *Hawk. c.* 33, *s.* 32; and the same if the husband were jointly interested with others in the property so taken. *R.* v. *Willis*, 1 *Mood. C. C.* 375. Nor *at common law* could the husband be guilty of larceny of his wife's goods, as her goods became his property on the marriage, 2 *Bl. Com.* by *Kerr*, 388. But the common law has been very materially modified by the *Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), under which a married woman may hold property in her own name separately from her husband, and he may, under certain circumstances set forth in *s.* 12 of that statute (*ante*, p. 60), be indicted for stealing it from his wife. And as the husband may be guilty of stealing from the wife, the wife may also be guilty of stealing from the husband, for "a wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall, in like manner, be liable to criminal proceedings by her husband." 45 & 46 *Vict. c.* 75, *s.* 16. The acts which, if done by the husband with respect to property of the wife, would make him liable to criminal proceedings by the wife under this Act are to be found in 45 & 46 *Vict. c.* 75, *s.* 12 (*ante*, p. 60; *see also post*, p. 459).

Larceny of property by the owner or joint owner.]—The prisoner assigned his goods by deed to trustees for the benefit of his creditors. No manual possession was taken by the trustees under the assignment, but the prisoner himself remained in possession of the goods, and whilst in such possession he removed the goods, intending fraudulently to deprive the creditors of them. The jury found the prisoner guilty of larceny, at the same time finding that the goods were not in the prisoner's custody as the agent of the trustees. Under these circumstances it was held that the verdict of guilty was wrong, as the prisoner being in lawful possession of the goods could not be convicted of larceny. *R.* v. *Pratt*, *Dears.* 360; 6 *Cox*, 373 (*C. C. R.*). So, if a man take his own goods, it is no larceny, unless they be in the hands of a bailee, and the taking of them have the effect of charging the bailee. Where thirty bales of nux vomica, which paid no duty upon exportation, but a large duty if intended for home

consumption, deposited by A. with B., who gave the usual bond to the custom-house, were sent by B., under the care of C., to be shipped on board a foreign vessel for exportation, and A., by collusion with C., took the nux vomica from the bales, substituted cinders for it, and shipped the bales on board the vessel, this was held, by a majority of the judges, to be larceny, because the taking rendered B. chargeable to the custom-house, and liable to a suit upon his bond. *R.* v. *Wilkinson*, *R. & R.* 470: *and see R.* v. *Wadsworth*, 10 *Cox*, 557. If one of several joint-tenants or tenants in common of a personal chattel, carry away and dispose of it, this is not larceny at common law; 1 *Hale*, 513; there was, in fact, no taking, for he was already in possession; it was merely the subject of an action of account, or bill in equity. But if he had taken it out of the possession of a person in whose hands it was for safe custody, and the effect of the taking would have been to charge the bailee, that was held to be a larceny at common law; as where a member of a benefit society entered the room of a person with whom a box containing the funds of the society was deposited, and took and carried it away, this was held to be larceny, the bailee being answerable to the society for the funds. *R.* v. *Bramley*, *R. & R.* 478. So also where the prisoner, a member of an industrial society, fraudulently took money from the shop of the society, which was under the management of H., another member, who was responsible for all moneys coming into his possession, the prisoner was held to have been rightly convicted of larceny on an indictment laying the property in the money in H. *R.* v. *Webster*, *L. & C.* 77; 31 *L. J.* (*M. C.*) 17; 9 *Cox*, 13 (*C. C. R.*). So, where the prisoner, a member of a co-operative society and one of the committee of management, fraudulently took money from the society's shop, where B., a servant of the society, sold its goods and received payments and was accountable for the money, the prisoner was held to have been rightly convicted of larceny on an indictment laying the property in the money in B. *R.* v. *Burgess*, *L. & C.* 299; 32 *L. J.* (*M. C.*) 185.

By the *Larceny Act*, 1868 (31 & 32 *Vict. c.* 116), *s.* 1 (*ante*, p. 432), theft by member of co-partnership and joint beneficial owner is punishable in the same way as if they had not had any interest in the thing stolen. *See R.* v. *Smith*, *L. R.*, 1 *C. C. R.* 266; 39 *L. J.* (*M. C.*) 112. An association having for its object not the acquisition of gain, but the mental improvement of its members, is not a "co-partnership" within the meaning of 31 & 32 *Vict. c.* 116. *R.* v. *Robson*, 16 *Q. B. D.* 137; 55 *L. J.* (*M. C.*) 55. But persons who have the control and disposition of money, or who have the power of devoting it, for the purpose of their enjoyment or amusement are beneficial owners within the statute. *R.* v. *Neat*, 69 *L. J.* (*Q. B.*) 118; 16 *T. L. R.* 109 (*C. C. R.*; 19 *Cox*, 424). In that case money collected for a *fête* by a committee was appropriated by a member of the committee. The offence created by 31 & 32 *Vict. c.* 116, *s.* 1, is a felony, and therefore the word "feloniously" is properly used in an indictment for such offence. *R.* v. *Butterworth*, 12 *Cox*, 132 (*C. C. R.*). Where the property is laid in the individual beneficial owners, who together form an association which is illegal under the *Companies Acts*, the indictment is good. *R.* v. *Tunkard* [1894] 1 *Q. B.* 548: 63 *L. J.* (*M. C.*) 61, *C. C. R.* (*and see post*, p. 564).

Larceny of goods found.]—It was at one time considered that if a man lost goods, and another found them, and, not knowing the owner, converted them to his own use, this was not larceny, 3 *Co. Inst.* 108; 1 *Hawk. c.* 33, *s.* 2, even although he denied the finding of them or secreted them. 1 *Hale*, 506. But this doctrine was always treated as subject to narrow

limitations. *Id.*: 2 *East, P. C.* 664: *R.* v. *Kerr*, 8 *C. & P.* 176: *R.* v. *Reed, C. & Mar.* 306: *R.* v. *Peters*, 1 *C. & K.* 245: *R.* v. *Mole, Id.* 417. And the true rule of law resulting from the authorities on this subject has been pronounced to be, that, "if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny; but if he takes them, with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny." *R.* v. *Thurborn*, 1 *Den.* 387; 2 *C. & K.* 831; 18 *L. J.* (*M. C.*) 140 (*C. C. R.*): *R.* v. *Dixon, Dears.* 580; 25 *L. J.* (*M. C.*) 39 (*C. C. R.*): *R.* v. *Shea*, 7 *Cox*, 147 (*C. C. R. Ir.*); *R.* v. *Christopher, Bell*, 27; 28 *L. J.* (*M. C.*) 35 (*C. C. R.*); and where property has been left by a passenger in a train or coach it would seem always to have been treated as larceny, if a servant of the railway company or coach owner appropriated it instead of taking it to the lost property office. *See R.* v. *Pierce*, 6 *Cox*, 117. In *R.* v. *Moore, L. & C.* 1; 30 *L. J.* (*M. C.*) 77 (*C. C. R.*), on an indictment for stealing a bank-note, the jury found that the prosecutor had dropped the note in the defendant's shop; that the defendant had found it there; that at the time he picked it up he did not know, nor had he reasonable means of knowing, who the owner was; that he afterwards acquired knowledge who the owner was, and after that converted the note to his own use; that he intended, when he found the note, to take it to his own use, and deprive the owner of it, whoever he was; and that he believed, when he found it, that the owner could be found. It was held, that, upon these findings, the defendant was rightly convicted of larceny. It is to be observed, that in the last-mentioned case, although the prisoner at the time he found the bank-note did not know, nor had reasonable means of knowing, who the owner was, yet that he *did* believe at the time of the finding that the owner could be found. The case of *R.* v. *Glyde, L. R.*, 1 *C. C. R.* 139; 37 *L. J.* (*M. C.*) 107, shows that the belief by the prisoner at the time of the finding of the chattel that he could find the owner, is a necessary ingredient in the offence, and that it is not sufficient that he intended to appropriate the chattel at the time of finding it, and that he acquired the knowledge of who the owner was before he converted it to his own use. In that case the prisoner found a sovereign on the highway, believing it had been accidentally lost; but, nevertheless, with the knowledge that he was doing wrong, he at once determined to appropriate it, notwithstanding it should become known to him who the owner was. The owner was speedily made known to him, and the prisoner refused to give up the sovereign. There was, however, no evidence that he believed, at the time of finding the sovereign, that he could ascertain who the owner was, and the prisoner was therefore held not to be guilty of larceny. In *R.* v. *Deaves*, 11 *Cox*, 227; *Ir. Rep.*, 3 *C. L.* 306, the facts were that the prisoner's child, having found six sovereigns in the street, brought them to the prisoner, who counted them and told some bystanders that the child had found a sovereign. The prisoner and the child then went down the street to the place where the child had found the money, and found a half-sovereign and a bag. On the same evening, about two hours after the finding, the prisoner was told that a woman had lost money, upon which the prisoner told her informant to mind her own business and gave her half a sovereign. It was held by the majority of the Irish Court of Criminal Appeal, that this case could not be distinguished from *R.* v. *Glyde, supra*, that there was nothing to show that at the time the child brought her the money the prisoner knew the property had an owner, or, at all events, to show that

she was under the impression that the owner could be found, and that therefore the conviction of the prisoner for larceny must be quashed. The proper question to be put to the jury is not whether they are satisfied that the prisoner could have found the owner, but whether they are satisfied that the prisoner himself believed that he could have found the owner. *R.* v. *Knight*, 12 *Cox*, 102 (*C. C. R.*). It is clearly larceny, if the defendant at the time he finds and appropriates the lost property, knows the owner; and, therefore, where a bureau was given to a carpenter to repair, and he found money secreted in it, which he kept and converted to his own use, it was held to be a larceny. *Cartwright* v. *Green*, 8 *Ves.* 405; 2 *Leach*, 952; 7 *R. R.* vi., 99. So if a hackney coachman convert to his own use a parcel left by a passenger in his coach by mistake, it is felony, if he know the owner, or if he took him or set him down at any particular place where he might have inquired for him. *R.* v. *Wynne*, 2 *East*, *P. C.* 664; 1 *Leach*, 413: *R.* v. *Lamb*, 2 *East*, *P. C.* 664: *R.* v. *Sears*, 1 *Leach*, 415, *n.* So, in every case where the property is not, properly speaking, lost, but only *mislaid*, under circumstances which would enable the owner to know where to look for and find it (as where a purchaser at a stall of the defendant in a market left his purse on the stall), the person who fraudulently appropriates property so mislaid is guilty of larceny. *R.* v. *West*, *Dears.* 402; 24 *L. J.* (*M. C.*) 4. Where a person purchased at an auction, a bureau, in which he afterwards discovered, in a secret drawer, a purse of money, which he appropriated to his own use, it was held that, if he had express notice that the bureau only, and not its contents, if any, were sold to him, or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny: but that, if he had reasonable ground for believing that he bought the bureau with its contents, if any, he had a colourable right to the property, and it was no larceny. *Merry* v. *Green*, 7 *M. & W.* 623; 10 *L. J.* (*M. C.*) 154. And in every case in which there is any *mark* upon the property by which the owner may be traced, or means of knowing who the owner is, and the finder, instead of restoring the property, converts it to his own use, such conversion will amount to larceny. *R.* v. *Preston*, 2 *Den.* 353; 21 *L. J.* (*M. C.*) 41: *R.* v. *Pope*, 6 *C. & P.* 346: *R.* v. *Mole*, 1 *C. & K.* 417. But unless *at the time of the finding* the defendant had the means of knowledge who the owner was, or reasonably believed that he could be found, and had also *at the time of the finding* an intention of appropriating the property to his own use, his subsequent appropriation of the property, with such means of knowledge, will not of itself be such a conversion as to amount to larceny. *R.* v. *Thurborn* (*ante*, p. 445): *R.* v. *Preston*, *ubi supra*: *R.* v. *York*, 1 *Den.* 335; 18 *L. J.* (*M. C.*) 38; 2 *C. & K.* 841: *R.* v. *Dixon* (*ante*, p. 445): *R.* v. *Christopher* (*ante*, p. 445): *R.* v. *Matthews*, 12 *Cox*, 489 (*C. C. R.*). A boy having found a lost cheque, the prisoner by some pretence got it from him, and kept it in hopes of getting a reward, but not being satisfied with the reward offered by the owner, he refused to deliver it either to the owner or to the boy. Under this state of facts it was held that the prisoner could not be convicted of stealing the cheque either from the owner or the boy. *R.* v. *Gardner*, *L. & C.* 243; 32 *L. J.* (*M. C.*) 35: 9 *Cox*, 253 (*C. C. R.*).

Where the finder of a lost purse containing money and documents retained it, not feloniously but in the hope of a reward, and showed it to the prisoner in order to get his opinion as to the amount of the reward likely to be offered, and for this purpose handed the purse and its contents to the prisoner to examine, and the prisoner retained the purse and its contents against the will of the finder, it was held that the prisoner

could be convicted of larceny on a count laying the property in the finder. *R.* v. *Swinson*, 64 *J. P.* 72, *Bosanquet*, Common Sergeant.

Constructive taking.]—We have just said that the taking may be actual or constructive: actual, where the goods have been actually taken out of the owner's possession, against his will or without his consent, and which requires no further comment or illustration: constructive, where the owner delivers the goods, but either he does not thereby divest himself of the legal possession, or the possession of the goods has been obtained from him by fraud, and in pursuance of a previous intent to steal them. The cases of constructive taking may be classed under the following heads: —(1) Where, by the delivery the owner of the goods passes not only the possession, but the right of property also. (2) Where the possession has been obtained *animo furandi*. (3) Where the possession was originally obtained *bonâ fide*, and without a felonious intent. (4) Where the delivery does not alter the possession in law.

1. *Obtaining property in goods by fraud, etc.*]—As to the cases where, by a delivery of the goods, not only the possession, but the right of property also, passes.—It is well established that if the owner, of his own free will, part with the *property* in the goods taken, there can be no felony in the taking, however fraudulent were the means by which the delivery of the goods was procured; *R.* v. *MacGrath*, *L. R.*, 1 *C. C. R.* 205; 39 *L. J.* (*M. C.*) 7: *R.* v. *Lovell*, 8 *Q. B. D.* 185; 50 *L. J.* (*M. C.*) 90: 2 *Russ. Cr.* (6th ed.) 141; 2 *East, P. C.* 668; and it is clear that no subsequent conversion by the person in whom the right of property has thus vested, can be construed into larceny, whatever the intent of the party may be. As, for instance, where goods are sold upon credit and delivered, no conversion of them by the vendee can amount to larceny. Where the defendant bought a horse, at a fair, of the prosecutor, to whom he was known, and having mounted the horse, said to the prosecutor that he would return immediately and pay him, to which the prosecutor answered, "Very well:" the defendant rode the horse away, and never returned; this was held to be no larceny, because the property, as well as the possession, was parted with. *R.* v. *Harvey*, 1 *Leach*, 467; 2 *East, P. C.* 669; 3 *R. R.* 714. So, where the defendant sent to a hatter, in the name of one of his customers, for a hat, and it was accordingly delivered to the messenger upon the credit of the customer; the judges held that this was not larceny, the owner having parted with his property in the hat. *R.* v. *Adams*, *R. & R.* 225; 2 *Russ. Cr.* (6th ed.) 145. So, where a woman obtained from the prosecutor, in the name of one of his neighbours, half a guinea's worth of silver, and said that she would return presently with the half guinea, it was held not to be larceny for the same reason. *R.* v. *Coleman*, 2 *East, P. C.* 672. So, where A. allowed B. to take a sovereign away to get change for it, and he never returned, this was held no larceny of the sovereign. *R.* v. *Thomas*, 9 *C. & P.* 741. So, where the defendant sent a letter to the prosecutor in the name of another person, requesting the loan of £3 for a few days, and obtained the money accordingly; eleven of the judges held this to be no felony, because it appeared that the property in the money was intended to pass by the delivery. *R.* v. *Atkinson*, 2 *East, P. C.* 673. So, where the defendant obtained goods of a tradesman by means of a forged order from a customer. *R.* v. *Adams*, 1 *Den.* 38. And where the prosecutor was inveigled by a set of sharpers to bet with them, and, by a preconcerted trick, one of them won from him the money in question, which he paid, imagining it to have been won fairly: the judges held that it was no larceny, the prosecutor having parted with his property in the money under the idea that it had been

fairly won. *R.* v. *Nicholson*, 2 *Leach*, 610. And where the goods are obtained not from the owner, but from his servant, who has an authority co-equal with his master, and parts with his master's goods, intending to part with the property in them, such goods cannot be said to be stolen, inasmuch as the servant intends to part with the property in them, and has authority to do so. *R.* v. *Prince*, *L. R.*, 1 *C. C. R.* 150; 38 *L. J.* (*M. C.*) 8. If, however, the servant's authority is so limited, then he can only part with the possession and not with the property; if he is tricked out of the possession, the offence so committed will be larceny. In *R.* v. *Longstreeth*, 1 *Mood. C. C.* 137 (*post*, p. 454), the carrier's servant had no authority to part with the goods, except to the consignee. His authority was not to act generally in his master's business, but limited in that way. The offence was in that case held to be larceny on that ground, and this distinguishes it from *R.* v. *Jackson*, 1 *Mood. C. C.* 119, *infra*, which the same judges, or at any rate some of them, had shortly before decided. There, the servant from whom the goods were obtained, had a general authority to act for his master, and the person who obtained the goods was held not to be guilty of larceny. See the judgment of *Blackburn*, J., in *R.* v. *Prince*, *L. R.*, 1 *C. C. R.*, at p. 155; 38 *L. J.* (*M. C.*) 11. And therefore where a person obtained money from the cashier of a bank by presenting, knowing it to be forged, a forged order purporting to be drawn by a customer of the bank, this was held not to be larceny, because the cashier, in paying the money, was acting within the scope of his general authority. *R.* v. *Prince*, *ubi supra*. So, where the defendant bought goods and desired them to be sent to him with a bill and a receipt, and the shopman who brought them left them, upon being paid for them by two bills, which, however, afterwards turned out to be mere fabrications; the judges held that this was not larceny, because the prosecutor had parted with the property, as well as the possession, upon receiving what was deemed at the time by his servant to be payment. *R.* v. *Parkes*, 2 *Leach*, 614; 2 *East*, *P. C.* 671. Where the servant of a pawnbroker, who had a general authority from his master to act in his business, delivered up a pledge to the pawner upon receiving a parcel, which he supposed to contain diamonds, and under that belief parted with the pledge entirely, but the parcel contained stones of no value, this was held to be no larceny. *R.* v. *Jackson*, 1 *Mood. C. C.* 119. *And see R.* v. *Barnes*, 2 *Den.* 59; 30 *L. J.* (*M. C.*) 34 (*C. C. R.*); *R.* v. *Essex*, *Dears. & B.* 371; 27 *L. J.* (*M. C.*) 20 (*C. C. R.*). The subjects above referred to in this paragraph were fully considered in *R.* v. *Middleton*, *L. R.*, 2 *C. C. R.* 38; 42 *L. J.* (*M. C.*) 73 (*C. C. R.*). In that case the prisoner was a depositor in a post-office savings bank, in which 11*s.* stood to his credit. He gave notice in the ordinary form to withdraw 10*s.*, and a warrant for that amount was issued to him, and a letter of advice was sent to the post-office at N. to pay him 10*s.* He went to that office and handed his deposit-book and the warrant to the clerk. The clerk, instead of referring to the proper letter of advice for 10*s.*, referred by mistake to another letter of advice for £8 16*s.* 10*d.*, and placed the latter amount upon the counter. The clerk entered the amount paid, £8 16*s.* 10*d.*, in the prisoner's deposit-book and stamped it. The prisoner took up the money and went away, having at the moment of taking it up an *animus furandi*, and knowing the money to be the money of the postmaster-general. Upon these facts, it was held by eleven of the judges that the prisoner was guilty of larceny, and by four he was not. Seven of the eleven held that, even assuming the clerk to have the same authority to part with the possession of and property in the money which the postmaster-general, the owner, would have had, the mere delivery under a mistake, though with the

intention of passing the property, did not pass the property, and that as the property did not actually pass, although it was intended to pass, and as the prisoner took up the money *animo furandi*, there was both a taking and a stealing within the definition of larceny. Three of the eleven held the prisoner guilty of larceny, on the ground that the clerk had only a limited authority to part with the money to the person named in the letter of advice, and, therefore, no property passed to the prisoner, and the prisoner took up the money *animo furandi*. One of the eleven held the prisoner guilty on the ground that the mistaken act of the clerk in placing the money on the counter stopped short of placing it completely in the prisoner's possession, and that his subsequently taking it up was larceny. The minority, consisting of four judges, who held that the prisoner was not guilty, based their opinion on the ground that the clerk had a general authority to part with the property in the money, and that he intended, although acting under a mistake, to part with such property to the prisoner at the time he handed over the money to him, and that having such general authority and such intention, and acting upon them, there was no felonious taking by the prisoner without the consent and against the will of the owner. *See also R.* v. *Hollis*, 12 *Q. B. D.* 25; 53 *L. J.* (*M. C.*) 38 (*post*, p. 453): *R.* v. *Hehir*, 18 *Cox*, 267 (*C. C. R. Ir.*). As to the effect on the right to a restitution order of the transfer of property in goods by means not amounting to larceny, *see ante*, p. 266, 268.

Whether, when property is given by the owner to a person *under a mistake* of which the latter was not aware when he received it, and afterwards, on finding out the mistake, he fraudulently converts such property to his own use, such person is guilty of larceny, is a question which, after having been argued before fourteen judges, still remains unsettled, seven of their lordships having answered it in the affirmative, and seven in the negative. *R.* v. *Ashwell*, 16 *Q. B. D.* 190; 55 *L. J.* (*M. C.*) 65, *and see R.* v. *Riley*, *post*, p. 457. The facts of that case were that the prisoner asked the prosecutor for the loan of a shilling. The prosecutor gave the prisoner a sovereign, believing it to be a shilling, and the prisoner took the coin under the same belief. Some time afterwards he discovered that the coin was a sovereign, and then fraudulently appropriated it to his own use. The prisoner having been convicted of larceny of the sovereign, it was held by the Court for Crown Cases Reserved that the prisoner had not been guilty of larceny as a bailee, but the court being equally divided as to whether the prisoner had been guilty of larceny at common law, the conviction stood. *Id. R.* v. *Ashwell* does not affect the old rule of law that the innocent receipt of a chattel, coupled with its subsequent fraudulent appropriation, does not amount to larceny. *R.* v. *Flowers*, 16 *Q. B. D.* 643; 55 *L. J.* (*M. C.*) 179. *See Stephen, Dig. Cr. L.* (6th ed.), p. 261.

Larceny by a trick.]—Where a man, having the *animus furandi* (*see ante*, p. 440), obtains, in pursuance thereof, possession of goods by some trick or artifice (the owner not intending to part with his entire right of property, but with the temporary possession only (*Cr. L. Com. 4th Rep.*, p. 50), this is considered such a taking (even although there be a delivery in fact) as to constitute larceny: *see* 1 *Hawk. c.* 33, *ss.* 15–23. Where the defendant offered to give the prosecutor gold for bank-notes, and upon the prosecutor's laying down some bank-notes, for the purpose of having them changed for gold, the defendant took them up, and went away with them, promising to return immediately with the notes, but never in fact returned; *Wood*, B., said that the property in the notes had never been parted with at all, and left it to the jury to say, whether the defendant had the *animus furandi* at the time he took the notes, and said, that if

they were of that opinion the case clearly amounted to larceny. *R.* v. *Oliver*, 4 *Taunt.* 274 *cit.*; 2 *Leach*, 1072; *see R.* v. *Rodway*, 9 *C. & P.* 784. The prisoner at a race-meeting made a bet with the prosecutor, laying odds against a particular horse, and the money for which the prosecutor backed the horse was deposited with the prisoner. The prosecutor admitted that he would have been satisfied although he did not receive back the same coins. The horse won, but while the race was being run the prisoner fraudulently went off with the money. It was held that as it appeared that the prosecutor parted with his money with the intention that in the event of the horse winning it should be repaid, while the prisoner obtained possession of the money fraudulently, never intending to repay it in any event, there was no contract by which the property in the money could pass to the prisoner, and therefore there was evidence of larceny by trick. *R.* v. *Buckmaster*, 20 *Q. B. D.* 182; 57 *L. J.* (*M. C.*) 25. Where the defendant agreed to discount a bill for the prosecutor, and the bill was given to him for that purpose; he told the prosecutor that if he then sent a person with him to his lodgings, he would give him the amount, deducting the discount and commission; a person was sent accordingly, but, upon reaching the lodgings, the defendant left the messenger there, and went out on pretence of getting the money, but never returned: the judge left it to the jury to say whether the defendant obtained possession of the bill with intent to steal it, and whether the prosecutor meant to part with his property in the bill, before he should have received the money for it: the jury being of opinion in the affirmative on the first proposition, and in the negative on the second, convicted the prisoner, and the judges afterwards held the conviction to be right. *R.* v. *Aickles*, 2 *East, P. C.* 675; 1 *Leach*, 294. Where the defendant obtained from a silversmith two cream-ewers, in order that the customer of the silversmith, with whom the defendant said he lived, might select which he liked best, and absconded with them, but the silversmith did not charge for either of the ewers, and did not at the time of the delivery intend to charge for either of them until he had ascertained which would be chosen, this was held by *Bayley*, J., to be larceny, because the possession only, and not the right of property, had been parted with: *R.* v. *Davenport*, *MS.*, 1 *Archbold's Peel's Acts* (3rd ed.), 271; 2 *Russ. Cr.* (6th ed.) 146. So, where the prisoner went to a shop and said that A. wanted some shawls to look at, and the prosecutor gave her five shawls, which she converted to her own use, it was held by *Patteson*, J., that as the property in the shawls would continue in the prosecutor until the selection was made, it was larceny if A. did not send for them; but there being no evidence that A. did not send for them, the prisoner was acquitted, because it was assumed, in the absence of such evidence, that A. did send her, that she received the shawls properly, and that she only conceived the design of wrongfully converting them to her own use, after she had rightfully obtained possession of them. *R.* v. *Savage*, 5 *C. & P.* 143; 2 *Russ. Cr.* (6th ed.) 146. Where the defendant prevailed upon a tradesman to take goods to a particular place, under pretence that the price would then be paid for them, and afterwards induced him to leave the goods in the care of a third person, from whom the defendant got the goods without paying the price, the tradesman swore that he did not intend to part with the goods until they were paid for, and the jury found that the defendant, *ab initio*, intended to get the goods without paying for them; this was held to be larceny. *R.* v. *Campbell*, 1 *Mood. C. C.* 179. So where the defendant induced a tradesman to send his goods by a servant to a particular place, with change for a crown piece, and on the way met the servant, and giving him a counterfeit crown piece, induced

him to part with the goods and change, which he had no authority to do without receiving payment; this was held to be larceny. *R.* v. *Small*, 8 *C. & P.* 46. So, where the prisoners ordered goods of the prosecutor, and the latter sent them to their house by his servant with strict injunctions not to part with them without receiving the price, and the prisoners gave the servant a cheque which they knew to be worthless, upon which he left the goods with them; this was held to be larceny. *R.* v. *Stewart*, 1 *Cox*, 174. If the owner had himself carried the goods and parted with them as the servant did, no doubt it would have been a case of false pretences; or if the servant had had a general authority to act, it would have been the same as if the master acted. But in this instance he had a limited authority which he chose to exceed. If the prisoners intended to get possession of these goods by giving a piece of waste paper, which they had no reasonable ground to believe would be of use to anybody, and the servant had received positive instructions not to leave the goods without cash payment, the charge of larceny is made out. *Per Alderson*, B., *in R.* v. *Stewart*, *supra*. *See also R.* v. *Longstreeth*, 1 *Mood. C. C.* 137 (*post*, p. 454). So, where the defendant having bargained for goods, which, by the custom of trade, should have been paid for before they were taken away, took them away without the consent of the owner, and when he bargained for them did not intend to pay for them, but meant to get them into his own possession, and dispose of them for his own benefit; this was held to be larceny. *R.* v. *Gilbert*, 1 *Mood. C. C.* 185. And where the defendant, intending *ab initio* to get goods by fraud, had them put into his cart upon the express condition that they should be paid for before they were taken out of the cart, and then took them out of the cart without paying for them, and converted them; this was held to be larceny. *R.* v. *Pratt*, 1 *Mood. C. C.* 250; *R.* v. *Cohen*, 2 *Den.* 249 (*C. C. R.*). The prosecutor sold goods to the prisoner, who agreed to pay ready money for them, and the goods were then delivered by the prosecutor to the prisoner, who then refused either to pay the money or restore the goods, having never intended to pay for them, and having meditated the fraud from the beginning; this was held to be larceny. *R.* v. *Slowly*, 12 *Cox*, 269 (*C. C. R.*). So, obtaining money or goods by the practice of *ring dropping* (as it is termed) has been held to be larceny. Thus, where the defendant in the presence of the prosecutor, picked up a purse in the street, containing a receipt for 147*l.* for a "*rich brilliant diamond ring*," and also the ring itself, it was then proposed that the ring should be given to the prosecutor, upon his depositing his watch and some money, as a security that he would return the ring as soon as his proportion of the value of it should be paid to him by the defendant; the prosecutor accordingly deposited his watch and money, which were taken away by some of the defendant's confederates; but the ring turned out to be of the value of 10*s.* only, and the watch and money were never returned: it was left to the jury to say, whether this was not an artful and preconcerted scheme to get possession of the prosecutor's watch and money; and the jury, being of that opinion, convicted the defendant. *R.* v. *Patch*, 1 *Leach*, 238. In *R.* v. *Moore*, 1 *Leach*, 314; 2 *East*, *P. C.* 679, the defendant being convicted of larceny under the same circumstances, and the case being reserved for the opinion of the judges, nine of them were of opinion that this practice of *ring dropping* amounted to larceny; and they distinguished it from the case of a loan; for here, although the possession was parted with the property in the goods was not. *See also R.* v. *Watson*, 2 *Leach*, 640; 2 *East*, *P. C.* 680. On the same principle it has been held, that a gipsy who obtains and keeps money or goods by a false pretence of witchcraft, the person from whom she

obtains them merely intending to part with the possession and expecting them to be returned, is guilty of larceny. *R.* v. *Bunce*, 1 *F. & F.* 523, *Channell*, B. Where the defendant, in the presence of the prosecutor, picked up a purse containing a watch chain and two seals, which the defendant and his confederate represented to be gold, and worth 18*l.*, and the prosecutor purchased the defendant's share for 7*l.*, intending to part with the property in the money as well as the possession of it, *Coleridge*, J., held that this was not larceny. *R.* v. *Wilson*, 8 *C. & P.* 111. So, where the prisoner by means of what is known as the *purse trick*, induced the prosecutor to give him a shilling for a purse, by showing the prosecutor three shillings, and then making it appear as if the prisoner had dropped them into the purse whereas he had in fact only dropped three halfpence into the purse, this was held not to be larceny but false pretences. *R.* v. *Solomons*, 17 *Cox*, 93 (*C. C. R.*). Where the defendants decoyed the prosecutor into a public-house, and then introduced the play of cutting, and one of them prevailed on the prosecutor, who did not play on his own account, to cut the cards for him; and then under the pretence that the prosecutor had cut the cards for himself, and lost, another of them swept his money off the table, and went away with it, it was considered to be a case in which it should be left to the jury to determine *quo animo* how the money was obtained; and that it would be felony should they find that the money was obtained upon a preconcerted plan to steal it. *R.* v. *Horner*, 1 *Leach*, 270; *Cald.* 295. So, where the prosecutor was induced, by a preconcerted plan, to deposit his money with one of the defendants, as a deposit upon a pretended bet, and the stakeholder afterwards, upon pretence that one of his confederates had won the wager, handed the money over to him; and it was left to the jury to say, whether, at the time the money was taken, there was not a plan that it should be kept, under the false colour of winning the bet, and the jury found that there was: this was held to be larceny; because at the time the defendants obtained the money from the prosecutor, he parted with the possession only, and the property was to pass eventually only if the other party won the wager. *R.* v. *Robson*, *R. & R.* 413. *See R.* v. *Buckmaster*, 20 *Q. B. D.* 182; 57 *L. J.* (*M. C.*) 25 (*C. C. R.*) (*ante*, p. 450). The prisoner agreed at a fair to sell a horse to the prosecutor for 23*l.*, of which 8*l.* was to be paid to the prisoner at once, and the remainder upon delivery of the horse. Prosecutor handed 8*l.* to the prisoner, who signed a receipt for the money; by the receipt it was stated that the balance was to be paid upon delivery. The prisoner never delivered the horse to the prosecutor, but caused it to be removed from the fair under circumstances from which the jury inferred that he had never intended to deliver it. It was held that the prisoner was rightly convicted of larceny by a trick of the 8*l.*, on the ground that the prosecutor had not intended to part with his property in the 8*l.*, until the prisoner had fulfilled his part of the bargain, which he never intended to do. *R.* v. *Russett* [1892] 2 *Q. B.* 312; 17 *Cox*, 534 (*C. C. R.*). This is a strong case, for the prosecutor in the course of his evidence said "I never expected to see the 8*l.* back, but to have the horse." *Id.* Where two men, J. and W., acting in concert, and intending to defraud the prosecutor, entered his shop, and by means of an artifice induced him to draw a cheque on his banker for 42*l.*, payable in the name of the prisoner J., and then to accompany J. to the bank to see it paid, on the understanding that they were to return to finish the transaction by the payment to the prosecutor of 42 sovereigns, and that the prisoner W. was to remain at the shop till they went to and returned from the bank; at the bank, by the prosecutor's desire, and in his presence, the banker handed four 10*l.* notes

and two sovereigns to the prisoner J.; the prosecutor and J. then left the bank together, and while on their way back to the shop J. absconded with the notes and two sovereigns, which he and W., who had in the meantime gone off from the shop, appropriated to their own use; this was held to be a larceny by both prisoners of the notes and the two sovereigns, the prosecutor never having parted with the property in and possession of them, and J. having no more than the bare custody of them until the payment to the prosecutor of the 42 sovereigns. *R.* v. *Johnson*, 2 *Den.* 310; 21 *L. J.* (*M. C.*) 32 (*C. C. R.*). Where the defendant by false representations induced the prosecutrix to buy from him a dress for 25*s.*, promising that if she would do so he would give her another dress worth 12*s.*; then took a guinea from her hand, gave her a dress worth much less than a guinea, and refused to give her the other dress he had promised: this, it being found by the jury that it was part of the defendant's scheme to obtain the money by means of a pretended sale, was held to be larceny. *R.* v. *Morgan*, *Dears.* 395; 6 *Cox*, 408 (*C. C. R.*). Where the prisoner went into a shop and asked for change for half a crown, and the shopman gave him two shillings and sixpence, the prisoner held out the half-crown, and the shopman just took hold of it by the edge, but never actually got it into his custody, and the prisoner ran away with the change and the half-crown; upon an indictment for stealing the two shillings and sixpence, *Parke*, J., held it to be larceny, but doubted whether an indictment would lie for stealing the half-crown. *R.* v. *Williams*, 6 *C. & P.* 390. So also, where A. & B. went into a shop, and A. put down sixpence in silver and sixpence in copper, and asked the prosecutrix to give him one shilling in change, upon which she took one shilling from the till and put it on the counter beside the sixpence in silver and the sixpence in copper; A. then said to the prosecutrix that she might as well give him a florin and take it all; she took a florin from the till and put that on the counter, expecting she was to receive two shillings of the prisoner's money, and the prisoner went away with the florin; the prosecutrix did not discover her mistake till she was putting the change into the till, but at the same moment B. distracted her attention by asking the price of some article: it was held that the prosecutrix never intended to part with her property in the florin, till she had received two shillings of the prisoner's money, and that the offence was larceny. *R.* v. *McKale*, *L. R.*, 1 *C. C. R.* 125; 37 *L. J.* (*M. C.*) 97. So where two persons by a series of tricks fraudulently induced a barmaid to pay over money of her master to them without having received from them in return the proper change, the barmaid having no authority to pay over the money without receiving the proper change, and having no intention of, or knowledge that she was so doing, it was held that they were guilty of larceny. *R.* v. *Hollis*, 12 *Q. B. D.* 25; 23 *L. J.* (*M. C.*) 38. Where a hosier, by the desire of the defendant, took a parcel of silk stockings to his lodging, out of which the defendant chose six pairs, which were laid on the back of a chair, the defendant then sent the prosecutor back to his shop for some articles, and, while he was absent, absconded with the stockings; the judges held, that this amounted to larceny, the defendant having clearly obtained possession of the goods *animo furandi*. *R.* v. *Sharpless*, 1 *Leach*, 93; 2 *East*, *P. C.* 675. So, where the prosecutor having told his servant in the defendant's hearing to go to S. and pay him some money, the defendant offered to take it, falsely stating that he lived a few doors from S., which statement induced the prosecutor to deliver the money to the defendant to take to S., instead of which he appropriated it to his own use; and the jury, finding the defendant guilty, stated that their verdict was founded on the belief that the defendant had obtained the

money by a trick, intending at the time to appropriate it to his own use; the conviction was held right. *R.* v. *Brown*, *Dears.* 616 (*C. C. R.*). To constitute a larceny *at common law*, by a party to whom the goods have been delivered on hire, there must be not only an original intention to convert them to his own use, but a subsequent actual conversion: and a mere agreement by the hirer to accept a sum offered for the goods by the third party, who, however, did not intend to purchase unless his suspicions as to the honesty and right of the vendor to sell were removed, was held not to amount to such a conversion. *R.* v. *Brooks*, 8 *C. & P.* 295, *Tindall*, C.J. The question, however, as to larceny by the party hiring the goods which arose in *R.* v. *Brooks* and in *R.* v. *Pear*, 1 *Leach*, 212: 2 *East*, *P. C.* 685, 3 *R. R.* 703: *R.* v. *Banks*, *R. & R.* 441: *R.* v. *Charlewood*, 1 *Leach*, 409; 2 *East*, *P. C.* 689, 3 *R. R.* 706: *R.* v. *Semple*, 1 *Leach*, 420; 2 *East*, *P. C.* 691, 3 *R. R.* 709, will not now arise by reason of the provisions of 24 & 25 *Vict. c.* 96, *s.* 3 (*ante*, p. 427) by which the fraudulent appropriation of property by bailees is declared to be larceny. (*See post*, p. 456). Where the prisoner went to an inn, on a fair-day, and desired the ostler to bring out his horse, and, upon the latter saying he did not know which was his horse, went into the stable, and pointing to a mare, said it was his, and the ostler brought out the mare, which the prisoner attempted to mount, but could not, the mare being frightened; upon which he desired the ostler to lead the mare out of the yard, which was done; but, before he could mount, the prisoner was detected and secured: *Garrow*, B., held this to be larceny. *R.* v. *Pitman*, 2 *C. & P.* 423. If a man, *animo furandi*, sue out a replevin, and by that means obtain the possession of another man's horse, and ride away with it: or by a fraudulent ejectment get possession of another's house, and carry away the goods out of it, he is guilty of larceny. 1 *Hale*, 507; 1 *Hawk. c.* 33, *s.* 12; 3 *Co. Inst.* 108: *and see R.* v. *Farre*, *Kel.* (*J.*) 43; 2 *Leach*, 1064, *n.* Where the defendant obtained the mail bags from the post-office, pretending that he was the mail guard, and then ran away with them; the jury, being of opinion that he got possession of them with intent to steal them, found him guilty; and the judges held the conviction to be right. *R.* v. *Pearce*, 2 *East*, *P. C.* 603. In this case the property did not pass, for the postmaster had no property in the mail bags to part with. 2 *East*, *P. C.* 673. Where the defendant, *animo furandi*, obtained goods from the servant of a carrier, by falsely pretending to be the person to whom the goods were directed, it was held to be larceny; because the servant had no authority to part with the goods but to the right person. *R.* v. *Longstreeth*, 1 *Mood. C. C.* 137. And where a carrier's servant left goods at the prisoner's house by mistake, but without any inducement from the prisoner, who, afterwards, knowing that they had been left by mistake, and did not belong to him, converted them to his own use; this was held to be larceny. *R.* v. *Little*, 10 *Cox*, 559. So, where the prosecutor, intending to sell his horse, sent his servant with it to a fair, but the servant had no authority to sell or deal with it in any way, and the defendant by fraud induced the servant to part with the possession of the horse, under colour of an exchange for another, intending all the while to steal it. This was held to be larceny. *R.* v. *Sheppard*, 9 *C. & P.* 121, *Coleridge*, J. T. J., the owner of a watch, sent it to be regulated to A., the person from whom he had bought it, and who had no authority to deliver it to anybody but the owner. The defendant fraudulently induced A. to believe that T. J. desired the watch to be sent by post to the postmaster at B., in a letter; and the watch, having been so sent, the defendant personated T. J., and induced the postmaster to deliver it to him as T. J. It was held that, on the receipt of the watch by the

postmaster, the special property of A. ceased, and the general property of the owner, being unincumbered, drew to it the possession; that the postmaster had only the custody of the watch for the purpose of delivering it to the owner, and so his possession, being the possession of the owner, the obtaining of it by the defendant was a larceny from T. J. *R.* v. *Kay*, *Dears. & B.* 231; 26 *L. J.* (*M. C.*) 119 (*C. C. R.*). Where an "automatic box," the property of a company, was placed in a public passage, and was so constructed that upon a penny being placed in it a cigarette was ejected from it, and the prisoner, instead of putting a penny in the box, put into it a metal disc of the size of a penny, and so obtained a cigarette, it was held that he was guilty of larceny. *R.* v. *Hands*, 16 *Cox*, 188 (*C. C. R.*). Prosecutor was owner of a coal yard, at which coal and slack were sold; the price of slack being about half the price of coal. By the custom of the yard, with which the prisoner was acquainted, the carts were weighed on entering the yard empty, and after being loaded were again taken to the machine and weighed, and the weight of the coal on the cart being thus ascertained, the price was paid *before the carts were permitted to leave the yard.* The prisoner went to the yard with his cart, and asked for a load of coal, which was loaded on his cart by the prosecutor's servant. After the cart was loaded, the prisoner placed slack over the coal so as to conceal it, and took the cart to the weighing machine. Being asked by the man at the weighing-machine what he had in his cart, he replied "slack." The cart was then weighed, and, the contents having been paid for after the rate of slack, was driven away by the prisoner. It was held, that if the prisoner went into the yard with the preconceived plan of obtaining the coal by the above artifice, he might be convicted of stealing the coal. *R.* v. *Bramley*, *L. & C.* 21; 8 *Cox*, 468 (*C. C. R.*). Where the defendant, by artifice, obtained possession of a request-note at the India-House, by means of which he obtained a permit for a chest of tea belonging to the prosecutor (to whom he was a perfect stranger), and the chest of tea was thereupon delivered to him: the judges held this to be larceny, notwithstanding the possession had been obtained by means of a regular request-note and permit. *R.* v. *Hench*, *R. & R.* 163. A hosier in the Haymarket, having sent his apprentice with a parcel of stockings to Cheapside, the defendant met him on Ludgate Hill, and asked him where he was going; the apprentice answered to Mr. Heath's; the defendant replied, that he was the person, desired the boy to give him the parcel, and gave him a small parcel in return, to take home to his master: the boy accordingly gave him the parcel; but the parcel he took from him for his master contained nothing but old rags of no value: the judges held this to be larceny. *R.* v. *Wilkins*, 1 *Leach*, 520; 2 *East*, *P. C.* 673; *and see Cundy* v. *Lindsay*, 3 *App. Cas.* 459.

Distinction between larceny and obtaining by false pretences.]—These two cases so nearly resemble a few of the cases collected under the first head (*ante*, p. 449), as to create some difficulty in distinguishing them upon principle. They may be considered as very near the line which separates the one class of cases from the other. In such cases, it is more prudent to indict the defendant for obtaining goods, etc., by false pretences; because if upon an indictment for obtaining goods, etc., by false pretences, it be proved that the defendant obtained the goods, etc., under circumstances which in law amount to larceny, he will not upon that ground be entitled to an acquittal. 24 & 25 *Vict. c.* 96, *s.* 88 (*post*, p. 593). Between the crime of false pretences and that of larceny the most intelligible distinction seems to be this:—In larceny the owner of the thing stolen has no intention to part with his property therein to the person taking

it, although he may intend to part with the possession; in false pretences the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud. *White* v. *Garden*, 10 *C. B.* 919, 927, *Talfourd*, J.: *R.* v. *Barnes*, 2 *Den.* 59; 20 *L. J.*(*M. C.*) 34 (*C. C. R.*): *R.* v. *Robins*, 6 *Cox*, 420; *Dears.* 418 (*C. C. R.*). "If," says *Parke*, B., "a person, through the fraudulent representations of another, delivers to him a chattel, intending to pass the property in it, the latter cannot be indicted for larceny, but only for obtaining the chattel under false pretences." *Powell* v. *Hoyland*, 6 *Ex.* 67, 70: *R.* v. *Adams*, *R. & R.* 225: *Cundy* v. *Lindsay*, *ubi supra*: *Bentley* v. *Vilmont*, 12 *App. Cas.* 471.

Where a man, having the *animus furandi* (*see ante*, p. 440), obtains possession of goods by frightening the owner, as by threatening him with temporary imprisonment unless he delivers up his goods, and the owner does deliver them under the influence of the fear inspired by this threat, this is considered such a taking (although there is a delivery in fact) as to constitute larceny. *R.* v. *MacGrath*, *L. R.* 1 *C. C. R.* 205; 39 *L. J.* (*M. C.*) 7: *R.* v. *Lovell*, 8 *Q. B. D.* 185; 50 *L. J.* (*M. C.*) 90. The prisoner, acting as auctioneer at a mock auction, knocked down a piece of cloth to the prosecutrix for 26*s.*, she not having bid, as he knew. The prosecutrix denied that she had bid; the prisoner asserted that she had, and must pay before she could leave the auction room. The prosecutrix tried to go out of the room, when a confederate of the prisoner prevented her doing so. She then in fear paid the 26*s.*, and took away the cloth which was given to her. These facts were held to constitute a larceny of the 26*s.* *R.* v. *Macgrath*, *supra*. The learned judges who decided this case expressed a doubt whether upon these facts the prisoner might not have been indicted for robbery, but they all agreed that even if a robbery had in fact been committed, that did not preserve the prisoner from the liability to be convicted of larceny, as a robbery includes a larceny. See the judgment of *Blackburn*, J., in *R.* v. *Macgrath*, *supra*. As to whether the facts in that case would have sustained an indictment for robbery, *see R.* v. *Knewland*, 2 *Leach*, 721: *R.* v. *Wood*, 2 *East*, *P. C.* 732, from which it would seem that they would not.

3. *Larceny as a bailee.*]—At common law, where goods were delivered to a man upon trust, or taken by him lawfully and *bonâ fide* and without any fraudulent design and with the owner's consent, he was not guilty of larceny by converting them to his own use. Therefore, in all cases where goods were borrowed or hired from the owner, or were delivered by the owner to another to have work done upon them, or cattle were delivered to be agisted, or the like, and so in all other cases where goods were in the possession of a *bailee*, and he, while the contract of bailment subsisted, converted the goods to his own use, this was not larceny, but only breach of trust: because the original taking was *bonâ fide* and rightful: unless, indeed, the jury found, on evidence warranting them in so finding, that the goods were originally obtained by the defendant from the owner *animo furandi*, or that the defendant received them, harbouring at the time an intention wrongfully to convert them to his own use. (*See ante*, p. 440 *et seq.*) It is, however, no longer necessary to refer to the numerous cases decided on this subject, many of which turned upon very nice distinctions, because, under 24 *&* 25 *Vict.* c. 96, *s.* 3 (*see ante*, p. 427, *and note*), *it is no longer a defence to an indictment for larceny, that the defendant originally received the goods in the character of a bailee.* As to the former law, *see R.* v. *Cornish*, 6 *Cox*, 432, 433, *n.* (*C. C. R.*). For that statute enacts, that "whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or

the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction." (*See R.* v. *Wells*, 1 *F. & F.* 109; and as to fraudulent misappropriation by persons entrusted with property, *see* 1 *Edw.* 7, *c.* 10, *s.* 1 (*post*, p. 475). Even before these statutes, although the goods had in the first instance been obtained without a *felonious* intent, yet if the possession of them was obtained by a *trespass*, the subsequent fraudulent appropriation of them, during the continuance of the same transaction, was a larceny. As where a man, driving a flock of sheep from a field, drove with them a sheep belonging to another person, without knowing that he had done so, but afterwards, when he discovered the fact, sold that sheep and appropriated the proceeds of the sale to his own use; he was held to be rightly convicted of larceny. *R.* v. *Riley*, *Dears.* 149; 22 *L. J.* (*M. C.*) 48 (*C. C. R.*). As a general rule a bailee cannot be convicted of larceny unless the bailment was to re-deliver the *very same* chattel or money. *R.* v. *Hassall*, *L. & C.* 58; 30 *L. J.* (*M. C.*) 175 (*C. C. R.*): *R.* v. *Hoare*, 1 *F. & F.* 647, *Wightman*, J.: *R.* v. *Garrett*, 2 *F. & F.* 14; 8 *Cox*, 368, *Willes*, J. A bailee is responsible when the article with which he has been intrusted is one which he is to return, or to deliver to somebody else, *in specie*; but he is not made responsible when he is at liberty, or is bound, to convert the particular article delivered to him into something else, before he returns it or delivers it to the other persons to whom he is instructed to deliver it. *Re Bellencontre* [1891] 2 *Q. B.* 122, *at* 137, *Cave*, J. The prosecutor gave a mare of his into the care of the prisoner, telling him that it was to be sold on the next Wednesday. On that day the prosecutor did not go himself to sell the mare, but sent his wife, who went to where the prisoner was, and saw him ride the mare about a horse-fair, and sell her, and receive on such sale some money. The prosecutor's wife then asked the prisoner to give her the money, saying she would pay his expenses, which, however, he declined to do, and he absconded with the money. The jury having found upon these facts that the prisoner had authority to sell the mare and had converted the money to his own use, it was held, *Stephen*, J., *diss.*, that the prisoner was a bailee of the money so paid to him, and was rightly convicted of stealing it. *R.* v. *De Banks*, 13 *Q. B. D.* 29; 53 *L. J.* (*M. C.*) 132; *Ex parte George*, 18 *Cox*, 631. In *R.* v. *Clegg* [1869] *Ir. Rep.* 3 *C. L.* 166 (*C. C. R.*), C. had contracted with a salvage association to save cargo from a wrecked ship. He saved some and wrote saying so and what he had saved. He then sold part and appropriated the proceeds. Held that he could properly be convicted of larceny as a bailee. The prosecutor asked the prisoner to bring him half a ton of coals from a coal-staith, and gave him money to pay for them. The prisoner bought half a ton of coals accordingly in his own name. He then put the coals into his own cart, and on his way abstracted one cwt. of the coals, and afterwards delivered the residue to the prosecutor as the coals which he had required. The prisoner was not in the prosecutor's employment. On these facts it was held that the prisoner was guilty of larceny as a bailee, some of the judges thinking that the coals being purchased with money given by the prosecutor for that express purpose, the property in them vested in the prosecutor on the purchase; others holding that to make the prisoner a bailee there must be evidence of a specific appropriation of the coals to the prosecutor; and all the court agreed that there was evidence on the facts of such an appropriation. *R.* v. *Bunkall*, *L. & C.* 371; 33 *L. J.* (*M. C.*) 75 (*C. C. R.*),

The prosecutor placed a sum of money in the hands of the prisoner for the purpose of purchasing coals for the prosecutor from a colliery company, which coals the prisoner was to pay for with the money so placed in his hands by the prosecutor. The prisoner did not buy any coals, but fraudulently appropriated the money to his own use. On these facts he was held to have been rightly convicted of larceny as a bailee of the money so placed in his hands. *R.* v. *Aden*, 12 *Cox*, 512 (*C. C. R.*). A carter was employed by the owner of a cargo of coals to load the coals in the carter's own cart from the vessel, and deliver specified quantities to persons whose names were on a list given to him. He sold two loads of the coals fraudulently to persons whose names were not on the list, and appropriated the money to his own use. It was held that he was guilty of larceny as bailee of the two loads. *R.* v. *Davies*, 10 *Cox*, 239 (*C. C. R.*). The prosecutor delivered two brooches to the prisoner to sell for him at 200*l.* for one and 115*l.* for the other, and the prisoner was to have them for a period not exceeding ten days for that purpose. After the ten days had elapsed the prisoner sold the brooches, with other jewellery, for 250*l.*, but arranged with the vendee that he might redeem the brooches for 110*l.* before a certain time. The prisoner was held to be guilty of larceny as a bailee of the brooches, it having been his duty after the ten days had expired without his effecting a sale to return the brooches in specie to the prosecutor, whereas he had sold them after the ten days without the intention of repossessing himself of them so as to enable him to fulfil that duty. *R.* v. *Henderson*, 11 *Cox*, 593 (*C. C. R.*). *Quære*, whether if he had had such intention, that would have been a defence. In the judgment it is expressly said that that question did not arise in the case, as the jury must be taken to have found that he had no such intention. *Id.* Where the prisoner, a commercial traveller, was intrusted by the prosecutors with silk for sale, and it was his duty at the end of six months to send in an account for the entire six months, and to return the unsold silk, and *before* the end of the six months he appropriated the silk to his own use, he was held to be rightly convicted of larceny as a bailee. *R.* v. *Richmond*, 12 *Cox*, 495 (*C. C. R.*). Where the prisoner was indicted for larceny as bailee of a coat, and the evidence was that the prosecutor had lent the coat to the prisoner to wear for a day, and that some few days afterwards the prisoner left the town, and was found wearing the coat on board a vessel bound for Australia, *Martin*, B., stopped the case on the ground that there was no evidence of a conversion sufficient to satisfy the statute. The determination of the bailment, said his lordship, must be something analogous to larceny, and some act must be done inconsistent with the purposes of the bailment. *R.* v. *Jackson*, 9 *Cox*, 505. In order to bring a bailee within 24 & 25 *Vict. c.* 96, *s.* 3, there must be a taking or conversion by him with the intention *permanently* to deprive the owner of his property. If he pledges the goods wrongfully, yet with the intention of redeeming them and restoring them to the owner, such a conversion by him does not come within this section; but if he pledges them with no intention of redeeming them and restoring them to the owner, but with the intention of depriving the owner of them altogether, he is guilty of a fraudulent conversion within the section. *R.* v. *Wynn*, 16 *Cox*, 231 (*C. C. R.*): *R.* v. *Medland*, 5 *Cox*, 292. The drawer of an accommodation bill for 30*l.* received it from the acceptor, upon an arrangement to get it cashed and pay over to the latter all the proceeds, except 3*l.*, which the drawer was to retain for his trouble. Instead of carrying out this arrangement, the drawer handed the bill to one of his creditors who was pressing him for payment of a debt for 10*l.*, in order that the creditor might discount the

bill, and retain out of it his debt of 10*l.*, and then hand over the balance to the drawer. The creditor, however, did not carry out this arrangement, and detained the bill. On these facts it was held by *Chambers* (*Common Serjeant*), that although the drawer was a bailee of the bill within the meaning of the statute, yet that there was no conversion of it by him analogous to larceny, and therefore that an indictment against him for larceny as bailee of the bill could not be sustained. *R.* v. *Weekes*, 10 *Cox*, 224. Whilst in treaty with a firm of solicitors for the transfer of a public-house licence, the prisoner was required by them to give security for the purchase-money before they would assist him in procuring a transfer. To enable him to give the required security, the prosecutor accepted three bills of exchange drawn upon him by the prisoner, which it was agreed that the latter should deposit with the solicitors by way of security, and that he should not negotiate or use them for any other purpose, and if the transfer was not effected that he should return them to the prosecutor. The prisoner, who, instead of depositing the bills with the solicitors, applied two of them to other purposes for his own benefit, was held not to have been a bailee of the bills within 24 & 25 *Vict. c.* 96, *s.* 3 (*ante*, p. 427). *R.* v. *Cosser*, 13 *Cox*, 187, *Bramwell*, B. But a person who receives a bill of exchange for the purpose of getting it discounted and handing the proceeds over to another, and instead of getting it discounted indorses it as his own to a creditor in payment of his account, intending to pass the property in the bill absolutely to the creditor, is a bailee of a valuable security, and guilty of a fraudulent conversion of the same to his own use, within 24 & 25 *Vict. c.* 96, *s.* 3. *R.* v. *Oxenham*, 46 *L. J.* (*M. C.*) 125; 13 *Cox*, 349. In delivering the judgment of the court in this case, *Coleridge*, C.J., said that in his opinion the cases of *R.* v. *Weekes* and *R.* v. *Cosser*, *supra*, were rightly decided. *See Re Bellencontre* (*ante*, p. 457).

Even before the *Married Women's Property Acts* it was held that a married woman might be a bailee within 24 & 25 *Vict. c.* 96, *s.* 3; *R.* v. *Robson*, *L. & C.* 93; 31 *L. J.* (*M. C.*) 22 (*C. C. R.*); overruling *R.* v. *Denmour*, 8 *Cox*, 440, *Martin*, B. And where an infant fraudulently converted to his own use goods which had been delivered to him by the owner under an agreement for their hire, it was held that he was rightly convicted of larceny as a bailee of the goods. *R.* v. *Macdonald*, 15 *Q. B. D.* 323; 15 *Cox*, 757 (*C. C. R.*).

At common law if the goods of a husband be taken with the consent or privity of the wife, it is not larceny. *R.* v. *Harrison*, 1 *Leach*, 47; *R.* v. *Avery*, *Bell*, 150; 28 *L. J.* (*M. C.*) 185 (*C. C. R.*). But if a woman steal the goods of her husband, and give them to her avowterer, who, knowing it, carries them away, the avowterer is at common law (or under the early statute, 13 *Edw.* 1, *c.* 34) guilty of felony; *Dalt. c.* 157; and where a stranger took the goods of the husband *jointly* with the wife, this was held to be larceny by him, he being her adulterer; *R.* v. *Tolfree*, 1 *Mood. C. C.* 243 (overruling *R.* v. *Clark*, 1 *Mood. C. C.* 376, *n.*): *R.* v. *Featherstone*, *Dears.* 369; 23 *L. J.* (*M. C.*) 127 (*C. C. R.*): *R.* v. *Berry*, *Bell*, 95; 28 *L. J.* (*M. C.*) 70 (*C. C. R.*): *R.* v. *Flatman*, 14 *Cox*, 396 (*C. C. R.*). And so it is, even though no adultery had then been committed, but the goods are taken with the intent that the wife shall elope and live in adultery with the stranger. *R.* v. *Tollett*, *C. & Mar.* 112, *Coleridge*, J.; *R.* v. *Thompson*, 1 *Den.* 549; 4 *Cox*, 191 (*C. C. R.*). And if a servant by direction of his master's wife, carries off his master's property, and the servant and wife go off together with the property with the intention of committing adultery, the servant may be indicted for stealing the property. *R.* v. *Mutters*, *L. & C.* 511; 34 *L. J.* (*M. C.*) 54; 10 *Cox*, 50 (*C. C.*

R.). It seems, however, that if a wife elopes with an adulterer, it is no larceny in the adulterer to assist in carrying away her necessary wearing apparel. *R.* v. *Fitch, Dears. & B.* 187; 26 *L. J.* (*M. C.*) 169; 7 *Cox*, 269 (*C. C. R.*); overruling on this point the direction of *Coleridge*, J., in *R.* v. *Tollett, C. & Mar.* 112. The prisoner, who had lodged at the prosecutor's house, left it, and the next day the prosecutor's wife also left, taking a bundle with her, which however was not large enough to contain the things which it was found had been taken away from the house on the evening when she left. Two days after, all the things were found in the prisoner's cabin, or on his person, in a ship in which the prosecutor's wife was, the prisoner and the prosecutor's wife having taken their passage in the ship as man and wife. It was held that from these facts the jury were justified in drawing the inference that the prisoner had received the property knowing it to have been stolen by some evilly disposed person. *R.* v. *Deer, L. & C.* 240; 32 *L. J.* (*M. C.*) 33; 9 *Cox*, 225 (*C. C. R.*). In that case it was clear that all the things which the prisoner was charged with receiving could not have been taken away by the prosecutor's wife, and therefore the jury were justified in concluding that some one, other than the prosecutor's wife, had actually stolen the goods, and that the prisoner had received them from that other person. If the goods had been taken by the prosecutor's wife and received by the prisoner from her, he could not have been convicted of receiving. For a wife, although she may have committed adultery, cannot at common law steal her husband's goods; and therefore the adulterer, receiving from her the goods which she has taken from her husband, cannot be guilty of receiving stolen goods. *R.* v. *Kenny*, 2 *Q. B. D.* 307; 46 *L. J.* (*M. C.*) 156. An adulterer cannot be convicted of stealing the goods of the husband brought by the wife to his house; in which the adultery is afterwards committed, merely upon evidence of their being there, unless they be traced to his personal possession. *R.* v. *Rosenberg*, 1 *C. & K.* 233. As to larceny by a wife of her husband's property *see R.* v. *Streeter* [1900] 2 *Q. B.* 601 (*C. C. R.*) *post*, p. 550. Where a wife took her husband's goods from a place within the jurisdiction of the Central Criminal Court, and was found committing adultery with the prisoner at Liverpool, the husband's goods being then in the prisoner's possession, but there was no evidence that the goods had been under the prisoner's control at any place within the jurisdiction of the Central Criminal Court, it was held that the prisoner could not be indicted in that court for larceny. *R.* v. *Prince*, 11 *Cox*, 145.

These authorities, so far as they depend on the common law, must now be read subject to the provisions of *ss.* 12, 16 of the *Married Women's Property Act*, 1882 (*ante*, pp. 60, 443), which render one spouse liable to criminal proceedings for stealing the goods of the other when about to leave or desert the other. *See R.* v. *James* [1902] 1 *K. B.* 540 (*C. C. R.*).

4. *Delivery of physical, without legal, possession.*]—If a servant, who has merely the care and oversight of the goods of his master, as the butler of plate, the shepherd of sheep, and the like, embezzle them, this is a larceny at common law: 1 *Hale*, 506; because the goods, at the time they are taken, are deemed in law to be in the possession of the master, the possession of the servant in such a case being the possession of the master. It was the duty of the prisoner, who was in the prosecutor's service as foreman, to enter weekly on a pay-sheet the amount due to each workman for the week's wages, to present this sheet to the cashier, and, the total amount due to the several workmen having been reckoned up, to obtain such total amount from the cashier, and to pay thereout the

amounts due to the respective workmen. The prisoner, intending at the time to defraud his master, falsely represented on the pay-sheet that 1*l.* 10*s.* 4*d.* was due to a certain workman, whereas a sum of 1*l.* 8*s.* only was due to him, and having obtained the total amount for the week from the cashier, which included such sum of 1*l.* 10*s.* 4*d.*, fraudulently appropriated the difference of 2*s.* 4*d.* to his own use. This was held to be larceny of the 2*s.* 4*d.*, for although it has been obtained by the prisoner from the cashier by a false pretence, it was merely handed to the prisoner as the servant of the master, and continued the property and in the constructive possession of the master. *R.* v. *Cooke*, *L. R.*, 1 *C. C. R.* 295; 40 *L. J.* (*M. C.*) 68. Where a person employed to drive cattle, or to take them to a particular place for a special purpose, and bring them back, sells them, it is larceny at common law; for he has the custody merely, and not the right to the possession; *R.* v. *Stock*, 1 *Mood. C. C.* 87: *R.* v. *M'Namee*, 1 *Mood. C. C.* 368; although the intention to convert them was not conceived until after they were delivered to him. *R.* v. *Harvey*, 9 *C. & P.* 353, *Alderson*, B.: *R.* v. *Jackson*, 2 *Mood. C. C.* 32: *see R.* v. *Goode*, *C. & Mar.* 582, *Patteson*, J.: *R.* v. *Jones*, *Id.* 611, *Cresswell*, J.: *R.* v. *Smith*, 1 *C. & K.* 423, *Coleridge*, J. Where the defendant, who was carter to the prosecutor, went away with and disposed of his master's cart, it was held to be felony. *R.* v. *Robinson*, 2 *East*, *P. C.* 565. Where the defendant, a porter to the prosecutor, was sent by his master to deliver goods to a customer, and, instead of doing so, sold them, the judges held this to be felony. *R.* v. *Bass*, 2 *East*, *P. C.* 566. The defendant, foreman and shopkeeper to the prosecutor, not residing in the house with him, but merely attending there in the daytime, received from his master a bill of exchange, with directions to send it enclosed in a letter to J. S. in London; the defendant absconded with the bill, and the judges held this to be felony. *R.* v. *Paradise*, 2 *East*, *P. C.* 565; 3 *R. R.* 721, *cit.* So, if money or a valuable security (as a cheque drawn by the prosecutor on a banker: *R.* v. *Heath*, 2 *Mood. C. C.* 33) be given by a master to his servant to carry to another, or to purchase goods with, and the servant apply it to his own use, it is larceny. *R.* v. *Lavender*, 2 *East*, *P. C.* 566: 2 *Russ. Cr.* (6th ed.) 328; *R.* v. *Beaman*, *C. & Mar.* 595, *Patteson*, J. So, if a man, having purchased corn on board a vessel, send his clerk or lighterman with a barge for the purpose of landing it, and the clerk or lighterman misappropriate a part of it, this has been held larceny. *R.* v. *Abrahat*, 2 *Leach*, 824: *R.* v. *Spears*, 2 *Leach*, 825; 2 *East*, *P. C.* 568. So, where the servant of a master carman, employed to cart goods, by collusion with others suffered the goods, and the cart, to be taken away, it was held to be larceny in the servant; and to be immaterial whether the property were laid in the bailee or the original owner. *R.* v. *Harding*, *R. & R.* 125. So, where a servant got ten guineas from her master, in order to get silver for them, and, instead of doing so, ran away with the guineas, it was held to be larceny. *R.* v. *Atkinson*, 1 *Leach*, 302, *n.* Even where a confidential clerk to a merchant, who had authority to get his master's bills discounted, and had the general management of his cash concerns, took a bill of exchange, unindorsed, got it discounted, and absconded with the produce of it, it was held to be felony. *R.* v. *Chipchase*, 2 *Leach*, 699; 2 *East P. C.* 567; *and see R.* v. *Murray*, 1 *Leach*, 344. In *Farquharson* v. *King* [1902] *App. Cas.* 325, a firm of timber merchants warehoused with a dock company their timber imported by them, and instructed the dock company to accept all transfer or delivery orders signed by a particular clerk, who had a limited authority to make sales to known customers. The clerk under an assumed name fraudulently sold his master's timber to K. who did not know the firm nor the clerk

under his real name. *Halsbury*, L.C., held this to be a clear case of larceny by the clerk. Where the defendant, a clerk and cashier in a banking-house, made false entries in the books to the credit of a customer, then obtained the customer's cheque for the sum thus falsely placed to his credit, and paid the amount of the cheque to himself by certain bank-notes, entering the payment in the books as being made to "a man"; this was held by the judges to be a larceny of the bank-notes. *R.* v. *Hammon*, *R. & R.* 221; 2 *Leach*, 1083; 4 *Taunt.* 304; 13 *R. R.* 596. So, if a sheriff's officer clandestinely sell, for his own use, part of the goods which he has seized under a *fi. fa.*, he is guilty of larceny, because he has the custody of the goods merely, like a servant, and has not the legal possession. *R.* v. *Eastall*, 2 *Russ. Cr.* (6th ed.), 264. But where A. employed B., who was by business a drover, to drive pigs and deliver them to C. at L.; he was to be paid by the day, but, by the usage of the trade, he had a right to drive other persons' pigs to L. along with A.'s if he chose; he drove the pigs to L., and as C.'s wife would not receive them, he took them to L. market, sold them, and absconded; this was held (before 20 & 21 *Vict. c.* 54, *s.* 4; *see ante*, p. 456) no larceny, as under the circumstances B. was a bailee, and not a servant, and he had no original intention of stealing the pigs. *R.* v. *Hey*, 1 *Den.* 602; 2 *C. & K.* 983 (*C. C. R.*): *R.* v. *Gibbs*, *Dears.* 445; 24 *L. J.* (*M. C.*) 62 (*C. C. R.*). An unauthorized *gift* by the servant of his master's goods is as much a felony as if he sold or pawned them. *R.* v. *White*, 9 *C. & P.* 344. And where a third party receives goods from a servant under colour of a pretended sale, knowing that the servant has no authority to sell them, and is in fact defrauding his master, this is larceny in both. *R.* v. *Hornby*, 1 *C. & K.* 305, *Coltman*, J. But where goods, of which the master has never been in possession, are delivered to the servant for the master's use, and the servant instead of delivering them to his master, by depositing them in his house, or the like, converts them to his own use, this is held not to be larceny at common law. 2 *East*, *P. C.* 568. Therefore, if a shopman receives money from a customer of his master, and instead of putting it into the till, secretes it; *R.* v. *Bull*, 2 *Leach*, 841, *cit.*; or, if a banker's clerk receive money at the counter, and, instead of putting it into the proper drawer, purloin it; *R.* v. *Bazeley*, 2 *Leach*, 835; or receive a bond for the purpose of being deposited in the bank, and, instead of depositing it, convert it to his own use; *R.* v. *Waite*, 1 *Leach*, 28; 2 *East*, *P. C.* 570; in these cases it has been held that the clerk or shopman is not guilty of larceny. So, where a servant was sent by his master to get silver for a 5*l.* note, which he did, and absconded with the silver, it was held not to be larceny, because the silver had never been in the possession of his master, except by the hands of the servant. *R.* v. *Sullens*, 1 *Mood. C. C.* 129. And where the prosecutor, having employed the defendant to purchase Exchequer bills for him, gave him a cheque upon his bankers for the amount, and the defendant received the amount of the cheque in bank-notes, and absconded, it was held not to amount to a larceny of the notes, because the prosecutor never had possession of them except by the hands of the defendant. *R.* v. *Walsh*, *R. & R.* 215; 2 *Leach*, 1054; 4 *Taunt.* 258. What is a sufficient delivery to the master for this purpose must depend upon the nature of the goods. Thus, the putting down, by the servant, of a load of hay, which the master had sent him for, at the master's stable door, was held a sufficient delivery to the master to make the servant guilty of larceny in then appropriating a part of it to his own use. *R.* v. *Hayward*, 1 *C. & K.* 518; *Tindal*, C.J.

If the owner of goods deliver them to another, but be present all the

time they are in the other's possession, and there be no intention on the part of the owner to relinquish his dominion over them by such delivery, the owner still retains the possession in law, notwithstanding this delivery; and if the person to whom he has so delivered them make away with them and convert them to his own use, he will be guilty of larceny. 2 *East, P. C.* 683, 684; 1 *Hawk. c.* 30, *s.* 2. As, for instance, if the owner give the goods to a man to carry, and accompany him at the same time—if the man run away with the goods, he is clearly guilty of larceny. The law laid down in this paragraph was cited with approval, and formed the ground of decision in *R.* v. *Thompson, L. & C.* 225; 32 *L. J.* (*M. C.*) 53 (*C. C. R.*). In that case a lady, wishing to get a railway ticket, finding a crowd at the pay place, asked the prisoner, who was nearer to the pay place, to get a ticket for her, and handed him a sovereign to pay for it. He took the sovereign, intending to steal it, and immediately ran off with it. On these facts he was held to have been guilty of larceny at common law, as the lady being present retained the dominion and possession in point of law, after she had handed the sovereign to him for the intended purpose. *Id.*

So, if a man have the bare charge or special use of the goods of another, this does not divest the owner of the possession in law; and if the person who thus has the use of them fraudulently convert them, it is larceny. As, for instance, if a guest rob his inn or tavern of a piece of plate, it is larceny; for he hath not the possession delivered to him, but merely the use. 1 *Hale*, 506; 1 *Hawk. c.* 33, *s.* 6.

Although the taking must, in strictness, be *invito domino*, yet where a servant being solicited to become an accomplice in robbing his master's house, informed his master of it; and the master thereupon told him to carry on the affair, consented to his opening the door leading to the premises, and to his being with the robbers during the robbery, and also marked his property, and laid it in a place where the robbers were expected to come; it was held that this conduct of the master was no defence to an indictment against the robbers. *R.* v. *Eggington*, 2 *Leach*, 913; 2 *B. & P.* 508; 5 *R. R.* 689: *cf. R.* v. *Williams*, 1 *C. & K.* 195.

"*Carry away.*"]—In order to constitute larceny, there must not only be a taking, but also *asportation*, or *carrying away*. A bare removal from the place in which the thief found the goods, though he does not make off with them, is a sufficient asportation; 1 *Hale*, 508; 4 *Bl. Com.* 231. As, for instance, if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, have removed them from his chambers downstairs; 3 *Co. Inst.* 108, 109; or if a servant, *animo furandi*, take his master's hay from his stable, and put it into his master's waggon; *R.* v. *Gruncell*, 9 *C. & P.* 365; or, if a thief, intending to steal plate, take it out of a chest in which it was, and lay it down upon the floor, but be surprised before he can make his escape with it; *R.* v. *Simson, Kel.* (*J.*) 31; 1 *Hawk. c.* 33, *s.* 28: *R.* v. *Amier*, 6 *C. & P.* 344; or if, intending to steal a cask of wine, he remove it from the head to the tail of the waggon in which it is placed, and be detected before he can effect his purpose of carrying it off. *R.* v. *Walsh*, 1 *Mood. C. C.* 14. And where the defendant drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of his pocket; but whilst the book was still about the person of the prosecutor, the prosecutor suddenly put up his hand, upon which the defendant let the book drop, and it fell into the prosecutor's pocket; this was considered a sufficient asportation to constitute larceny. *R.* v. *Thompson*, 1 *Mood. C. C.* 78. So, the transfer of a letter by a letter-carrier from his pouch to his pocket is

a sufficient asportation. *R.* v. *Poynton*, *L. & C.* 247; 32 *L. J.* (*M. C.*) 29 (*C. C. R.*). But where the defendant merely set a package on end, in the place where it lay, for the purpose of cutting open the side of it to get out the contents, and was detected before he had accomplished his purpose; the judges held that this was not sufficient. *R.* v. *Cherry*, 2 *East, P. C.* 556; 1 *Leach*, 236, 321. So, where the thief was not able to carry off the goods on account of their being attached by a string to the counter: *Anon.*, 2 *East, P. C.* 556; or to carry off a purse on account of some keys attached to the strings of it getting entangled in the owner's pocket: *R.* v. *Wilkinson*, 1 *Hale*, 508; the court in these cases held, that there was not sufficient carrying away to constitute larceny: to render the asportation in such cases complete, there must be a severance. 2 *Russ.* (6th ed.), 122; *and see R.* v. *Lapier*, 1 *Leach*, 320, where the defendant had assaulted a lady, and torn from her ear an earring which was subsequently found in her hair. Where, however, there is no asportation, the prisoner may be indicted for an attempt to steal, which is a misdemeanor at common law (*see ante*, p. 3); or upon an indictment for the full offence of larceny, he may be convicted of the attempt only. 14 & 15 *Vict. c.* 100, *s.* 9 (*ante*, p. 219). A man may be convicted of an attempt to steal when, even if no interruption had taken place, he could not have committed the complete offence, *e.g.*, when a thief puts his hand in an empty pocket. *R.* v. *Ring*, 61 *L. J.* (*M. C.*) 116; 17 *Cox*, 491: *R.* v. *Brown*, 24 *Q. B. D.* 357; 59 *L. J.* (*M. C.*) 47; 16 *Cox*, 715 (*C. C. R.*): overruling *R.* v. *Collins*, *L. & C.* 471: 33 *L. J.* (*M. C.*) 177. As to attempts generally (*see ante*, p. 2). As to what is sufficient to constitute an attempt to steal, *see further R.* v. *Cheeseman*, *L. & C.* 140; 31 *L. J.* (*M. C.*) 89; 9 *Cox*, 100 (*C. C. R.*), where the circumstances were peculiar. In an indictment for an attempt to steal, it is sufficient to aver that the prisoner attempted to steal the goods of A. B. without specifying the particular goods. *R.* v. *Johnson*, *L. & C.* 489; 34 *L. J.* (*M. C.*) (*C. C. R.*).

LARCENY BY CLERKS OR SERVANTS.

Statutes.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 67.]—Whosoever, being a clerk or servant, *or being employed for the purpose or in the capacity of a clerk or servant*, shall steal any chattel, money or valuable security belonging to or in the possession or power of his master *or employer*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 6, *with the addition of the words in italics.*]

26 & 27 *Vict. c.* 103 (*Misappropriation by Servants Act*, 1863), *s.* 1—*Punishment of servants taking their master's corn, etc., without authority.*]—"If any servant shall, contrary to the orders of his master, take from his possession any corn, pulse, roots, or other food, for the purpose of giving the same or of having the same given to any horse or other animal belonging to or in possession of his master, the servant so offending shall not by reason thereof be deemed guilty of or be proceeded against for felony, but shall, on conviction of such offence before two justices of the peace, at

their discretion, either be imprisoned, with or without hard labour, for any term not exceeding three months, or else shall forfeit and pay such penalty as shall appear to them to be meet, not exceeding the sum of 5*l.*; and if such penalty shall not be paid, either immediately after the conviction, or within such period as the said justices shall at the time of the conviction appoint, the servant so offending shall be imprisoned, with or without hard labour. . . .

"Provided always, that if upon the hearing of the charge the said justices shall be of opinion that the same is too trifling, or that there are circumstances in the case which render it inexpedient to inflict any punishment, they shall have power to dismiss the charge without proceeding to a conviction:

"Provided also, that if upon the trial of any servant for feloniously taking from his master any corn, pulse, roots, or other food consumable by horses or other animals, such servant shall allege that he took the same under such circumstances as would constitute an offence punishable under this Act, and thereof shall satisfy the jury charged with his trial, then it shall be lawful for such jury to return a verdict accordingly; and thereupon the court before which such trial shall take place, shall proceed to award such punishment against such servant as may be awarded by two justices of the peace on the conviction of any person under the provisions of this Act:

"Provided also, that in case of non-payment of any penalty to be imposed by the court on such servant, he shall be imprisoned, with or without hard labour, for any term not exceeding three months, as the court shall order, unless such penalty be sooner paid."

24 & 25 *Vict. c.* 96, *s.* 72.]—*Power to convict of embezzlement on indictment for larceny, and vice versâ* (*see post*, p. 557).

1 *Edw.* 7, *c.* 10 (*Larceny Act*, 1901), *s.* 1—*Fraudulent conversion of property.*]—(*See post*, p. 475).

54 & 55 *Vict. c.* 69, *s.* 1—*Terms of penal servitude and imprisonment.*]—(*Ante*, p. 235).

Indictment under 24 & 25 *Vict. c.* 96, *s.* 67.

Commencement as ante, p. 433]—then being clerk and servant ("*clerk or servant*") to J. N. [*or* then being employed by J. N. for the purpose and in the capacity of a clerk and servant to him the said J. N. ("*employed for the purpose or in the capacity of a clerk or servant*")], certain money to the amount of ten pounds, ten yards of linen cloth, and a certain valuable security, to wit, one bill of exchange for the payment of ten pounds ("*any chattel, money, or valuable security*," *see ante*, p. 427), of and belonging to the said J. N., his master [*or* employer] [*or*, in the possession and power ("*possession or power*") of the said J. N. his master [*or* employer] then being], feloniously did steal, take, and carry away: against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity.

A count for larceny at common law may be added, but is unnecessary, as the jury can negative the relation of master and servant and convict of simple larceny. R. v. *Jennings*, 7 *Cox*, 397: *Dears. & B.* 447 (*C. C. R.*). *If it appear that the money, etc., was received by the clerk, etc., for and on account of his master, and was not received into the possession of the master otherwise than by the actual possession of the clerk, etc., so as not to amount to larceny but to embezzlement,*

the defendant is nevertheless not entitled to be acquitted, but the jury may return as their verdict that the defendant was not guilty of larceny, but was guilty of embezzlement, and thereupon he shall be liable to be punished in the same manner as if he had been convicted on an indictment for embezzlement; but he cannot be afterwards prosecuted for embezzlement on the same facts. 24 & 25 *Vict. c.* 96, *s.* 72 (*post*, p. 557). *This provision extends to indictments framed upon* 31 & 32 *Vict. c.* 116, *s.* 1 (*ante*, p. 430), *relating to larceny or embezzlement by partners or joint beneficial owners.* *R.* v. *Rudge*, 13 *Cox*, 17 (*C. C. R.*).

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment with or without hard labour, for not more than two years; and, if a male under sixteen years, with or without whipping.—24 & 25 *Vict. c.* 96, *s.* 67 (*ante*, p. 464); 54 & 55 *Vict.* c. 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

Evidence.

Prove that the defendant, at the time he committed the offence, was "clerk or servant" to J. N., or was employed by J. N. for that purpose or in that capacity, as alleged in the indictment. (*See post*, p. 561, *tit.* "*Embezzlement.*") The driver of a glass-coach hired for the day is not the servant of the hirer, so as to come within the statute. *R.* v. *Haydon*, 7 *C. & P.* 445; *and see Quarman* v. *Burnett*, 6 *M. & W.* 499: *Milligan* v. *Wedge*, 12 *A. & E.* 737: *Jones* v. *Scullard* [1898] 2 *Q. B.* 565: *R.* v. *Hey*, 1 *Den.* 602; 2 *C. & K.* 983 (*C. C. R.*): *R.* v. *Gibbs*, *Dears.* 445; 24 *L. J.* (*M. C.*) 62 (*ante*, p. 462). In *R.* v. *Warren*, 10 *Cox*, 359, a woman living with a man as his wife was convicted of larceny as a servant.

Then prove the larceny as directed, *ante*, pp. 404–464; *see particularly* p. 460. Where, upon an indictment for larceny, it appeared that the defendant, being sent by his master to get change for a £5 note, got silver for it and absconded, it was held that it was not larceny, because the silver had never been in the possession of the master, except by the hands of the defendant; *R.* v. *Sullens*, 1 *Mood. C. C.* 129; but it is now embezzlement within 24 & 25 *Vict. c.* 96, *s.* 68, *and see s.* 72 (*post*, p. 557). But if the property be in the possession of the master, even by the hands of another clerk or servant, or by delivery into the master's house or barn, or into his cart or barge, it is larceny. *R.* v. *Murray*, 1 *Mood. C. C.* 276; 5 *C. & P.* 145: *R.* v. *Watts*, 2 *Den.* 14; 19 *L. J.* (*M. C.*) 192: *R.* v. *Spears*, 2 *Leach*, 825: 2 *East, P. C.* 568: *R.* v. *Reed*, *Dears.* 168, 257; 23 *L. J.* (*M. C.*) 25 (*C. C. R.*). If a servant receives from his master goods for the purpose of selling them and appropriates them to his own use, it is larceny, not embezzlement. *R.* v. *Hawkins*, 4 *Cox*, 224 (*C. C. R.*). It was the duty of the prisoner, a servant of the prosecutors, to give out materials to be wrought up, and pay the workman when the work was finished, and for this purpose he received cash from his masters, and at the end of each week he accounted with them for sums so received and paid. The cash was kept by him, but he was not authorized to apply it in any other manner. He paid one of the workmen 13*s.*, and fraudulently charged his masters as having paid him 14*s.* 8*d.*, and appropriated the 1*s.* 8*d.* to his own use. On these facts it was held that he was rightly convicted of larceny, as a servant, of the 1*s.* 8*d.* *R.* v. *Low*, 10 *Cox*, 168 (*C. C. R.*): but *see R.* v. *Dartnell*, 20 *L. T.* (*N. S.*) 1020, *Byles*, J. It is not required by the statute that the goods, etc., stolen should be the property of the master; the words of the statute are, "belonging to or in the possession or power of the master." If the defendant is not shown

to be the clerk or servant of J. N., but a larceny is proved, he may be convicted of the larceny merely. *R.* v. *Jennings*, 7 *Cox*, 397, *ante*, p. 465.

As to taking from the possession of the master by the servant, contrary to the master's orders, of any corn, etc., for the purpose of giving the same to any horse, etc. *See* 26 & 27 *Vict. c.* 103, *s.* 1, *ante*, p. 464.

By the *Falsification of Accounts Act*, 1874 (38 & 39 *Vict.* 24), *post*, p. 591, and the *Larceny Act*, 1901 (1 *Edw.* 7, *c.* 10), *post*, p. 575, many of the difficulties formerly found in prosecuting servants for defrauding their masters are removed.

LARCENY BY PERSONS EMPLOYED IN THE PUBLIC SERVICE, OR BY POLICE CONSTABLES.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 69.]—Whosoever, being employed in the public service of [his] Majesty, or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever, shall steal any chattel, money, or valuable security belonging to or in the possession or power of [his] Majesty, or intrusted to or received or taken into possession by him by virtue of his employment, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . . [*This section was new law in* 1861.]

Sect. 70—*Venue—Form of Indictment.*]— . . . Every offender against . . . the last preceding section may be dealt with, indicted, tried and punished either in the county or place in which he shall be apprehended or be in custody, or in which he shall have committed the offence; and in every case of larceny . . . of any chattel, money, or valuable security in . . . the last preceding section mentioned, it shall be lawful in the warrant of commitment by the justice of the peace before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money, or valuable security in [his] Majesty.

Sect. 72—*Person indicted for larceny not to be acquitted, if embezzlement be proved.*]—*Post*, p. 557, *tit.* "*Embezzlement.*"

39 & 40 *Vict. c.* 36—(*Customs Consolidation Act*, 1876), *s.* 29.]—Any moneys, chattels, or other valuable securities which shall or may be received by any officer, clerk, or other person in the service of the customs, either as duties of customs, or under or by virtue of any statute, or by the order or direction of the Commissioners of Customs, or in virtue of his office or employment, or otherwise for the use and service of [his] Majesty, or of any public department, shall be deemed to be money, chattels, or valuable securities for the public service, and shall be considered as such within the meaning of the *Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), and in any information, indictment, or other instrument in relation thereto, the same may be laid as the property of [his] Majesty.

54 & 55 *Vict. c.* 69, *s.* 1 (*term of penal servitude or imprisonment.*]—*See ante*, p. 235.

A police constable employed by an inspector of prisons as his agent to collect contributions of parents towards the maintenance of their children committed to reformatory and industrial schools under 29 & 30 *Vict.* c. 117 (which authorized the appointment of an agent), is "employed in the public service of his Majesty." *R.* v. *Graham*, 13 *Cox*, 57 (*C. C. R.*). A bailiff appointed under the *County Court Acts* by the high bailiff of a county court to assist him in his duties is not, since the issue of the *County Court Rules*, 1875, "employed in the public service," etc., but is the servant of the high bailiff. *R.* v. *Parsons*, 16 *Cox*, 498, *Cave*, J. This was otherwise before 1875: *R.* v. *Glover*, *L. & C.* 466; 33 *L. J.* (*M. C.*) 169; 9 *Cox*, 500 (*C. C. R.*) The rule *O.* 2, *r.* 30 of the Rules of 1875, on which *R.* v. *Parsons* was based, is still in force as *O.* 2, *r.* 34 of the Rules of 1903.

STEALING OR KILLING HORSES, COWS, SHEEP, ETC.

Statute.

24 & 25 *Vict.* c. 96 (*Larceny Act*, 1861), *s.* 10.]—Whosoever shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 25.]

Sect. 11.]—Whosoever shall wilfully kill *any* animal, with intent to steal the carcass, skin, or any part of the animal so killed, shall be guilty of felony, and being convicted thereof shall be liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed would have amounted to felony. [*This section is framed on, but is wider in its scope than* 7 & 8 *G.* 4, *c.* 29, *s.* 5. *As to stealing dogs, see post*, p. 470].

Indictment for stealing Horses, Cows, Sheep, etc. (24 & 25 *Vict.* c. 96, *s.* 10).

Commencement as ante, p. 433]—one mare ("*horse, mare, gelding, colt, or filly, bull, cow, ox, heifer, or calf, ram, ewe, sheep, or lamb*") of the goods and chattels of J. N., feloniously did steal, take, and lead away against the form (*as ante*, p. 465). *If the indictment be for stealing a bull, etc., or sheep, etc., say*, "drive away," *instead of* "lead away." *The indictment must give the animal one of the descriptions mentioned in the statute; otherwise the defendant can be punished as for simple larceny merely. R.* v. *Beaney*, *R. & R.* 416.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment not exceeding two years, with or without hard labour.—24 & 25 *Vict.* c. 96, *s.* 10; 54 & 55 *Vict.* c. 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict.* c. 96, *s.* 117 (*ante*, p. 431).

Evidence.

Prove a larceny of the mare, etc., as directed, *ante*, p. 434. *See R.* v. *Phillips* (*ante*, p. 441): *R.* v. *Crump*, *R.* v. *Cabbage* (*ante*, p. 442): *R.* v. *Harvey* (*ante*, p. 447): *R.* v. *Pear*, *R.* v. *Charlewood*, *R.* v. *Banks* (*ante*, p. 454): *R.* v.

Stock, *R.* v. *Smith* (*ante*, p. 461). Where the defendant removed sheep from the fold into the open field, killed them, and took away the skins merely; the judges held, that removing the sheep from the fold was a sufficient driving away to constitute larceny. *R.* v. *Rawlins*, 2 *East*, *P. C.* 617. But where, upon an indictment for sheep-stealing, the evidence was that the carcasses of the sheep were found lying in the grip of a ditch, killed, and the tallow and fat taken away, the judges held that the removal of the sheep to the ditch for the purpose of killing them was not such a removal as would constitute a larceny of them within the meaning of the statute. *R.* v. *Williams*, 1 *Mood. C. C.* 107; *cf. R.* v. *Petch*, 14 *Cox*, 116 (*C. C. R.*). *R.* v. *Townley*, *L. R.*, 1 *C. C. R.* 315 (*ante*, p. 437). (*See the next precedent, infra.*) Upon the trial of an indictment for horse-stealing, the prosecutor stated that he had agisted the horse on the land of another at some distance, and that, hearing from that person of the loss of the horse, he went to the field where the horse had been to feed; and discovered that he was gone: but neither the agister nor his servant was called as a witness: *Gurney*, B., held that this was not sufficient evidence against the prisoner, for it was not shown that he might not have obtained possession of the horse honestly. *R.* v. *Yend*, *C. & P.* 176.

The evidence must correspond with the description of the animal in the indictment. If the animal stolen be specially mentioned in the statute, it must be described and proved to be of that particular description, for the enumeration of the several kinds in the statute contradistinguishes the one from the other. Thus, an indictment framed on 15 *G.* 2, *c.* 34 (*rep.*) for stealing a cow was held not to be supported by evidence of stealing a heifer, because the statute mentioned both cows and heifers. *R.* v. *Cook*, I *Leach*, 105; 2 *East*, *P. C.* 616. And an indictment for stealing sheep was held not to be supported by evidence of stealing lambs or ewes. *R.* v. *Loom*, 1 *Mood. C. C.* 160. *See R.* v. *Birket*, 4 *C. & P.* 216: *R.* v. *Jewett*, 2 *Cox*, 227: *R.* v. *Puddifoot*, 1 *Mood. C. C.* 247. But *R.* v. *Puddifoot* was declared to be bad law in *R.* v. *McCulley*, 2 *Mood. C. C.* 34; 2 *Lewin*, 272; and the word "sheep" is now held to be a generic term. *R.* v. *Spicer*, 1 *Den.* 82; 1 *C. & K.* 699. Any sheep or wether is properly described as a "sheep." *R.* v. *Stroud*, 6 *C. & P.* 535 (*and see ante*, p. 76). An indictment for stealing a colt or filly would be supported by evidence of the larceny of a foal, because colt or filly means a young horse or mare; and a foal is not specifically mentioned in the statute; and it was held that an indictment on 2 *& 3 Edw.* 6, *c.* 33 (*rep.*) for stealing a mare was supported by evidence of stealing a filly, though the Act mentioned only horses, geldings, and mares. *R.* v. *Welland*, *R. & R.* 494. Under the present Act it seems sufficient to describe the animal as a horse, and to prove that it is horse, mare, gelding, colt, or filly, as the fact is. *R.* v. *Aldridge*, 4 *Cox*, 143, *Erle*, J.

The court, however, has now extensive powers of amendment of variances between pleading and proof, where the variance is not material and the defendant cannot be prejudiced thereby. 14 *&* 15 *Vict. c.* 100, *s.* 1 (*ante*, pp. 52, 53).

24 *&* 25 *Vict. c.* 96, *s.* 10, applies only to the stealing of live cattle, and theft of dead animals is simple larceny, and the punishment is different. *As to the description of dead animals, see ante*, p. 76.

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ndictment for killing Animals with intent, etc. (24 & 25 *Vict. c.* 96, *s.* 11.)

Commencement as ante, p. 433]—one sheep ("*any animal*" "*provided the offence of stealing the animal so killed would have amounted to felony*"),

of the goods and chattels of J. N. feloniously and wilfully did kill, with intent feloniously to steal, take, and carry away part of the carcass ("*the carcass, skin, or any part of the animal so killed*"), that is to say [the inward fat] of the said sheep; against the form (*as ante*, p. 465). *As to indictment for killing a sheep with intent to steal part, etc., see R. v. Wheeler*, 7 *C. & P.* 170; *Coleridge*, J.

Felony: 24 & 25 *Vict. c.* 96, *s.* 11. *See the last precedent.*

Evidence.

To support this indictment, you must prove two things:—

1. That the defendant killed the sheep; and this is proved either positively, as by a witness who saw him do it; or by circumstantial evidence, as, for instance, that the skins were found in his possession, or were sold by him to another person, or the like. (*See ante*, p. 339). Where the defendant was indicted for killing a lamb with intent to steal part of the carcass, and the evidence was, that he cut off the leg of the lamb whilst it was alive, and carried the leg away before the animal died; the lamb afterwards died of the wound; the judge at the trial thought that as the death-wound was given before the theft, it was sufficient, and the defendant was convicted; the judges afterwards were unanimous that the conviction was right. *R. v. Clay, R. & R.* 387: *see also R. v. Sutton*, 2 *Mood. C. C.* 29; 3 *C. & P.* 291: *R. v. McCulley*, 2 *Lewin*, 272: 2 *Mood. C. C.* 34.

2. That he killed the sheep with the intent stated in the indictment. The best proof of this is, that the part of the carcass mentioned was actually stolen. But if the defendant was caught in the fact, that is, after killing the sheep, but before he had actually cut it up, then it is for the jury to say, upon a consideration of the facts of the case, whether he did not intend to steal the carcass. Upon an indictment, under 14 *G.* 2, *c.* 6 (*rep.*), for killing three sheep, with intent to steal the whole of the carcasses, the jury found that the defendant intended to steal a part of the carcasses only; but the judges were of opinion that the evidence was sufficient to sustain the indictment, as the statute meant to make it immaterial whether the intent was to steal the whole or a part only of the carcass. *R. v. Williams*, 1 *Mood. C. C.* 107.

In this, as in the last case, the evidence should correspond with the description of the animal in the indictment. (*See ante*, p. 469.)

STEALING DOGS AND OTHER DOMESTIC ANIMALS NOT THE SUBJECT OF LARCENY AT COMMON LAW.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 18—*Stealing dogs.*]—Whosoever shall steal any dog shall, on conviction thereof before two justices of the peace, either be committed to the common gaol or house of correction, there to be imprisoned, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or shall forfeit and pay, over and above the value of the said dog, such sum of money, not exceeding 20*l.*, as to the said justices shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former Act of parliament, shall afterwards steal any dog, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen

months, with or without hard labour. [*This section is taken from* 8 & 9 *Vict. c.* 47, *s.* 2. *The defendant can elect to be tried on indictment on a charge of a first offence.* 42 & 43 *Vict. c.* 49, *s.* 17, *ante*, p. 6.]

Sect. 19—*Knowingly being in possession of stolen dogs, etc.*]—Whosoever shall unlawfully have in his possession or on his premises any stolen dog, or the skin of any stolen dog, knowing such dog to have been stolen or such skin to be the skin of a stolen dog, shall, on conviction thereof before two justices of the peace, be liable to pay such sum of money not exceeding 20*l.*, as to such justices shall seem meet; and whosoever, having been convicted of any such offence, *either* against this *or any former* Act of parliament, shall afterwards be guilty of any such offence as in this section before mentioned, shall be guilty of a misdemeanor, *and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour.* [*This section is taken from* 8 & 9 *Vict. c.* 47, *s.* 3, *with the additions italicized.*]

Sect. 20—*Taking money to restore dogs.*]—Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any dog which shall have been stolen, or which shall be in the possession of any person not being the owner thereof, shall be guilty of a misdemeanor, *and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labour.* [*This section is taken from* 8 & 9 *Vict. c.* 47, *s.* 6, *with the additions italicized.*]

Sect. 21—*Stealing animals ordinarily kept in confinement or for domestic purposes.*]—Whosoever shall steal any bird, beast, or other animal ordinarily kept in a state of confinement, or for any domestic purpose, not being the subject of larceny at common law, or shall wilfully kill any such bird, beast, or animal with intent to steal the same or any part thereof, shall on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned or kept to hard labour for any term not exceeding six months, or else shall forfeit and pay over and above the value of the bird, beast, or other animal such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever having been convicted of any such offence either against this or any former Act of parliament shall afterwards commit any offence in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept for hard labour for such term not exceeding twelve months as the convicting justice shall think fit.

[*This section is taken from* 7 & 8 *G.* 4, *c.* 29, *s.* 31. *The accused can elect to be tried on indictment.* 42 & 43 *Vict. c.* 49, *s.* 17 (*ante*, p. 6). *The election need not be stated in the indictment* (*R. v. Chambers*, 65 *L. J.* (*M. C.*) 214; 18 *Cox*, 401), *which, for a first offence, can be framed on the precedent, ante, p.* 468, *and, for a subsequent offence, on the precedent for stealing dogs, post, p.* 472. *As to what animals are within the section, see* 24 & 25 *Vict. c.* 97, *s.* 41, *post, tit.* "*Malicious Damage.*"]

Sect. 22—*Persons found in possession of stolen animals liable to penalties.*]—If any such bird or any of the plumage thereof, or any dog, or any such beast, or the skin thereof, or any such animal or any part thereof, shall be found in the possession or on the premises of any person, any justice

may restore the same respectively to the owner thereof; and any person in whose possession or on whose premises such bird or the plumage thereof, or such beast or the skin thereof, or such animal or any part thereof, shall be so found, (such person knowing that the bird, beast, or animal has been stolen, or that the plumage is the plumage of a stolen bird' or that the skin is the skin of a stolen beast, or that the part is the part of a stolen animal), shall, on conviction before a justice of the peace, be liable for the first offence to such forfeiture, and for every subsequent offence to such punishment, as any person convicted of stealing any beast or bird is made liable to by the last preceding section. (*See s.* 21.) [*This section was framed on* 7 *&* 8 *G.* 4, *c.* 20, *s.* 32, and 8 *&* 9 *Vict. c.* 47, *s.* 3. *Smith* v. *Dear*, 67 *J. P. Rep.* 244, *where it was held that a prosecution under s.* 23 *need not be by the owner of the pigeon stolen seems equally applicable to ss.* 21, 22.]

Indictment for stealing a Dog, after a Previous Conviction.

Middlesex, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the —— day of ——, A.D. 1905, one dog, the property of J. N., unlawfully did steal, take, and carry away; against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence hereinbefore charged and stated, the said J. S., on the —— day of ——, A.D. 1901, at ——, in the county of ——, was duly convicted before J. P., Esq., and the Rev. O. R., clerk, two of his Majesty's justices of the peace for the said county, for that he the said J. S. on [*etc., as in the previous conviction, to the words*] against the form of the statute in such case made and provided; and the said J. S. was thereupon then and there adjudged for his said offence to be committed to and imprisoned in the common gaol in and for the said county, for the term of three months.

[*As to the necessity for charging the subsequent offence first, see* 24 *&* 25 *Vict. c.* 96, *s.* 116 (*ante, p.* 430), *which enacts, that in any indictment for any offence punishable under this Act, and committed after a previous conviction or convictions for any offence punishable upon summary conviction, it shall be sufficient,* AFTER CHARGING THE SUBSEQUENT OFFENCE, *to state that the offender was at a certain time and place convicted of an offence punishable upon summary conviction,* WITHOUT OTHERWISE DESCRIBING THE PREVIOUS OFFENCE. *It would seem, from the last six words, that it is unnecessary to set out the previous conviction at length, as is done in the above indictment, but it is safer to do so, as s.* 18 *is directed not against a dog-stealer, who has been previously convicted of any larceny punishable on summary conviction, but against one who has been previously summarily convicted of dog-stealing, and it might therefore be argued that the fact of the previous conviction having been for dog-stealing ought to appear on the face of the indictment, notwithstanding the general words used in s.* 116.]

Misdemeanor: imprisonment, with or without hard labour, not exceeding eighteen calendar months. 24 *&* 25 *Vict. c.* 96, *s.* 18. *See also s.* 117 (*ante*, p. 431), *as to fines and sureties.*

Evidence.

Prove the subsequent offence, as directed, *ante*, p. 434 *et seq.*; and if the defendant is found guilty, or pleads guilty, prove the former conviction in manner directed by 24 *&* 25 *Vict. c.* 96, *s.* 116 (*ante*, p. 430); and

the identity of the defendant. The mode of proceeding at the trial as to arraignment, etc., is regulated by 24 & 25 *Vict. c.* 96, *s.* 116, *ubi supra.*

There cannot be a conviction for obtaining a dog by false pretences, under 24 & 25 *Vict. c.* 96, *s.* 88: *see R. v. Robinson, Bell*, 34; 28 *L. J.* (*M. C.*) 58; 8 *Cox*, 115 (*C. C. R.*).

HUNTING OR STEALING DEER.

Statute.

24 & 25 *Vict. c.* 86 (*Larceny Act*, 1861), *s.* 12—*In uninclosed part of forest, etc.*]—Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet; and whosoever, having been previously convicted of any offence relating to deer, for which a pecuniary penalty shall have been imposed by this or by any former Act of parliament, shall afterwards commit any of the offences hereinbefore enumerated, whether such second offence be of the same description as the first or not, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and, if a male under the age of sixteen years, with or without whipping. [*This section is taken from* 7 *G.* 4, *c.* 29, *s.* 26.]

Sect. 13—*In inclosed ground.*]—Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and, if a male under the age of sixteen years, with or without whipping. [*This section is taken from* 7 *G.* 4, *c.* 29, *s.* 26.]

Sect. 14—*Suspected persons found in possession of venison, etc.*]—If any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, shall be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being taken *or summoned* before a justice of the peace, shall not satisfy the justice that he came lawfully by such deer, or the head, skin, or other part thereof, or had a lawful occasion for such snare or engine, and did not keep the same for any unlawful purpose, he shall, on conviction by the justice, forfeit and pay any sum not exceeding twenty pounds; and if any such person shall not under the said provisions be liable to conviction, then, for the discovery of the party who actually killed or stole such deer, the justice, at his discretion, as the evidence given and the circumstances of the case shall require, may summon before him every person through whose hands such deer, or the head, skin, or other part thereof, shall appear to have passed; and if the person from whom the same shall have been first received, or who shall have had possession thereof, shall

not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, be liable to the payment of such sum of money as is hereinbefore last mentioned. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 27.]

Sect. 15—*Setting engines for taking deer, etc.*]—Whosoever shall unlawfully and wilfully set or use any snare or engine whatsoever, for the purpose of taking or killing deer, in any part of any forest, chase, or purlieu, whether such part be inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer shall be usually kept, or shall unlawfully and wilfully destroy any part of the fence of any land where any deer shall be then kept, shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding twenty pounds, as to the justice shall seem meet. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 28.]

Sect. 16—*Powers of deer-keepers as to seizure, etc.*]—If any person shall enter into any forest, chase, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, every person intrusted with the care of such deer, and any of his assistants, whether in his presence or not, may demand from every such offender any gun, firearms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer, and in case such offender shall not immediately deliver up the same, may seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer; and if any such offender shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this Act (*see R.* v. *Amey, R. & R.* 500), every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 29. *Holding a deer-keeper down to the ground whilst a confederate escaped was held not a beating within* 7 & 8 *G.* 4, *c.* 29, *s.* 29: *R.* v. *Hale*, 2 *C. & K.* 326, *Maule*, J.]

Indictment for hunting or stealing Deer in Inclosed Places
(24 & 25 *Vict. c.* 96, 1861, *s.* 13, *ante*, p. 473).

Commencement as ante, p. 433]—in certain inclosed land ("*in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept*"), situate in the parish of ——, in the county of ——, in the occupation of J. N., where deer had been and then were usually kept, one fallow deer, the property of the said J. N., then and there kept and being, in the said inclosed land unlawfully, wilfully and feloniously did hunt, kill, and carry away ("*course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound*"); against the form [*as ante*, p. 465]. *The enactment seems to apply to deer of all kinds, ages, and either sex.* *R.* v. *Strange, Greaves, Crim. Cons. Acts* (2nd ed.), 111. *It seems essential to state whether the land is inclosed or uninclosed.* *See R.* v. *King*, 18 *L. J.* (*M. C.*) 43.

Felony: imprisonment not exceeding two years, with or without hard

labour, and if a male under sixteen years of age, with or without whipping (*see ante*, p. 240)—24 & 25 *Vict. c.* 96, *s.* 13. *As to requiring the offender to enter into recognizances and find sureties for keeping the peace, Id. s.* 117 (*ante*, p. 431).

Evidence.

To support this indictment, you must prove the hunting, killing, or stealing of the deer, as stated in the indictment; that the act was unlawful, *i.e.*, done in a place in which it is not lawful for the accused to kill the deer. (*Threlkeld* v. *Smith* [1901] 2 *K. B.* 531, 536; 70 *L. J.* (*K. B.*) 921; 20 *Cox*, 38); that the land in which the offence was committed was at the time inclosed, in the occupation of J. N., and situated as stated in the indictment; and that deer had been and then were usually kept there. In *R.* v. *Money*, Gloucester Summer Assizes, 1847, *Erle*, J., held that an inclosure in the Forest of Dean made under an Act of Charles 2, and surrounded by a ditch and bank sufficient to keep out cattle, but over which deer could pass, was inclosed land within 7 & 8 *G.* 4, *c.* 29, *s.* 26 (*rep.*). *See Greaves, Crim. Cons. Acts* (2nd ed.) 112.

Indictment for hunting or stealing Deer in Uninclosed Places, after a Previous Conviction, 24 & 25 *Vict. c.* 96, *s.* 12 (*ante*, p. 473).

Southampton, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the —— day of ——, A.D. 1905, in a certain uninclosed part of the forest of —— ("*in the uninclosed part of any forest, chase, or purlieu*"), situate in the parish of ——, in the county of ——, one fallow deer, then and there being in the said uninclosed part of the said forest, unlawfully and wilfully did hunt, kill, and carry away ("*course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound*"); against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore, and before the committing of the offence hereinbefore mentioned, to wit, on the —— day of ——, A.D. 1903, at ——, in the county of ——, the said J. S. was duly convicted before J. P., Esq., and the Rev. O. R., clerk, two of his said Majesty's justices of the peace for the said county of ——, for that he the said J. S. [*setting out the previous conviction*]: And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the day and in the year first aforesaid, in the said uninclosed part of the said forest of ——, situate in the said parish of ——, in the said county of ——, the said fallow deer then and there being in the said uninclosed part of the said forest, unlawfully, wilfully and feloniously did hunt, kill, and carry away; against the form of the statute in such case made and provided.

Second count.]—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the —— day of ——, A.D. 1905, in a certain uninclosed part of the said forest of ——, situate in the said parish of ——, in the said county of ——, one fallow deer, then and there being in the said uninclosed part of the said forest, unlawfully, wilfully and feloniously did hunt, kill, and carry away; against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore, and before the committing of the offence in this count hereinbefore mentioned, to wit, on the —— day of ——, A.D. 1903, at ——, in the county of ——, the said J. S. was duly convicted before J. P., Esq., and the Rev. O. R.,

clerk, two of his said Majesty's justices of the peace for the said county of ——, for that he the said J. S. [*setting out the previous conviction. See R.* v. *King*, 13 *L. J.* (*M. C.*) 43.] *As to the form of this indictment, see the note to the precedent, ante*, p. 472.

Felony: punishable as mentioned in the last precedent. 24 & 25 *Vict. c.* 96, *s.* 12.

Evidence.

To support this indictment, you must prove the hunting, killing, or stealing of the deer by the defendant, as stated in the indictment—the commission of the offence in an uninclosed part of the forest, as described, and the locality of that part of the forest in which the offence was committed. If the defendant pleads guilty to, or is found guilty of, the subsequent offence, prove the previous conviction in manner directed by 25 & 26 *Vict. c.* 96, *s.* 116 (*ante*, p. 430), and the identity of the defendant. The course of proceedings at the trial, as to arraignment, etc., is regulated by the last-named section.

The prisoner may take exception to the validity of the previous conviction, and if it be bad, he cannot be convicted upon this indictment. *R.* v. *Allen*, *R.* & *R.* 513.

Where a summary conviction for an offence relating to a deer did not state substantively where the place was situate in which the offence was committed, but in awarding the distribution of the penalty gave it to the overseers of D., in the said county, "where the said offence was committed," it was held good. *R.* v. *Weale*, 5 *C.* & *P.* 135.

TAKING OR KILLING HARES OR RABBITS IN WARRENS, ETC., IN THE NIGHT TIME.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 17.]—Whosoever shall unlawfully and wilfully, *between the expiration of the first hour after sunset and the beginning of the last hour before sunrise*, take or kill any hare or rabbit in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not, shall be guilty of a misdemeanor; and whosoever shall unlawfully and wilfully, *between the beginning of the last hour before sunrise and the expiration of the first hour after sunset*, take or kill any hare or rabbit, in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or rabbits, shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding five pounds, as to the justice shall seem meet:

Provided that nothing in this section contained shall affect any person taking or killing in the daytime any rabbits on any sea-bank or river-bank in the county of *Lincoln*, so far as the tide shall extend or within one furlong of such bank. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 30, *with the alterations italicized.*]

Indictment.

Commencement as ante, p. 433.]—between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, to wit, about the hour of eleven in the night of the same day, in a certain warren and ground ("*in any warren or ground lawfully used for the breeding or keeping of hares or rabbits, whether the same be inclosed or not*")

in the occupation of J. N., situate in the parish of ——, in the county of ——, the said warren and ground then being lawfully used for the breeding and keeping of hares ("*hares or rabbits*"), unlawfully and wilfully did take twenty hares ("*take or kill*"); against the form [*as ante*, p. 465]. *Add a count for taking rabbits, if it be necessary.*

Misdemeanor: fine or imprisonment or both (with sureties to keep the peace and be of good behaviour, if the court shall think fit, 24 & 25 *Vict. c.* 96, *s.* 117, *ante*, p. 431).—24 & 25 *Vict. c.* 96, *s.* 17.

Evidence.

To support this indictment you must prove—1*st*. That the defendant took or killed the hares (or rabbits) in the place mentioned in the indictment. "A rick-yard" where a few rabbits were kept has been held not to be a "ground used for breeding or keeping." *R.* v. *Garratt*, 6 *C.* & *P.* 369, *Patteson*, J. "Taking," in the statute, means "catching," and not taking away. Where a defendant, who set several wires in a warren, in one of which a rabbit was caught, was seized just as he was laying hold of the wire to take the rabbit, which was then alive, the judges held this to be a taking within the meaning of statute 7 & 8 *G.* 4, *c.* 29, *s.* 30 (*rep.*). *R.* v. *Glover*, *R.* & *R.* 269.—2*nd*. That the offence was committed in the night-time, as defined, for the purpose of this offence, by 24 & 25 *Vict. c.* 96, *s.* 1 (*post*, p. 620), that is, between the expiration of the first hour after sunset and the beginning of the last hour before sunrise.—3*rd*. That the place in which the defendant took the hares (or rabbits) was a warren or ground then used for the breeding or keeping of hares (or rabbits); that it was in the occupation of J. N., and is situate as described in the indictment. It is immaterial whether the warren or ground was inclosed or not.

As to when larceny can be committed of rabbits, *see R.* v. *Petch*, 14 *Cox*, 17 (*C. C. R.*) (*ante*, p. 438).

The *Ground Game Act*, 1880 (43 & 44 *Vict. c.* 47), which gives the occupiers of land the right to kill rabbits and hares, forbids them the use of firearms to kill them between the expiration of the first hour after sunset and the commencement of the last hour before sunrise, and prohibits the use of poison, or of rabbit traps, except in rabbit holes (*s.* 6). It would seem that if this enactment be disobeyed by an occupier he will be within the provisions of 24 & 25 *Vict. c.* 96, *s.* 17 (*ante*, p. 476).

TAKING OR DESTROYING FISH IN WATER ADJOINING A DWELLING-HOUSE.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 24.]—Whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanor;

And whosoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as hereinbefore mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of

the fish taken or destroyed (if any), such sum of money, not exceeding five pounds, as to the justice shall seem meet:

Provided that nothing hereinbefore contained shall extend to any person angling *between the beginning of the last hour before sunrise and the expiration of the first hour after sunset*;

But whosoever shall, by angling, *between the beginning of the last hour before sunrise and the expiration of the first hour after sunset*, unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, shall, on conviction before a justice of the peace, forfeit and pay any sum not exceeding five pounds; and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding two pounds, as to the justice shall seem meet;

And if the boundary of any parish, township or vill shall happen to be in or by the side of any such water as is in this section before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment or information, or in any parish, township or vill adjoining thereto. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 34, *with addition of the words in italics.*]

Sect. 25.]—*Power to owner of fishery or his servant or any person authorized by him to seize tackle of persons offending against s.* 24. *Proviso that if tackle is taken from persons angling in daytime they shall not be liable to pay any penalty or damages.*

Indictment.

Commencement as ante, p. 433]—in a certain stream of water ("*any water*") then running and being in certain land ("*any land adjoining or belonging to the dwelling-house*") adjoining [*or* belonging] to the dwelling-house of J. N., situate in the parish of ——, in the county of ——, the said J. N. then being the owner of the said water [*or*, the said J. N. then having a right of fishery in the said water], ninety fish, to wit, thirty carp, thirty tench, and thirty trout, unlawfully and wilfully did take ["*take or destroy*"]; against the form [*as ante*, p. 465]. *Where the indictment alleged the fish to be the goods and chattels of the prosecutor, the judges held that these words might be rejected as surplusage.* *R.* v. *Hundsdon*, 2 *East*, *P. C.* 611.

Misdemeanor: fine or imprisonment, without hard labour, or both, with sureties, etc. (*See ante*, pp. 238, 240; 24 & 25 *Vict. c.* 96, *ss.* 24, 117.

Evidence.

Prove the taking or destruction of the fish mentioned, or some of them. The taking need not be such a taking as would be necessary to constitute a larceny. *See R.* v. *Glover*, *R. & R.* 269 (*ante*, p. 477). But a taking by angling in the daytime will not be sufficient. And taking fish with the consent of the tenant but not of the owner of soil is not an offence unless the fishing is reserved to the owner by the lease. *Jones* v. *Davies*, 20 *Cox*, 184; 66 *J. P.* 439 (*K. B. D.*). If a destruction only be charged, it must be proved to have been wilful. Prove, also, that the fish were taken or destroyed in a stream [*or* water] running or being in land adjoining to (*see R.* v. *Hodges*, *post*, p. 484), or belonging to the dwelling-house of J. N., and which at the time belonged to J. N., or in which he had a right of fishery. The local situation of the dwelling-house and water must also be proved; but if the boundary of any parish, township or vill, happen to be in or by the side of the water, it will be sufficient to prove that the offence was committed either in the parish, etc., named in the indictment, or in the parish, etc., adjoining thereto. 24 & 25 *Vict. c.* 96, *s.* 24.

STEALING, OR DREDGING FOR, OYSTERS, ETC.

Statutes.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861)], *s.* 26.—Whosoever shall steal any oysters or oyster-brood from any oyster-bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny (*ante*, p. 428). [*As to the common law, see R.* v. *Walford* [1803] 5 *Esp.* 62, *Hotham*, B.]

And whosoever shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any oyster-bed, laying, or fishery, *being the property of any other person, and sufficiently marked out or known as such*, for the purpose of taking oysters or oyster-brood, although none shall be actually taken, or shall unlawfully and wilfully, with any net, instrument, or engine, drag upon the ground or soil of any such fishery, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three months, with or without hard labour. . . .

And it shall be sufficient in any indictment to describe, either by name or otherwise, the bed, laying, or fishery, in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill;

Provided that nothing in this section contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument, or engine adapted for taking floating fish only. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 36, *with the addition of the words in italics.*]

31 & 32 *Vict. c.* 45 (*Sea Fisheries Act*, 1868), *part iii. s.* 28—*Interpretation of terms.*]—In this part of this Act the words "oysters" and "mussels" respectively include the brood, ware, half-ware, spat, and spawn of oysters and mussels respectively. In this part of the Act the expression "oyster and mussel fishery" includes a fishery for either oysters or mussels separately, and the term "oyster or mussel fishery" includes a fishery for both oysters and mussels; and the provisions of this part of this Act shall be construed to apply in the case of any fishery to oysters and oyster ground and beds alone, or to mussels and mussel ground and beds alone, or to both oysters and mussels, and oyster and mussel ground and beds, according as the right of fishery is for oysters alone, or for mussels alone, or for both oysters and mussels.

Sect. 42—*Marking out of oyster, etc., fishery, how proved.*]—Whenever it is necessary in any legal proceeding to prove that in pursuance of any Act of parliament or of an order under this part of this Act, the limits of any oyster and mussel fishery have been duly buoyed or otherwise marked, or notices of such limits have been duly published, posted or distributed, or that notice of the provisions of the order or of such Act relating to the oyster and mussel fishery has been duly published, a certificate purporting to be under the hand of one of the secretaries or assistant secretaries of the Board of Trade, certifying that the Board of Trade are satisfied that the said limits were so buoyed or marked, or that the said notices were duly published, posted, or distributed, shall be

received as evidence that the same have been so buoyed or marked, or that the said notices have been so published, posted, or distributed.

Sect. 43—*Oyster fishery to be within county for purposes of jurisdiction.*]—The portion of the sea-shore to which an order of the Board of Trade under this part of this Act relates (as far as it is not by law within the body of any county) shall for all purposes of jurisdiction be deemed to be within the body of the adjoining county, or to be within the body of each of the adjoining counties, if more than one (*see ante*, p. 39, 43).

Sect. 51—*Property in oysters, etc., within several fishery.*]—All oysters and mussels being in or on an oyster or mussel bed within the limits of a several oyster and mussel fishery granted by an order under this part of this Act, and all oysters being in or on any private oyster bed which is owned by any person independently of this Act, and is sufficiently marked out or sufficiently known as such, shall be the absolute property of the grantees or of such owner, as the case may be, and in all courts of law and equity and elsewhere, and for all purposes, civil, criminal, or other, shall be deemed to be in the actual possession of the grantees and such owner respectively.

Sect. 52—*Property in oysters, etc., removed from several fishery.*]—All oysters and mussels removed by any person from an oyster or mussel bed within the limits of any such several fishery, and all oysters removed by any person from any such private oyster bed, and not either sold in market overt or disposed of by or under the authority of the grantees or owner (as the case may be), shall be the absolute property of the grantees and owner respectively, and in all courts of law and equity and elsewhere, and for all purposes civil, criminal, or other, the absolute right to the possession thereof shall be deemed to be in the grantees and owner respectively.

Sect. 55—*Statement and proof of ownership, etc., in case of contiguous fisheries.*]—When two or more oyster or mussel beds or fisheries belonging to different proprietors are contiguous to each other, and any proceeding by indictment or otherwise is taken against any person for stealing oysters or mussels from any bed formed under an order made in pursuance of this part of this Act, or for stealing oysters from any bed formed independently of this Act, it shall be sufficient, in alleging and proving the property and lawful possession of the oysters or mussels stolen, and the place from which they were stolen, to allege and prove that they were the property of and in the lawful possession of one or other of such proprietors, and were stolen from one or other of such contiguous beds or fisheries.

Sect. 65—*Saving.*]—Nothing in this Act shall prevent any person being liable under any other Act or otherwise to any indictment proceeding, punishment, or penalty, other than is provided for any offence by this Act, so that no person be punished twice for the same offence. [*Cf.* 52 & 53 *Vict. c.* 63, *s.* 33, *ante*, p. 170.]

Indictment for stealing Oysters or Oyster-Brood. (24 & 25 *Vict. c.* 96, *s.* 26, *ante*, p. 479.)

Commencement as ante, p. 433]—from a certain oyster bed ("*any oyster bed, laying, or fishery, being the property of any other person, and sufficiently*

marked out or known as such") called ——, the property of J. N., and sufficiently [marked out and] known as the property of the said J. N., one thousand oysters feloniously did steal, take and carry away; against the form [*as ante*, p. 465]. *It is sufficient to describe, either by name or otherwise, the bed, laying, or fishery in which the offence is committed, without stating the same to be in any particular parish, township, or vill.* 24 & 25 *Vict. c.* 96, *s.* 26. *As to the mode of alleging the property in the oysters and the place from which they were stolen when they have been stolen from one of two or more contiguous beds belonging to different proprietors, but it is not known from which of such beds they have been stolen, see* 31 & 32 *Vict. c.* 45, *s.* 55 (*ante*, p. 480).

Felony: punishable as simple larceny. (*See ante*, pp. 428, 433).—24 & 25 *Vict. c.* 96, *s.* 26.

Evidence.

Prove a larceny of the oysters or some of them as directed, *ante*, p. 434 *et seq.* Prove, also, that the place from whence they were taken was at the time the oyster bed, laying, or fishery of J. N., and was sufficiently marked out or known as such. That it was sufficiently marked out may be proved as directed by 31 & 32 *Vict. c.* 45, *s.* 42 (*ante*, p. 479). As to the proof of the property in the oysters and the place from which they have been stolen when the theft has been from one of two or more contiguous beds belonging to different proprietors, but it is not known from which of such beds they have been stolen, *see* 31 & 32 *Vict. c.* 45, *s.* 55 (*ante*, p. 480).

Indictment for using a Dredge, etc., in the Oyster Fishery of another.

Commencement as ante, p. 433]—within the limits of a certain oyster-bed ("*any oyster-bed, laying, or fishery*") called ——, the property of J. N., and sufficiently [marked out and] known as the property of the said J. N., unlawfully and wilfully did use a certain dredge ("*any dredge, net, instrument, or engine whatsoever*") for the purpose of then and there taking oysters ("*oysters or oyster-brood*"); against the form [*as ante*, p. 465]. *See the last precedent.*

Misdemeanor: punishable by imprisonment not exceeding three months, with or without hard labour.—24 & 25 *Vict. c.* 96, *s.* 26. *The offender may also, in addition to or in lieu of this punishment, be fined, and required to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behaviour.* 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

Evidence.

Prove that the defendant used a dredge, etc., within the limits of the oyster-bed, etc., of J. N., as stated in the indictment; and that such oyster-bed, etc., was at the time the property of J. N., and was sufficiently [marked out and] known as such. That it was so marked out may be proved as directed by 31 & 32 *Vict. c.* 45, *s.* 42 (*ante*, p. 479). The purpose is to be inferred from the act, and it is immaterial whether the defendant actually took any oysters or oyster-brood or not. The statute does not apply to persons catching or fishing for any floating fish within the limits of an oyster fishery with any net, instrument or engine adapted for taking floating fish only. 24 & 25 *Vict. c.* 96, *s.* 26.

Indictment for dragging upon the Ground of the Oyster Fishery of another. (24 & 25 *Vict. c.* 96, *s.* 26.)

Commencement as ante, p. 433]—upon the ground ("*ground or soil*") of a certain oyster fishery ("*such fishery*") called ——, the property of J. N., and sufficiently [marked out and] known as the property of the said J. N., with a certain net ("*any net, instrument or engine*") unlawfully and wilfully did drag; against the form [*as ante*, p. 465].

Misdemeanor: see the last precedent. 24 & 25 *Vict. c.* 96, *s.* 26.

Evidence.

Prove that the defendant dragged with a net, etc., upon the ground of the oyster-bed, etc., as stated in the indictment; and that such oyster-bed, etc., was at the time the property of J. N., and was sufficiently [marked out and] known as such. That it was so marked out may be proved as directed by 31 & 32 *Vict. c.* 45, *s.* 42 (*ante*, p. 479). The statute does not apply to persons catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument, or engine adapted for taking floating fish only. 24 & 25 *Vict. c.* 96, *s.* 26.

STEALING, OR SEVERING WITH INTENT TO STEAL, ORE, ETC., FROM A MINE.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 38.]—Whosoever shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine, bed, or vein thereof respectively, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . (*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 43.)

Section 39.]—Whosoever being employed in or about any mine, shall take, remove, or conceal any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud any proprietor of or any adventurer in such mine, or any workman or miner employed therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . [*This section was taken from* 2 & 3 *Vict. c.* 58, *s.* 10, *and meets the difficulty created by R.* v. *Webb*, 1 *Mood. C. C.* 431, *where it was held not to be larceny for miners employed to bring ore to the surface, and paid by the owners according to the quantity produced, to remove from the heaps of other miners ore produced by them, and add it to their own, in order to increase their wages, the ore still remaining in the possession of the owner.*]

Indictment under s. 38.

Commencement as ante, p. 433]—twenty pounds' weight of copper ore, ("*the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal,*") the

property of J. N., from a certain mine of copper ore ("*mine, bed, or vein thereof respectively*") of the said J. N., situate in the parish of ——, in the county of ——, feloniously did steal, take and carry away [*or* feloniously did sever, with intent the same then and there feloniously to steal, take and carry away]; against the form [*as ante*, p. 465]. *An indictment alleging that the defendants being persons employed in a mine, in the parish of, etc., in the county of Cornwall, on, etc., at, etc., did steal certain ore, the property of the adventurers in the said mine, then and there being found, did not sufficiently show that the ore was stolen from the mine. R.* v. *Trevenner*, 2 *M. & Rob.* 476. *As to local description, see ante*, pp. 67, 298.

Felony: imprisonment not exceeding two years, with or without hard labour.]—24 *& 25 Vict. c.* 96, *s.* 38. *As to requiring the offender to enter into recognizances and find sureties for keeping the peace, Id. s.* 117 (*ante*, p. 431).

Evidence.

Prove a larceny of the ore, etc., as directed, *ante*, p. 434 *et seq.*, or if a severance with intent to steal be alleged in the indictment, prove the severance, and circumstances from which the jury may infer the intent. (*See R.* v. *Bleasdale*, 2 *C. & K.* 765, *and ante*, pp. 308, 312.) Prove, also, that the mine was at the time in the possession or occupation of J. N., and is situate as described in the indictment.

STEALING OR CUTTING TREES, ETC.

Statute.

24 *& 25 Vict. c.* 96 (*Larceny Act*, 1861), *s.* 32.]—Whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound) be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny (*ante*, p. 428);

And whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations in this section before mentioned, shall (in case the value of the article or articles stolen, or the amount of the injury done shall exceed the sum of five pounds) be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny. (*Ante*, p. 428.) [*This section re-enacts* 7 *&* 8 *G.* 4, *c.* 29, *s.* 38.]

Indictment for stealing or cutting, etc., with intent to steal, Trees, etc., in Parks, etc., Value above £1.

Commencement. as ante, p. 433]—one oak-tree ("*the whole or any part of any tree, sapling, or shrub, or any underwood*"), of the value of two pounds,* the property of J. N., then growing in a certain park ("*park, pleasure-ground, garden, orchard, avenue, or any ground adjoining or belonging to any dwelling-house*") of the said J. N., situate in the parish of ——, in the county of ——, in the said park, feloniously did steal, take, and

carry away [or feloniously did cut ("*cut, break, root up, or otherwise destroy or damage*") with intent the same feloniously to steal, take, and carry away]; then thereby doing injury to the said J. N., to an amount exceeding the sum of one pound, to wit, to the amount of two pounds]; against the form [*as ante*, p. 465].

* *If the indictment be for cutting, etc., with intent to steal, omit this allegation of value.*

Felony: punishment same as in simple larceny.—24 & 25 *Vict. c.* 96, *s.* 32. (*See ante*, pp. 428, 433.)

Evidence.

Prove a larceny of the tree, as directed, *ante*, p. 434 *et seq.*; or, if the indictment allege that the defendant cut, etc., the tree with intent to steal it, prove the cutting, etc., as stated in the indictment, and circumstances from which the jury may infer the intent. (*See ante*, p. 283.) In the former case, the value of the tree, and in the latter, the amount of the injury done, must be proved to exceed the sum of 1*l.* But if several trees be stolen or cut at the same time, or so continuously as to form one transaction, and the value or injury done exceed that amount in the aggregate, it will be sufficient. *R.* v. *Shepherd*, *L. R.*, 1 *C. C. R.*, 118; 37 *L. J.* (*M. C.*) 45: 11 *Cox*, 119. The injury mentioned in the statute means the actual injury to the tree itself, not *consequential* injury resulting from the defendant's act; and where the evidence showed that the actual injury done to certain trees damaged by the defendant was less than the statutable amount, but that it would, in consequence of the damage done, be necessary to stub up and replace part of an old hedge, at an expense greater than the statutable amount, this was held insufficient. *R.* v. *Whiteman*, *Dears.* 353; 23 *L. J.* (*M. C.*) 120. Prove that the tree, etc., stolen or cut, etc., was at the time growing in a park, etc., belonging to or in the occupation of J. N., and situate as described in the indictment. The words "adjoining any dwelling-house" import *actual contact*; and therefore ground separated from a house by a narrow walk and paling, wall, or gate, is not within their meaning. *R.* v. *Hodges*, *M. & M.* 341.

Indictment for stealing, or cutting, etc., with intent to steal, Trees, etc., growing elsewhere, value above 5l.

Commencement as ante, p. 433]—one ash-tree ("*the whole or any part of any tree, sapling, or shrub, or any underwood*") of the value of six pounds,* the property of J. N., then growing in a certain close ("*elsewhere than in a park, pleasure-ground, garden, orchard, avenue, or any ground adjoining or belonging to any dwelling-house*") of the said J. N., situate in the parish of ——, in the county of ——, in the said close, feloniously did steal, take, and carry away [*or* feloniously did cut ("*cut, break, root up, or otherwise damage or destroy*") with intent the same feloniously to steal, take, and carry away; thereby then doing injury to the said J. N., to an amount exceeding the sum of five pounds, to wit to the amount of six pounds]; against the form [*as ante*, p. 465].

* *If the indictment be for cutting, etc., with intent to steal, etc., omit this allegation of value.*

Felony: see the last precedent.—24 & 25 *Vict. c.* 96, *s.* 32 (*ante*, p. 483).

Evidence.

Prove a larceny of the tree, as directed, *ante*, pp. 434 *et seq.*; or, if the indictment allege that the defendant cut, etc., the tree with intent to

steal it, prove the cutting, as stated in the indictment, and circumstances from which the jury may infer the intent. (*See ante*, pp. 303, 312.) In the former case, the value of the tree, and in the latter the amount of injury done (*see supra*), must be proved to exceed the value of 5*l*., but if several trees be stolen or cut at the same time, or so continuously as to form one transaction, and the value or injury done in the aggregate exceed that amount, it will be sufficient. *R.* v. *Shepherd*, *L. R.*, 1 *C. C. R.* 118; 37 *L. J.* (*M. C.*) 45. Prove that the close in which the tree was stolen or cut belonged to or was in the occupation of J. N., and was situate as described in the indictment. It is not necessary to prove that the close was not a park, etc.

STEALING OR CUTTING TREES, AFTER TWO PREVIOUS CONVICTIONS, AND STEALING FENCES.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 33—*First offence.*]—Whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done being to the amount of a shilling at the least, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the article or articles stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet;

Second offence.]—And whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the convicting justice shall think fit. [*A person charged with a second offence under this section can elect to be tried on indictment: see post*, p. 487.]

Subsequent offence.]—And whosoever, having been twice convicted of any such offence (whether both or either of such convictions shall have taken place before or after the passing of this Act), shall afterwards commit any of the offences in this section before mentioned shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny. (*Ante*, p. 428.) [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 40.]

Sect. 34—*Stealing, cutting, etc., live or dead fences. First offence.*]—Whosoever shall steal, or shall cut, break, or throw down with intent to steal, any part of any live or dead fence or any wooden post, pale, wire, or rail set up or used as a fence or any stile or gate or any part thereof respectively, shall on conviction before a justice of the peace forfeit and pay over and above the value of the article or articles so stolen, or the amount of injury done such sum of money not exceeding 5*l*. as to the justice shall seem meet;

Subsequent offence.]—And whosoever having been convicted of any such

offence, either against this or any former Act of Parliament shall afterwards commit any of the said offences in this section before mentioned and shall be convicted thereof in like manner shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months as the convicting justice shall think fit. [*A person charged with a second or subsequent offence may elect to be tried on indictment, as to which, see post*, p. 487.]

Indictment. (24 & 25 *Vict. c.* 96, *s.* 33.)

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., on the —— day of ——, A.D. 1905, one oak sapling ("*the whole or any part of any tree, sapling or shrub, or any underwood*") of the value of two shillings,* the property of J. N., then growing in certain land situate in the parish of ——, in the county of —— ("*wheresoever growing*"), unlawfully did steal, take, and carry away, [*or* unlawfully did cut ("*cut, break, root up, or otherwise destroy or damage*"), with intent the same unlawfully to steal, take, and carry away, thereby then doing injury to the said J. N., to an amount exceeding the sum of one shilling, to wit, to the amount of two shillings,] against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence hereinbefore charged and stated, to wit, on the —— day of ——, A.D. 1904, at ——, in the county of ——, the said J. S. was duly convicted before J. P., Esq., and the Rev. O. R., clerk, two of his said Majesty's justices of the peace for the said county of ——, for that he and the said J. S., on [*etc., as in the first conviction, to the words*]—against the form of the statute in such case made and provided; and the said J. S. was thereupon then and there adjudged for his said offence, to forfeit and pay the sum of five pounds, over and above the value of the said tree so stolen as aforesaid, and the further sum of two shillings, being the value of the said tree, and also to pay the further sum of —— shillings for costs; and, in default of immediate payment of the said sums, to be imprisoned in the ——, and there kept to hard labour for the space of —— calendar months, unless the said sums should be sooner paid: And the jurors aforesaid, upon their oath aforesaid, do further say, that heretofore and before the committing of the offence first hereinbefore charged and stated, to wit, on the —— day of ——, A.D. 1904, at ——, in the county of ——, the said J. S. was duly convicted before L. S. and T. W., two of his Majesty's justices of the peace for the said county of ——, for that he [*etc., setting out the second conviction in the same manner as the first, and proceed thus*]: and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the day and year first aforesaid, the said oak sapling, of the value of two shillings,* the property of the said J. N., then growing in the said land, situate in the said parish of ——, in the said county of ——, feloniously did steal, take, and carry away [*or* feloniously did cut, with intent the same feloniously to steal, take, and carry away, thereby then doing injury to the said J. N., to an amount exceeding the sum of one shilling, to wit, to the amount of two shillings] ; against the form of the statute in such case made and provided;

Second count.]—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the —— day of —— A.D. 1905, one oak sapling, of the value of two shillings,* the property of the said J. N., then growing in certain land, situate in the

said parish of ——, in the said county of ——, feloniously did steal, take and carry away [*or* feloniously did cut, with intent the same feloniously to steal, take, and carry away, thereby then doing injury to the said J. N., to an amount exceeding the sum of one shilling, to wit, to the amount of two shillings]; against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence in this count hereinbefore mentioned, to wit, on the —— day of ——, A.D. [*here set out the first conviction as in the first count*]: And the jurors aforesaid, upon their oath aforesaid, do further say, that heretofore, and before the committing of the offence in this count first hereinbefore mentioned, to wit, on the —— day of —— A.D. [*here set out the second conviction as directed in the first count*].

* *If the indictment be for cutting, etc., with intent to steal, omit the allegation of value in this place.*

A first and second offence against 24 & 25 *Vict. c.* 96, *s.* 33, *supra*, are both punishable on summary conviction (subject to the right of the accused on a second charge to elect to be tried on indictment, 42 & 43 *Vict. c.* 49, *s.* 17, *ante*, p. 6), but a third or subsequent offence against that section is a felony. 24 & 25 *Vict. c.* 96, *s.* 116 (*ante*, p. 430) enacts, that, "in any indictment for any offence punishable under this Act, and committed after a previous conviction or convictions for any felony, misdemeanor, *or offence or offences punishable upon summary conviction*, it shall be sufficient *after charging the subsequent offence*, to state that the offender was at a certain time and place or at certain times and places convicted of felony, or of an indictable misdemeanor, or of an offence or offences punishable upon summary conviction (as the case may be), without otherwise describing the previous felony, misdemeanor, offence, or offences," etc. It appears clear from this enactment that it was intended that the subsequent offence should be first charged, and in both counts of the above form of indictment that course has accordingly been adopted.

It will be seen that the first count consists of three parts:—1. The charge of the subsequent offence which is charged as an offence, *not as a felony*. 2. The charge of the two previous summary convictions. 3. An averment commencing, "And so the jurors aforesaid," etc. The reason for charging the subsequent offence first has already been given. It is charged in the first instance as an offence only by reason of the terms of 24 & 25 *Vict. c.* 96, *s.* 116 (*ante*, p. 430). In pursuance of this enactment, therefore, the prisoner must be first arraigned for the subsequent offence, and if he plead not guilty, the jury must first inquire and give their verdict concerning that subsequent offence. They cannot find the prisoner guilty of *felonious* stealing at that stage of the proceedings, for they are then ignorant of the previous conviction, and therefore, at that stage, they can only find him guilty of the offence of unlawfully stealing. If they find him guilty of the unlawful stealing, they are then to inquire of the previous convictions. If they find him guilty of the previous convictions, or if he pleads guilty to them, the ingredients are complete which make the felony, which, however, up to that time they have not expressly found. But then follows the third part of the indictment, "And so the jurors aforesaid," etc. This last part of the indictment, perhaps, need not be put to the jury in so many words, as the verdict of guilty of the subsequent offence, together with the verdict of guilty of the previous convictions, amount to a verdict of guilty of the felony, and would, as it should seem, authorize the entry of such a verdict on the record. That the omission of the word "feloniously," in the first part of

the indictment, does not vitiate it, *see R.* v. *Crighton, R. & R.* 62, in which case an indictment for embezzlement was held good, in which the word "feloniously," was omitted before the word "embezzled," in the first part of the indictment, which, however, concluded—and so the jurors say that the prisoner did "feloniously embezzle, steal, take, and carry away," etc. Sect. 116 of 24 & 25 *Vict.* c. 96, is analogous to *s.* 37 of 24 & 25 *Vict. c.* 99 (the *Coinage Offences Act*, 1861), and the mode of proceeding at the trial above suggested was approved in *R.* v. *Martin, L. R.*, 1 *C. C. R.* 214; 39 *L. J.* (*M. C.*) 31 (*C. C. R.*), where the prisoner was indicted under *s.* 12 of 24 & 25 *Vict. c.* 99, for being unlawfully in possession of counterfeit coin, after having been convicted of unlawfully uttering counterfeit coin. The court held that as *s.* 37 of 24 & 25 *Vict. c.* 99 regulated the mode of proceeding at the trial, the prisoner must first be arraigned upon the subsequent offence, and evidence respecting the subsequent offence must first be submitted to the jury, and the charge of the previous conviction must not be inquired into until after the verdict on the charge of the subsequent offence.

The second count varies from the first in charging the subsequent offence in the first instance as a felony.

As to setting out the previous convictions in full in the indictment, *see ante*, p. 472.

Felony: punishable as simple larceny. (*See ante*, p. 428.)—24 & 25 *Vict. c.* 96, *s.* 33.

The right to prosecute is not limited to the owner of the injured property or a person aggrieved by the injury. *Tarry* v. *Newman*, 15 *M. & W.* 645: *Smith* v. *Dear* [1903] 67 *J. P. Rep.* 244; 88 *L. T.* 664.

Evidence.

Prove the larceny of the sapling, as directed *ante*, pp. 434 *et seq.*; or, if the defendant be charged with cutting, etc., the sapling with intent to steal it, the cutting, as stated in the indictment, and circumstances from which the jury may imply the intent. (*See ante*, p. 312.) Prove, also, that the sapling was growing on land belonging to or in the occupation of J. N., and that, in the first case, the value, and, in the second, the amount of the injury done (*see ante*, p. 483) exceeds one shilling. If the defendant pleads guilty, or is found guilty, of the subsequent offence, prove the two former convictions in manner directed by 24 & 25 *Vict. c.* 96, *s.* 116, *ante*, p. 430, and the identity of the defendant. The course of proceedings at the trial as to the arraignment, etc. (as to which *see ante*, pp. 185, 486), is also regulated by the last-named section.

STEALING OR DESTROYING PLANTS, ETC., IN GARDENS, ETC.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 36—*First offence.*]—Whosoever shall steal, or shall destroy or damage with intent to steal, any plant, root, fruit, or vegetable production growing in any garden, orchard, *pleasure-ground*, nursery-ground, hothouse, greenhouse, or conservatory, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the

amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet [*the defendant may elect to be tried on indictment: see note, post*, p. 490];

Subsequent offence.]—And whosoever having been convicted of any such offence, *either* against this *or any former* Act of Parliament, shall afterwards commit any of the offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny. [*This section re-enacts 7 & 8 G. 4, c. 29, s. 42, with the additions italicized.*]

Indictment for a Subsequent Offence.

Middlesex, to wit: The jurors for our lord the King upon their oath present, that J. S., on the —— day of ——, A.D. 1905, twenty pounds' weight of grapes ("*plant, root, fruit, or vegetable production*"), the property of J. N., then growing in a certain garden ("*garden, orchard, pleasure-ground, nursery-ground, hothouse, greenhouse, or conservatory*") of the said J. N., situate in the parish of ——, in the county of ——, unlawfully did steal, take, and carry away, [*or* unlawfully did damage ("*destroy or damage*"), with intent the same then and there unlawfully to steal, take, and carry away]; against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore, and before the committing of the offence hereinbefore mentioned, to wit, on the —— day of —— A.D. 1902, at —— in the county of ——, the said J. S. was duly convicted before J. P., Esq., and the Rev. O. R., clerk, two of his said Majesty's justices of the peace for the said county of ——, for that he the said J. S. on [*etc., as in the previous conviction, to the words*]—against the form of the statute in such case made and provided; and the said J. S. was thereupon then and there adjudged for his said offence to forfeit and pay the sum of twenty pounds, over and above the amount of the injury so done as aforesaid, and the further sum of six shillings, being the amount of the said injury; and also to pay the sum of —— shillings for costs; and in default of immediate payment of the said sums, to be imprisoned in the ——, and there kept to hard labour for —— calendar months, unless the said sums should be sooner paid: And so the jurors aforesaid, upon their oath aforesaid, do say that the said J. S. on the day and in the year first aforesaid, the said twenty pounds' weight of grapes, the property of the said J. N., then growing in the said garden of the said J. N., situate in the said parish of ——, in the said county of ——, feloniously did steal, take, and carry away [*or* feloniously did damage, with intent the same then and there feloniously to steal, take, and carry away]; against the form of the statute in such case made and provided.

Second count.]—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the —— day of ——, A.D. 1905, twenty pounds' weight of grapes, the property of the said J. N., then growing in a certain garden of the said J. N., situate in the said parish of ——, in the said county of ——, feloniously did steal, take, and carry away [*or* feloniously did damage with intent the same then and there feloniously to steal, take, and carry away]; against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore, and before the committing of the offence in this count hereinbefore mentioned, to wit, on the —— day of ——, A.D. 1902 [*here set out the previous conviction*

as in the first count. As to the form of this indictment, see the note to the last precedent (ante, p. 487).

Felony: punishable as simple larceny. (*See ante,* p. 428.)—24 & 25 *Vict. c.* 96, *s.* 36.

Evidence.

Prove a larceny of the grapes, as directed *ante,* p. 434 *et seq.*; or, if the indictment allege that the defendant damaged the grapes with intent to steal them, the damage, as stated in the indictment, and circumstances from which the jury may infer the intent. (*See ante,* p. 312.) Prove, also, that at the time of the offence the grapes were growing in a garden belonging to or in the occupation of J. N., and situated as described in the indictment. If the defendant plead guilty to, or is found guilty of, the subsequent offence, prove the previous conviction in manner directed by the 24 & 25 *Vict. c.* 96, *s.* 116 (*ante,* p. 430), and the identity of the defendant. The course of proceedings at the trial as to arraignment, etc., is regulated by the last-named section. As to this, and the reason for inserting the second count, *see ante,* p. 487.

The words "plant," or "vegetable production," in 7 & 8 *G.* 4, *c.* 29, *s.* 42, did not include young trees. *R.* v. *Hodges, M. & M.* 341. Whether the ground be properly described as a garden, is a question for the jury. *Id.*

STEALING, ETC., VEGETABLE PRODUCTS NOT GROWING IN GARDENS.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act,* 1861), *s.* 37—*First offence.*]—Whosoever shall steal, or shall destroy, or damage with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land open or inclosed, not being a garden, orchard, *pleasure ground,* or nursery ground, shall, on conviction thereof, before a justice of the peace at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding one month, or else shall forfeit and pay over and above the value of the article or articles so stolen or the amount of the injury done, such sum of money not exceeding 20*s.*, as to the justice shall seem meet, and in default of payment thereof, together with the costs (if ordered), shall be committed as aforesaid for any term not exceeding one month, unless payment be sooner made;

Subsequent offence.]—And whosoever having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding six months as the convicting justice shall think fit. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 43. *By the Summary Jurisdiction Act,* 1879 (42 & 43 *Vict. c.* 49), *s.* 17 (*ante,* p. 6), *on proceedings under the above section for a second or subsequent offence, the accused may elect to be tried on indictment, in which case the offence is treated as indictable, and the costs of prosecution are payable as in felony. The fact of his election to be indicted need not be averred. R.* v. *Chambers,* 65 *L. J.* (*M. C.*) 214; 18 *Cox,* 401.]

Indictment.

An indictment for this offence can be framed on the precedent, *ante*, p. 489.

Evidence.

Prove the offence as directed, *ante*, p. 490.

Clover was held to be a cultivated root or plant within 7 & 8 *G.* 4, c. 29, s. 43, of which 24 & 25 *Vict.* c. 96, s. 37, is a re-enactment. *R.* v. *Brumby*, 5 *Cox*, 315; 3 *C.* & *K.* 315, *Williams*, J.

STEALING, OR CUTTING WITH INTENT, ETC., LEAD, METAL, OR FIXTURES.

Statute.

24 & 25 *Vict.* c. 96 (*Larceny Act*, 1861), s. 31.]—Whosoever shall steal, or shall rip, cut, sever, or break with intent to steal, any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively fixed in or to any building whatsoever, or anything made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden, or area, or in any square or street, or in any place dedicated to public use or ornament, *or in any burial-ground*, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny;

And in the case of any such thing fixed in any such square, street, or place as aforesaid, it shall not be necessary to allege the same to be the property of any person. [*This section re-enacts* 7 & 8 *G.* 4, c. 29, s. 44, *with the addition of the words italicized, to get rid of doubts as to fixtures in burial-grounds.* *R.* v. *Blick*, 4 *C.* & *P.* 377: *R.* v. *Jones*, *Dears.* & *B.* 555; 27 *L. J.* (*M. C.*) 171; 7 *Cox*, 498.]

Indictment for stealing, or cutting with intent, etc., Lead, etc., affixed to Buildings, etc. (24 & 25 *Vict.* c. 96, s. 31.)

Commencement as ante, p. 433]—sixty pounds' weight of lead ("*any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, or of both*"), the property of J. N., then being fixed to the dwelling-house ("*any building whatsoever*") of the said J. N., situate in the parish of ——, in the county of ——, feloniously did steal, take, and carry away [*or* feloniously did rip, cut, sever, and break ("*rip, cut, sever, or break*"), with intent the same feloniously to steal, take, and carry away]; against the form [*as ante*, p. 465].

The offence being a statutory felony and not larceny at common law, the venue can only be laid in the county in which the offence was committed. *R.* v. *Millar*, 7 *C.* & *P.* 665.

Felony: punishable as simple larceny. (*See ante*, pp. 428, 433.)—24 & 25 *Vict.* c. 96, s. 81.

Evidence.

Prove a larceny of the lead, etc., as directed *ante*, p. 434 *et seq.*; or if the indictment charge that the defendant ripped, etc., the lead, with intent to steal it, prove the ripping, etc., as stated in the indictment, and

circumstances from which the jury may infer the intent. (*See ante*, pp. 303, 312.) Prove, also, that the house from which the lead was stolen or ripped was the dwelling-house of J. N., situate as described in the indictment. On an indictment for stealing lead from the dwelling-house of W., B. proved that he managed the property of W., who resided at Patras, that he received the rent for W. and let the house: it was held that W.'s ownership was sufficiently proved. *R.* v. *Brummitt*, *L. & C.* 9; 8 *Cox*, 413. An unfinished building intended as a cart-shed, which is boarded up on all its sides, and has a door with a lock on it, and the frame of a roof with loose gorse thrown upon it, because it is not yet thatched, is a building within the meaning of this statute. *R.* v. *Worrall*, 7 *C. & P.* 516. Any material variance in the description of the building, between the indictment and evidence, will be fatal, unless amended (*see ante*, p. 298).

An indictment for stealing a copper pipe fixed to the dwelling-house of A and B, was held not supported by proof of stealing a pipe fixed to two rooms of which A and B were *separate* tenants in the same house. *R.* v. *Finch*, 1 *Mood. C. C.* 418. Where a man (having given a false representation of himself) got into possession of a house under a treaty for a lease of it, and then stripped it of the lead, the jury being of opinion that he obtained possession of the house with intent to steal the lead, found him guilty; and he afterwards had judgment. *R.* v. *Munday*, 2 *Leach*, 850; 2 *East, P. C.* 594. An indictment for stealing lead fixed to "a certain *wharf*" was held to be sufficient, it being proved that the wharf was in fact a building. *R.* v. *Rice*, *Bell*, 87; 28 *L. J.* (*M. C.*) 64.

Upon an indictment on this section of the statute, the defendant cannot be convicted of a simple larceny. *R.* v. *Gooch*, 8 *C. & P.* 293; *and see R.* v. *Millar* (*ante*, p. 491).

Indictment for stealing, or ripping, etc., with intent, etc., Metal fixed in Land, being Private Property, or for a Fence to a Dwelling-house, etc. (24 & 25 *Vict. c.* 96, *s.* 31.)

Commencement as ante, p. 433]—two hundred pounds' weight of iron ("*anything made of metal*"), the property of J. N., then being fixed in certain land which was then private property, to wit, in a garden ("*in any land being private property*") of the said J. N., situate in the parish of ——, in the county of —— [*or*, fixed for a fence to a dwelling-house ("*dwelling-house, garden, or area*") of the said J. N., situate, etc.], feloniously did steal, take, and carry away [*or* feloniously did rip, cut, sever, and break ("*rip, cut, sever, or break*"), with intent the same feloniously to steal, take, and carry away]; against the form [*as ante*, p. 465].

Felony: punishable as simple larceny. (*See ante*, pp. 428, 433.)—24 & 25 *Vict. c.* 96, *s.* 31.

Evidence.

Prove a larceny of the iron, as directed *ante*, p. 434 *et seq.*; or, if the indictment charge that the defendant ripped, etc., the iron with intent to steal it, prove the ripping, etc., and circumstances from which the jury may infer the intent. (*See ante*, pp. 303, 312.) Prove, also, that the iron was fixed in a garden in the possession or occupation of J. N.; that the garden was private property, and is situate as described in the indictment; or, if the indictment be for stealing, or ripping, etc., with intent to steal, iron fixed for a fence to a dwelling-house, etc., prove that the iron was fixed as stated in the indictment; that the dwelling-house was at the time in the possession or occupation of J. N., and is situate as described

in the indictment. The defendant cannot be convicted of simple larceny. *R.* v. *Gooch* (*ante*, p. 492).

Indictment for stealing, or ripping, etc., with intent to steal Metal fixed in a Square, etc. (24 & 25 *Vict. c.* 96, *s.* 31.)

Commencement as ante, p. 433]—ten iron rails, and twenty-five pounds' weight of iron ("*anything made of metal*"), then being fixed in a certain square called Grosvenor Square, situate in the parish of ——, in the county of —— ("*in any square or street, or in any place dedicated to public use or ornament, or in any burial-ground*"), feloniously did steal, take, and carry away [*or*, feloniously did rip, cut, sever, and break ("*rip, cut, sever, or break*") with intent the same feloniously to steal, take, and carry away]; against the form [*as ante*, p. 465]. *It is not necessary in the indictment to allege the thing stolen, etc., to be the property of any person.* 24 & 25 *Vict. c.* 96, *s.* 31.

Felony: punishable as simple larceny. (*See ante*, p. 428.)—24 & 25 *Vict. c.* 96, *s.* 31.

Evidence.

Prove a larceny of the rails, as directed *ante*, p. 434 *et seq.*; or, if the indictment charge the defendant with ripping, etc., the rails with intent to steal them, prove the ripping, etc., and circumstances from which the jury may infer the intent. (*See ante*, pp. 303, 312.) Prove, also, that the rails were fixed in the square, as mentioned in the indictment, and that the square is situate as is there described. It is not necessary to prove that the rails were the property of any person. The defendant cannot be convicted of simple larceny. *R.* v. *Gooch* (*ante*, p. 492).

STEALING, REMOVING, OBLITERATING, ETC., RECORDS, ETC.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 30.]—Whosoever shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously *cancel*, obliterate, injure, or destroy *the whole or any part of* any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or of any original document whatsoever of or belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, or of any bill, petition, answer, interrogatory, deposition, affidavit, order or decree, or of any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, or of any original document in anywise relating to the business of any office or employment under [his] Majesty, and being or remaining in any office appertaining to any court of justice or in any of [his] Majesty's castles, palaces, or houses, or in any government or public office, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude . . . ; and it shall not in any indictment for such offence be necessary to allege that the article, in respect of which the offence is committed, is the property of any person. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 21, *with the additions italicized.*]

Indictment for stealing a Record, etc. (24 & 25 *Vict. c.* 96, *s.* 30.)

Commencement as ante, p. 433]—a certain record (*writ, etc., or other original document*) of (*of or belonging to*) a certain Court of Record, to wit a (*describe record*) of the King's Bench Division of the High Court of Justice, feloniously did steal, take, and carry away; against the form [*as ante*, p. 465]. *It is not necessary to allege that the record, etc., is the property of any person.* 24 & 25 *Vict. c.* 96, *s.* 30.

By the R. S. C., 1883, *Order LXI., Rule* 8, *it is no longer necessary to enrol any judgment or order of the High Court, and in the case of modern records the document should be described according to the name by which it is most commonly known, and so as to identify the particular record.*

Felony: penal servitude for not less than three years and not exceeding five years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 *Vict. c.* 96, *s.* 30; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances, and find sureties for keeping the peace,* 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

This offence is not triable at quarter sessions.—5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove a larceny of the record, etc., described in the indictment, as directed, *ante*, p. 434 *et seq.* It is an indictable offence at common law, to steal the parchment upon which a record, not concerning the realty, is written. *R.* v. *Walker*, 1 *Mood. C. C.* 155. A warrant of execution on a judgment in the county court had issued against the prisoner, under which a levy had been made by the high bailiff, and the warrant was handed to the under-bailiff, who was then left in possession of the prisoner's goods. The prisoner afterwards forcibly took the warrant from the under-bailiff, kept it, and then ordered him away as having no longer authority to remain there, and on his refusal to leave forcibly turned him out of the house in which the goods were. The prisoner was convicted upon an indictment framed on 24 & 25 *Vict. c.* 96, *s*, 30, and charging in the first count a stealing of the warrant of execution, and in the second a taking of the same for a fraudulent purpose from a person having the lawful custody thereof. It was held that the facts above mentioned did not afford any evidence of a larceny of the warrant, and that therefore the conviction on the first count could not be supported, but that they were sufficient to justify the conviction on the second count. *R.* v. *Bailey*, *L. R.*, 1 *C. C. R.* 347; 41 *L. J.* (*M. C.*) 61.

Indictment for taking a Record, etc., from its Place of Deposit.
(24 & 25 *Vict. c.* 96, *s.* 30.)

Commencement as ante, p. 433]—a certain record of (*of or belonging to*) a certain Court of Record, to wit a (*describe record*) of the King's Bench Division of the High Court of Justice, from its place of deposit for the time being, to wit, from the central office of the said court [*or*, from one J. N. then having the lawful custody of the same], feloniously and for a fraudulent purpose did take; against the form [*as ante*, p. 465]. *If possible, add a second count, specifying the fraudulent purpose.* (*See post*, p. 496.)

Felony: punishment and court of trial (*see the last precedent*).

Evidence.

Prove that the record, etc., described in the indictment was deposited in the central office of the High Court, or in the record office, or other place mentioned in the indictment, and that such was its proper place of deposit for the time being; or, that the person from whose custody the record, etc., is charged in the indictment to have been taken, was by law entitled to have, and in fact had, possession of it at the time. That the defendant took the record, etc., from the place or person mentioned in the indictment, which may be proved either by positive or by circumstantial evidence. (*See ante*, p. 339.) And that he took it for a fraudulent purpose, which, in most cases, can only be matter of inference from circumstances, and is not capable of direct proof. The mere taking is evidence from which fraud may fairly be presumed, unless it be satisfactorily explained by the defendant. As to what facts will support a conviction for taking the process of a court for a fraudulent purpose from a person having the lawful custody thereof, *see R.* v. *Bailey*, *L. R.* 1 *C. C. R.* 347; 41 *L. J.* (*M. C.*) 61 (*ante*, p. 494).

Indictment for cancelling, obliterating, injuring, or destroying a Record, etc. (24 & 25 *Vict. c.* 96, *s.* 30.)

Commencement as ante, p. 433.]—A certain record of (*of or belonging to*) a certain Court of Record, to wit, a (*describe record*) of the King's Bench Division of the High Court of Justice (*see supra*), feloniously, unlawfully, and maliciously did obliterate ("*cancel, obliterate, injure, or destroy*"), against the form [*as ante*, p. 465].

Felony: punishment and place of trial (*see the precedent ante*, p. 494).

Evidence.

Prove the obliteration, injury, or destruction of the record, etc., by the defendant, as stated in the indictment. Prove that it was done maliciously, which may be inferred, if it be proved to have been done wilfully: *see post*, p. 651.

STEALING, DESTROYING, CONCEALING WILLS, ETC.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 29.]—Whosoever shall, either during the life of the testator, or after his death, steal, or for any fraudulent purpose destroy, *cancel, obliterate*, or conceal, *the whole or any part of* any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .

And it shall not in any indictment for such offence be necessary to allege, that such will, codicil, or other instrument, is the property of any person:

Provided that nothing in this or the last preceding section (*see post*, p. 497) mentioned, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall prevent, lessen, or impeach any remedy at

law or in equity, which any party aggrieved by any such offence might or would have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him;

And no person shall be liable to be convicted of any of the felonies in this and the last preceding section mentioned (*post*, p. 497) by any evidence whatever, in respect of any act done by him, if he shall at any time previously to his being *charged with* such offence, have *first* disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been bonâ fide instituted by any party aggrieved; or if he shall have first disclosed the same in any *compulsory* examination or deposition before any court *upon the hearing of any matter in bankruptcy or insolvency.* [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *ss.* 23, 24, *with the alterations indicated in italics. The word "first" was inserted to get rid of the doubt expressed in R.* v. *Skeen, Bell*, 97, *post*, p. 497.]

Indictment.

Commencement as ante, p. 433]—a certain will and testamentary instrument of one J. N., feloniously did steal, take, and carry away [*or*, feloniously, and for a fraudulent purpose, did cancel, destroy, and obliterate, *or* did conceal]; against the form [*as ante*, p. 465]. *Where the indictment is for destroying or concealing a will, etc., add another count specifying the fraudulent purpose, if it can be done with certainty. In R.* v. *Morris*, 9 *C.* & *P.* 89, *Alderson*, B., *intimated an opinion that such statement was necessary to the validity of the indictment. It is not necessary to allege that the will, etc., is the property of any person.* 24 & 25 *Vict. c.* 96, *s.* 29.

Felony: penal servitude for life, or for not less than three years, or imprisonment for not more than two years, with or without hard labour.—24 & 25 *Vict. c.* 96, *s.* 29; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances, and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

This offence is not triable at quarter sessions.—5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove a larceny of the will, etc., as directed *ante*, p. 434 *et seq.*; or, if the indictment be for destroying or concealing a will, etc., prove the destruction or concealment by the defendant as stated in the indictment, and also the fraudulent purpose for which he did it. The fraudulent purpose can, in most cases, be only matter of inference not capable of direct proof (*see R.* v. *Morris*, 9 *C.* & *P.* 89); but the mere destruction or concealment, unexplained by the defendant, is evidence from which fraud may fairly be presumed. It is immaterial whether the will, etc., be stolen during the life or after the death of the testator, or whether it relate to real or personal estate, or to both.

No person can be convicted of this offence by any evidence whatever, in respect of any act done by him, if at any time previously to his being charged with the offence he shall "have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved: or if he shall have *first* disclosed the same in any examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency." The words of 7 & 8 *G.* 4,

c. 29, s. 23 (*rep.*), were different from the present, in not confining the protection to the case where the defendant shall have *first* disclosed the act on oath in consequence of the compulsory process of any court, etc., or in any examination or deposition in bankruptcy; and where a defendant, indicted for having fraudulently transferred for his own benefit a bill of lading intrusted to him as a broker, under 5 & 6 *Vict.* c. 39 (*rep.*), which contained a proviso similar in its term to the last branch of the proviso in 7 & 8 *G.* 4, c. 29, s. 23 (*rep.*) had, *after* he was charged with the offence before a magistrate, upon which occasion depositions were taken containing full evidence to support the charge, but before he was indicted, made, in his examination in the court of bankruptcy, a statement which was substantially an admission of the facts stated in such depositions, the judges were divided on the question whether the defendant was protected by the proviso: the majority holding that he was not, for that the disclosure intended by the statute was a statement of that which was before unknown or incapable of proof, or which, at all events he had reason to believe was so. *R.* v. *Skeen, Bell*, 97; 28 *L. J.* (*M. C.*) 91. This difficulty was avoided by the language of 24 & 25 *Vict.* c. 96, s. 29 (*ante*, p. 495), which limits the protection to the case where the party shall, previously to his being *charged with* (not *indicted for*) the offence, have *first* disclosed the act on oath, etc. Evidence of A. that B. had told him that C. had committed an offence, is inadmissible as against C. as evidence of the knowledge of B. as to the fact of C. having committed the offence; and it was therefore inadmissible as evidence that an offence, disclosed by C. a bankrupt, in his examination, had been disclosed previously to such examination, so as to disentitle C. to the protection of the proviso to 24 & 25 *Vict.* c. 96, s. 85 (*post*, p. 578); *R.* v. *Gunnell*, 16 *Cox*, 154 (*C. C. R.*), in which case the meaning of the words "first disclosure" was fully considered. The proviso discussed in *R.* v. *Gunnell*, which was in identical terms with that of 24 & 25 *Vict.* c. 96, s. 29, was repealed by 53 & 54 *Vict.* c. 71, s. 29: *see post*, pp. 579, 581; but the latter Act has not affected *section* 29 of the *Larceny Act*, and *R.* v. *Gunnell* seems to be still a guide to the meaning of that section.

STEALING DOCUMENTS OF TITLE TO REAL ESTATE.

Statute.

24 & 25 *Vict.* c. 96 (*Larceny Act*, 1861), s. 1.—*Definition of Document of Title to Lands.*]—(*Ante*, p. 427.)

Sect. 28.]—Whosoever shall steal, *or shall for any fraudulent purpose destroy, cancel, obliterate or conceal, the whole or any part of* any document of title to lands, shall be guilty of *felony*, and being convicted thereof shall be liable . . . to be kept in penal servitude . . . ;

And in any indictment for any such offence relating to any document of title to lands, it shall be sufficient to allege such document to be or to contain evidence of the title or of part of the title of the person or of some one of the persons having an interest, whether vested or contingent, legal or equitable, in the real estate to which the same relates, and to mention such real estate, or some part thereof. [*This section re-enacts* 7 & 8 *G.* 4, c. 29, s. 23, *with the alterations indicated in italics. See Greaves Criminal Law Consolidation Acts* (2nd ed.), p. 123.]

Sect. 29.]—*Ante*, p. 495.

Indictment.

Commencement as ante, p. 433]—a certain deed, the property of J. N., being [*or*, containing] evidence of the title [*or*, of part of the title] of the said J. N. to a certain real estate [*or*, to part of a certain real estate] called *Whiteacre*, in which said real estate the said J. N. then had, and still hath, an interest, feloniously did steal, take and carry away (*or* feloniously and unlawfully, and for a fraudulent purpose did destroy [*destroy, cancel, obliterate or conceal*]); against the form [*as ante*, p. 465]. *Add a second count, describing the nature of the instrument more particularly thus:*—a certain [other] deed, being a deed of release between A. B. of the one part, and C. D. of the other part, the property of J. N., being evidence, etc. *And where the indictment is for destroying, etc., the document, add a count specifying the fraudulent purpose, if it can be done; see ante*, p. 496. *It is sufficient to allege the document stolen to be or to contain evidence of the title, or of part of the title, of the person, or of some one of the persons, having an interest, whether vested or contingent, legal or equitable, in the real estate to which the same relates; and to mention such real estate, or some part thereof.*—24 & 25 *Vict. c.* 96, *s.* 28.

Mortgage deeds, being subsisting securities for money, are choses in action, and cannot be described in an indictment as "goods and chattels." *R. v. Powell*, 2 *Den.* 403; 21 *L. J.* (*M. C.*) 78.

Felony: penal servitude for not less than three years and not exceeding five years, or imprisonment for not more than two years, with or without hard labour—24 & 25 *Vict. c.* 96, *s.* 28; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove a larceny of the deed, as directed *ante*, p. 434, *et seq.* Prove also, that it is, or contains, evidence of the title or part of the title of J. N. to the real estate mentioned in the indictment, or part of it, which may be done by producing the instrument, or giving secondary evidence of it (*see ante*, pp. 315, 316, 380), and by showing how J. N. claims the estate. Prove, also, that at the time of the larceny J. N. had an interest (whether vested or contingent, legal or equitable, is sufficient) in the real estate, of his title to which the deed is evidence.

No person can be convicted of this offence by any evidence whatever in respect of any act done by him, if at any time previously to its being charged with the offence he shall "have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency." 24 & 25 *Vict. c.* 96, *s.* 29 (*see ante*, p. 495).

CONCEALMENT OF INSTRUMENT OF TITLE OR FALSIFICATION OF PEDIGREE BY VENDOR OR MORTGAGOR, OR HIS SOLICITOR OR AGENT.

Statute.

22 & 23 *Vict. c.* 35 (*Law of Property Amendment Act*, 1859), *s.* 24.]—Any seller or mortgagor of land, or of any chattels, real or personal, or choses

in action conveyed or assigned to a purchaser [*or* mortgagee, *see* 23 & 24 *Vict. c.* 38, *s.* 8, *infra*], or the solicitor or agent of any such seller or mortgagor, who shall, after the passing of this Act (Aug. 13, 1859) conceal any settlement, deed, will, or other instrument material to the title, or any incumbrance from the purchaser [*or* mortgagee, *see* 23 & 24 *Vict. c.* 38, *s.* 8, *infra*], or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor, and being found guilty shall be liable, at the discretion of the court, to suffer such punishment by fine or imprisonment for any time not exceeding two years, with or without hard labour or by both, as the court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them, or either or any of them, in consequence of the settlement, deed, will, or other instrument or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages, where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them or either or any of them in improvements on the land; but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of [his] Majesty's attorney-general, or in case that office be vacant, of [his] Majesty's solicitor-general; and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted as the attorney-general or the solicitor-general (as the case may be) shall direct.

Sect. 25.—*Interpretation.*]—In the construction of the previous provisions in this Act

The term "land" shall be taken to include all tenements and hereditaments, and any part or share of or estate or interest in any tenements or hereditaments, of what tenure or kind soever; and

The term "mortgage" shall be taken to include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged, or charged as security for the repayment of money or money's worth lent, and to be re-conveyed, re-assigned, or released on satisfaction of the debt; and

The term "mortgagor" shall be taken to include every person by whom such conveyance, assignment, pledge, or charge as aforesaid shall be made; and

The term "mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, assignment, pledge, or charge as aforesaid is made or transferred.

23 & 24 *Vict. c.* 38 (*Law of Property Amendment Act*, 1860), *s.* 8.]—The section 24 in the Act 22 & 23 *Vict. c.* 35 (*supra*), shall be read and construed as if the words "or mortgagee" had followed the word "purchaser" in every place where the latter word is introduced in the said section.

STEALING VALUABLE SECURITIES.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 27.]—Whosoever shall steal, *or shall for any fraudulent purpose destroy, cancel, or obliterate the whole or any part of* any valuable security, other than a document of title to lands (*see ante*, p. 427), shall be guilty of felony, of the same nature and in the same degree, and punishable in the same manner, as if he had stolen any chattel of like value with the share, interest or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing *represented*, mentioned *or referred to in or by the security.* [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 5, *with addition of the words italicized.*]

Definition of valuable security.]—*Sect.* 1, *ante*, p. 427.

Definition of document of title to goods.]—*Ante*, p. 426.

Indictment.

Commencement as ante, p. 433]—a certain valuable security, other than a document of title to lands, to wit, one bill of exchange for the payment of ten pounds, the property of J. N. [the said sum of ten pounds secured and payable by and upon the said bill of exchange being then due and unsatisfied to the said J. N.], feloniously did steal, take, and carry away; against the form [*as ante*, p. 465]. *As to the description of the bill or other security, see ante*, pp. 74, 75. *As the* 24 & 25 *Vict. c.* 96, *s.* 27, *limits the term "valuable security" to securities "other than a document of title to lands," it is material, in an indictment under it, to describe the security so as to show that it is within the section. R.* v. *Lowrie, L. R.* 1 *C. C. R.* 61; 36 *L. J.* (*M. C.*) 24. *If the instrument be for any reason void in law, the defendant may be convicted on a count charging him with stealing a piece of paper. R.* v. *Perry*, 1 *Den.* 69; 1 *C. & K.* 725.

Felony of the same nature, and in the same degree, and punishable in the same manner, as if the defendant had stolen any chattel of like value with the share, interest, or deposit to which the security stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security. 24 & 25 *Vict. c.* 96, *s.* 27 (*supra*).

Evidence.

Prove a larceny of the bill, etc., as directed, *ante*, p. 434, *et seq.* The defendant, a stock-broker, received from the prosecutor a cheque upon his banker, to purchase Exchequer bills for him; the defendant cashed the cheque and absconded with the money. Upon an indictment for stealing the cheque and the proceeds of it, it was held to be no larceny, although the jury found that, before he received the cheque, the defendant had formed the intention of converting the money to his own use; not of the cheque, because the defendant had used no fraud or contrivance to induce the prosecutor to give it to him; and because being the prosecutor's own cheque, and of no value in his hands, it could not be called his goods and chattels; nor of the proceeds of the cheque,

because the prosecutor never had possession of them, except by the hands of the defendant. *R.* v. *Walsh*, *R. & R.* 215. But where the prosecutors gave to the defendant, who was occasionally employed as their clerk, a cheque payable to a creditor, to be delivered by him to the creditor, and he appropriated it to his own use, it was held by the judges to be a larceny of the cheque. *R.* v. *Metcalf*, 1 *Mood. C. C.* 433: *R.* v. *Heath*, 2 *Mood. C. C.* 33.

The bill or other security must be of the description specified in the statute. *R.* v. *Lowrie*, *ubi supra*. Where the defendant was indicted under 15 *G.* 2, *c.* 13, *s.* 12 (*rep.*) for stealing certain bills, commonly called Exchequer bills, and it appeared in evidence that the person who signed them on the part of the Government was not legally authorized to do so, it was held that they were not good Exchequer bills. *R.* v. *Aslett*, 2 *Leach*, 954. But on a subsequent trial of the same person, the documents were held to be "valuable effects or securities" within the said statute. *Id.* 958, 974.

In cases where the prosecutor has been compelled by duress or induced by fraud to sign a "valuable security," difficulties formerly arose in proving in support of an indictment for larceny that the property or possession of the instrument in question was in the prosecutor. These cases (*R.* v. *Phipoe*, 2 *Leach*, 673: *R.* v. *Edwards*, 6 *C. & P.* 515, 521: *R.* v. *Smith*, 2 *Den.* 449; 21 *L. J.* (*M. C.*) 111) are now provided for by 24 *&* 25 *Vict. c.* 96, *ss.* 48 *and* 90, which made it a criminal offence for a person by threats (*s.* 48, *post*, p. 522) or false pretences (*s.* 90, *post*, p. 594) to induce another to affix his name to any paper "in order that the same may be afterwards made or converted into or used or dealt with as a valuable security."

In consequence of an advertisement, A. applied to B. to raise money for him, B. promised to procure 5000*l.*, and produced ten blank 6*s.* stamps, across which A. wrote an acceptance, and B. took them up without saying anything, and afterwards filled up the stamps for 500*l.* each, and put them into circulation on these facts. *Littledale*, J., *Bolland*, B., and *Bosanquet*, J., held that the stamps so filled up were not bills of exchange, orders for the payment of money, or securities for money, within the meaning of 7 *&* 8 *G.* 4, *c.* 29, *s.* 5 (*rep.*); and that, as the prosecutor never had any possession of the papers so as to enable him to maintain trespass for them, there was no taking of them such as to constitute larceny. *R.* v. *Minter Hart*, 6 *C. & P.* 106. But a document which was a complete bill of exchange in all respects, except that it wanted the drawer's signature, was held to be, when it had reached the hands of the intended drawer, a "security for the payment of money," within 24 *&* 25 *Vict. c.* 96, *s.* 75 (*rep.*): *R.* v. *Bowerman* [1891] 1 *Q. B.* 112; 60 *L. J.* (*M. C.*) 13; and therefore would seem to be so within 24 *&* 25 *Vict. c.* 96, *s.* 1. Where country bank-notes, paid by the agent in London, were sent by him to the bankers in the country to be re-issued, and were stolen by the defendant, who was indicted for stealing the notes, and also for stealing the paper and stamps, this was held to be a larceny of the paper and stamps; but the judges seem to have been of opinion that the notes were not within 2 *G.* 2, *c.* 25, *s.* 3 (*rep.*), because it could not be said that the money secured thereby was due and unsatisfied. *R.* v. *Clark*, *R. & R.* 181; 2 *Leach*, 1036. *See* *R.* v. *Perry*, 1 *Den.* 69; 1 *C. & K.* 725 (*ante*, p. 501). So, where the defendant was indicted for receiving certain pieces of stamped paper, the goods and chattels of the prosecutor, and it appeared that the notes had been paid in London, and were in the possession of a partner of the firm, who was taking them to the country to be re-issued, when they were stolen, it was held that they were properly described in the indictment

as goods and chattels; but some of the judges doubted whether they were valuable securities within the meaning of 7 & 8 *G.* 4, *c.* 29, *s.* 5 (*rep.*). *R.* v. *Vyse*, 1 *Mood. C. C.* 218. Documents which purported to be certificates entitling the holder to shares, and to receive dividends in a *foreign* railway company, and which passed by delivery like bank-notes, and were treated and dealt with on the London stock exchange as railway shares, were held to be valuable securities within that statute. *R.* v. *Smith, Dears.* 561; 25 *L. J.* (*M. C.*) 31. The halves of notes, if stolen, may be described as goods and chattels. *R.* v. *Mead*, 4 *C. & P.* 535. It would seem, however, that they may also be described as *parts* of a valuable security, *see* 24 & 25 *Vict. c.* 96, *s.* 27 (*ante*, p. 500). The notes themselves may be described as money: 14 & 15 *Vict. c.* 100, *s.* 18 (*ante*, p. 54). Where upon an indictment on 7 *G.* 3, *c. s.* (*rep.*), which made it felony for persons employed in the post office to secrete any letter, etc., containing any note, etc., it appeared that the note had been paid to the holder, and had not been re-issued, the judges were of opinion that such notes retained the character and fell within the description of promissory notes, and were, as promissory notes, valuable to the owners of them. *R.* v. *Ranson*, *R. & R.* 232; 2 *Leach*, 1090, 1093. A cheque on a banker, written on unstamped paper, payable to D. F. J., and not made payable to bearer, was held not to be a valuable security within the meaning of the statute. *R.* v. *Yates*, 1 *Mood. C. C.* 170. A cheque on a banker may be described as "a valuable security, to wit, a cheque of the value of," etc., without stating the drawee to be a banker. *R.* v. *Heath*, 2 *Mood. C. C.* 33. It is not necessary that a bill should be indorsed by the payee at the time it is stolen, so as to be in a negotiable state. *Anon.*, 2 *East, P. C.* 598. But in *R.* v. *Pooley*, *R. & R.* 12: 2 *Leach*, 887, an unstamped draft was held to be of no value and not to be a bill or draft within 7 *G.* 3, *c.* 50, *s.* 1 (*rep.*).

Money orders—Postal orders.]—The *money orders* issued by the post office are warrants and orders for the payment of money within the statute; and it is no objection that they are unstamped, the practice of issuing them without a stamp having existed before, and been legalized by 3 & 4 *Vict. c.* 96. *R.* v. *Gilchrist*, 2 *Mood. C. C.* 233; *C. & Mar.* 224. *See also* 43 & 44 *Vict. c.* 33, *s.* 4, *sub-s.* 4 (*ante*, p. 432), as to *postal orders*.

A pawnbroker's duplicate was held to be a warrant for the delivery of goods, within 7 & 8 *G.* 4, *c.* 29, *s.* 5 (*rep.*). *R.* v. *Morrison, Bell*, 158; 28 *L. J.* (*M. C.*) 210. A written agreement to pay money for a sufficient consideration appearing on the face thereof is a valuable security within 24 & 25 *Vict. c.* 96, *s.* 1 (*ante*, p. 427). *R.* v. *John*, 13 *Cox*, 100, *Brett*, J.

By 16 & 17 *Vict. c.* 2, the Bank of England may impress upon their notes, etc., by machinery, the names of their cashiers, etc.; and notes so impressed are to be deemed and taken to be, and may be described in indictments, as bank-notes, etc., in the same manner as if they had been subscribed in the handwriting of the cashiers, etc.

STEALING, ETC., POSTAL PACKETS, ETC.

Statutes.

7 *W.* 4 & 1 *Vict. c.* 36 (*Post Office Offences Act*, 1837), *s.* 25—*Opening or delaying letters.*]—Every person employed by or under the post office who

shall contrary to his duty open or procure or suffer to be opened a post letter, or who shall wilfully detain or delay, or procure or suffer to be detained or delayed a post letter, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof, shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet: Provided always, that nothing herein contained shall extend to the opening or detaining or delaying of a post letter returned for want of a true direction, or of a post letter returned by reason that the person to whom the same shall be directed is dead or cannot be found, or shall have refused the same, or shall have refused or neglected to pay the postage thereof; nor to the opening or detaining or delaying of a post letter in obedience to an express warrant in writing under the hand in Great Britain of one of the principal secretaries of state, and in Ireland under the hand and seal of the Lord Lieutenant of Ireland.

Sect. 26—*Stealing or embezzling letters.*]—Every person employed under the post office who shall steal, or shall for any purpose whatever embezzle, secrete, or destroy, a post letter, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall, at the discretion of the court, either be *transported beyond the seas* for the term of *seven* years, or be imprisoned for any term not exceeding *three* years; and if any such post letters so stolen or embezzled, secreted, or destroyed, shall contain therein any chattel or money whatsoever, or any valuable security, every such offender shall be *transported beyond the seas* for life. [*As to present punishment, see ante*, pp. 235, 236.]

Sect. 27—*Stealing money, etc., out of letters.*]—Every person who shall steal from or out of a post letter any chattel, money, or valuable security, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be *transported beyond the seas* for life. [*As to present punishment, see ante*, pp. 235, 236.]

Sect. 28—*Stealing Letters sent by the mail.*]—Every person who shall steal a post-letter bag, or a post letter from a post-letter bag, or shall steal a post letter from a post office, or from an officer of the post office, or from a mail, or shall stop a mail with intent to rob or search the same, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be *transported beyond the seas* for life. [*As to present punishment, see ante*, pp. 235, 236.]

Sect. 29—*Stealing, etc., letters sent by a post-office packet.*]—Every person who shall steal, or unlawfully take away a post-letter bag sent by a post-office packet, or shall steal, or unlawfully take a letter out of any such bag, or shall unlawfully open any such bag, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be *transported beyond the seas* for any term not exceeding fourteen years. [*As to present punishment, see ante*, pp. 235, 236.]

Sect. 30—*Receiving stolen letters, etc.*]—*Post*, p. 535.

Sect. 31—*Fraudulently retaining letters after delivery, etc.*]—*Recites, that post letters are sometimes by mistake delivered to the wrong person; and post letters and post-letter bags are lost in the course of conveyance or delivery thereof, and are detained by the finder in expectation of gain or reward, and enacts, that* Every person who shall fraudulently retain, or shall wilfully secrete or keep, or detain, or, being required to deliver up by an officer

of the post office, shall neglect or refuse to deliver up a post letter which ought to have been delivered to any other person, or a post-letter bag or post letter which shall have been sent, whether the same shall have been found by the person secreting, keeping, or detaining, or neglecting or refusing to deliver up the same, or by any other person, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable to be punished by fine and imprisonment. [*See ante*, pp. 237-240. *This section was passed to meet the cases of R.* v. *Mucklow*, 1 *Mood. C. C.* 160; *and see also R.* v. *Davies*, *Dears.* 640: 25 *L. J.* (*M. C.*) 91.]

54 & 55 *Vict. c.* 46 (*Post Office Act*, 1891), *s.* 10—*Opening or impeding delivery of letters by person not in employment of postmaster-general.*]—Any person not in the employment of the postmaster-general who wilfully and maliciously, with intent to injure any other person, either opens or causes to be opened any letter which ought to have been delivered to such other person, or does any act or thing whereby the due delivery of such letter to such other person is prevented or impeded, shall be guilty of a misdemeanor, and be liable to a fine not exceeding fifty pounds, or to imprisonment not exceeding six months.

Nothing in this section shall apply to a person who does any act to which this section applies where he is parent or in the position of a parent or guardian of the person to whom the letter is addressed.

A prosecution shall not be instituted in pursuance of this section except by direction of the postmaster-general.

A letter in this section means a post letter within the meaning of the *Post-Office* (*Protection*) *Act*, 1884 [47 & 48 *Vict. c.* 76, *see s.* 19 *of that statute*, *post*, p. 507], and any other letter which has been delivered by post.

Sect. 12, *sub-s.* 2.]—This Act shall be deemed to be a post-office Act within the meaning of the *Post-Office* (*Offences*) *Act*, 1837 [7 *W.* 4 & 1 *Vict. c.* 36].

7 *W.* 4 & 1 *Vict. c.* 36, *s.* 36—*Endeavouring to procure the commission of such offences.*]—Every person who shall solicit or endeavour to procure any other person to commit a felony or misdemeanor punishable by the post-office Acts, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being thereof convicted, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years.

Sect. 37—*Venue: Trial and punishment of accessories and abettors.*]—The offence of every offender against the post-office Acts may be dealt with, and indicted and tried, and punished, and laid and charged to have been committed in England and Ireland either in the county or place where the offence shall be committed, or in any county or place in which he shall be apprehended or be in custody, as if his offence had been actually committed in that county or place [provisions as to trial in Scotland omitted]; and where an offence shall be committed, in or upon, or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post-letter bag or post letter, or in respect of a post-letter bag or post letter, or a chattel, or money, or valuable security sent by the post, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed, as well in any county or place in which the offender shall be apprehended or be in custody, as

also in any county or place through any part whereof the mail, or the person, or the post-letter bag, or the post letter, or the chattel, or the money, or the valuable security sent by the post, in respect of which the offence shall have been committed, shall have passed in due course of conveyance or delivery by the post, in the same manner as if it had been actually committed in such county or place; and in all cases where the side or the centre, or other part of a highway, or the side, the bank, the centre, or other part of a river, or canal, or navigation, shall constitute the boundary of two counties, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed, in either of the said counties through which or adjoining to which, or by the boundary of any part of which, the mail or person shall have passed in due course of conveyance or delivery by the post, in the same manner as if it had actually been committed in such county or place; and every accessory before or after the fact to any such offence, if the same be a felony or a high crime, and every person aiding or abetting, or councilling (*sic*) or procuring the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried and punished, as if he were a principal, and his offence laid and charged to have been committed in any county or place in which the principal offender may be tried.

Sect. 39—*Punishment of post-office offences committed in admiralty jurisdiction.*]—*See ante*, pp. 39–43.

Sect. 40—*Property, how laid.*]—In every case where an offence shall be committed in respect of a post-letter bag or a post letter, or a chattel, money, or a valuable security sent by the post, it shall be lawful to lay, in the indictment or criminal letters to be preferred against the offender, the property of the post-letter bag or of the post letter, or chattel or money, or the valuable security sent by the post, in the postmaster-general; and it shall not be necessary in the indictment or criminal letters to allege or to prove upon the trial or otherwise, that the post-letter bag, or any such post letter, or valuable security, was of any value; and in any indictment or in any criminal letters to be preferred against any person employed under the post office for any offence committed against the post-office Acts, it shall be lawful to state and allege that such offender was employed under the post office of the United Kingdom at the time of the committing of such offence, without stating further the nature or particulars of his employment. [*And see ante*, p. 65.]

Sect. 41—*Punishment.*]—Every person convicted of any offence for which the punishment of transportation for life is herein awarded, shall be liable to be transported beyond the seas for life, or for any term . . . and every person convicted of any offence punishable according to the post-office Acts by *transportation* for fourteen years, shall be liable to be *transported* for any term not exceeding fourteen years. . . . [*See ante*, pp. 235, 236.]

Sect. 42—*Hard labour.*]—Where any person shall be convicted of an offence punishable under the post-office Acts, for which imprisonment may be awarded, the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction. . . .

47 & 48 *Vict. c.* 76, *s.* 13—*Power to mitigate punishment.—Repealed as*

to indictable offences, 61 & 62 *Vict. c.* 22 (*S. L. R.*); *see* 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

7 *W.* 4 & 1 *Vict. c.* 86, *s.* 47—*Interpretation of terms.*(*a*)]—The following terms and expressions shall have the several interpretations hereinafter respectively set forth, unless such interpretations are repugnant to the subject, or inconsistent with the context of the provisions in which they may be found: (that is to say) . . . the term "*letter*" shall include packet, and the term "*packet*" shall include letter; . . . and the term "*mail*" shall include every conveyance by which post letters are carried, whether it be a coach or cart or horse, or any other conveyance, and also a person employed in conveying or delivering post letters, and also every vessel which is included in the term "packet boat"; and the term "*mail bag*" shall mean a mail of letters, or a box, or a parcel, or any other envelope in which post letters are conveyed, whether it does or does not contain post letters; and the term "*master of a vessel*" shall include any person in charge of a vessel, whether commander, mate, or other person, and whether the vessel be a ship of war, or other vessel; and the expression "*officer of the post office*" shall include the postmaster-general and every deputy postmaster, agent, officer, clerk, letter carrier, guard, post boy, rider, or any other person employed in any business of the post office, whether employed by the postmaster-general, or by any person under him, or on behalf of the post office; . . . and the term "*packet letter*" shall mean a letter transmitted by a packet boat; . . . and the expression "*persons employed by or under the post office*" shall include every person employed in any business of the post office, according to the interpretation given to "officer of the post office;" and the terms "*packet boats*" and "*post-office packets*" shall include vessels employed by or under the post office or the admiralty, for the transmission of post letters, and also ships or vessels (though not regularly employed as packet boats) for the conveyance of post letters under contract, and also a ship of war or other vessel in the service of his Majesty, in respect of letters conveyed by it; and the term "*postage*" shall mean the duty chargeable for the transmission of post letters; and the term of "*post town*" shall mean a town where a post office is established (not being a penny, or twopenny, or convention post office); and the term "*post-letter bag*" shall include a mail bag or box, or packet, or parcel, or other envelope or covering in which post letters are conveyed, whether it does or does not contain post letters: . . . the terms "*post-office Acts*" and "*post-office laws*" shall mean all Acts relating to the management of the post, or to the establishment of the post office, or to postage duties, from time to time in force; [*see also* 32 & 33 *Vict. c.* 73, *s.* 24 (*post* p. 509), *as to the Telegraph Acts*]; . . . and the term "*United Kingdom*" shall mean the United Kingdom of *Great Britain* and *Ireland*; and the term "*valuable security*" shall include the whole or any part of any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company or society, or to any deposit in any savings bank, or the whole or any part of any debenture, deed, bond, bill, note, warrant, or order or other security whatsoever for money, or for payment of money, whether of this kingdom or of any foreign state, or of any warrant or order for the delivery or transfer of any goods or valuable thing; [*see R.* v. *Ranson*, *R.* & *R.* 232:

(*a*) Only so much of the section is set out as is necessary to explain the sections above quoted.

and see also 43 & 44 *Vict. c.* 33, *s.* 4, *sub-s.* 4, *ante*, p. 432, *as to postal orders*]: . . . and every officer mentioned shall mean the person for the time being executing the functions of that officer; and whenever in this Act, or the schedules thereto, with reference to any person, or matter, or thing, or to any persons, matters or things, the singular or plural number, or the masculine gender only is expressed, such expression shall be understood to include several persons, or matters or things, as well as one person, or matter, or thing, and one person, matter, or thing, as well as several persons, or matters, or things, females as well as males, bodies politic or corporate as well as individuals, unless it be otherwise specially provided, or the subject or context be repugnant to such construction.

62 & 63 *Vict. c.* 63 (*Interpretation Act*, 1889), *s.* 12.]—In this Act and in every other Act, whether passed before or after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely: . . . (2) The expression "*the Treasury*" shall mean the lord high treasurer for the time being, or the commissioner for the time being of his Majesty's Treasury. . . . (11) The expression "*postmaster-general*" shall mean his Majesty's postmaster-general for the time being. . . . [*These enactments supersede the similar definitions in* 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 47, *which are repealed by* 53 & 54 *Vict. c.* 51 (*S. L. R.*).]

47 & 48 *Vict. c.* 76 (*Post-Office* (*Protection*) *Act*, 1884), *s.* 19—"*Post letter*," "*post office*," "*post-office letter box*"—*meaning of these terms—evidence.*]—In this Act and in the *Post-Office* (*Offenders*) *Act*, 1837 (7 *W.* 4 & 1 *Vict. c.* 36), and in any enactments incorporating or referring to that Act, or to be construed as one therewith, the following expressions shall, unless the context otherwise requires, have the meanings assigned to them by this section (that is to say) the expression "*post letter*" shall mean a postal packet, as defined by this Act (*see post*, *s.* 20) from the time of its being delivered to a post office to the time of its being delivered to the person to whom it is addressed, and a delivery of a postal packet of any description to a letter carrier or other person authorized to receive postal packets of that description for the post shall be a delivery to the post office, and a delivery at the house or office of the person to whom the postal packet is addressed, or to whom or to his servant or agent, or other person considered to be authorized to receive the postal packet according to the usual manner of delivering that person's postal packets, shall be a delivery to the person addressed. The expression "*post office*" shall mean any house, building, room, carriage, or place where postal packets, as defined by this Act, or any of them, are by the permission or under the authority of the postmaster-general received, delivered, sorted, or made up, or from which such packets, or any of them, are by the authority of the postmaster-general despatched, and shall include any post-office letter box. The expression "*post-office letter box*" shall include any pillar box, wall box, or other box or receptacle provided by the permission, or under the authority of the postmaster-general for the purpose of receiving postal packets, or any of them, for transmission by or under the authority of the postmaster-general. . . . A certificate purporting to be signed by the postmaster-general or any secretary or assistant secretary of the post office, and to the effect that any box or receptacle is or was provided by the permission or under the authority of the postmaster-general for the purpose of receiving postal packets, or any of them, shall in any legal proceeding be evidence of the facts stated in the certificate.

Sect. 20—"*Postal packet*," *meaning of the term.*]—In this Act, unless the context otherwise requires, the expression "*postal packet*" has the same meaning as in the *Post Office Act*, 1875 (38 & 39 *Vict. c.* 22, *s.* 10, *infra*), as amended by this Act, inclusive of such postal packets as are defined by regulations of the Treasury to be parcels, and includes a telegram.

38 & 39 *Vict. c.* 22 (*Post Office Act*, 1875), *s.* 10—"*Postal packet*," *meaning of the term.*]—The expression "*postal packet*" in this Act means a letter, post card, newspaper, book packet, pattern or sample packet, circular, legal and commercial document, packet of photographs, and every packet or article which is not for the time being prohibited by or in pursuance of the post-office Acts from being sent by post. . . .

Sect. 11.]— . . . This Act shall be deemed one of the *Post Office Acts* within the meaning of the Act described in Part One of the Schedule to this Act [*i.e.* of the *Post Office* (*Offences*) *Act*, 1837 (7 *W.* 4 & 1 *Vict. c.* 36), *supra*].

47 & 48 *Vict. c.* 76, *s.* 12, *sub-s.* 5—*Postal packet, evidence of article being.*] —On the prosecution of any offence under the *Post Office Acts*, whether on summary conviction or on indictment, evidence that any article is in the course of transmission by post or has been accepted on behalf of the postmaster-general for transmission by post shall be sufficient evidence that such article is a postal packet.

31 & 32 *Vict. c.* 110 (*Telegraph Act*, 1868), *s.* 20—*Officials of post office disclosing or intercepting telegraph messages.*]—Any person having official duties connected with the post office, or acting on behalf of the postmaster-general, who shall, contrary to his duty, disclose or in any way make known or intercept the contents, or any part of the contents, of any telegraphic messages, or any message intrusted to the postmaster-general for the purpose of transmission, shall, in England and in Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and shall upon conviction be subject to imprisonment for a term not exceeding twelve calendar months; and the postmaster-general shall make regulations to carry out the intentions of this section, and to prevent the improper use by any person in his employment or acting on his behalf of any knowledge he may acquire of the contents of any telegraphic message.

Sect. 21—*Property in telegraphic messages, how laid—Form of indictment.*]—In every case where an offence shall be committed in respect of a telegraphic message sent by or intrusted to the postmaster-general, it shall be lawful and sufficient, in the indictment or criminal letters to be preferred against the offender, to lay the property of such telegraphic message in his Majesty's postmaster-general, without specifying any further or other name, addition, or description whatsoever, and it shall not be necessary in the indictment or criminal letters to allege or to prove upon the trial or otherwise that the telegraphic message was of any value; and in any indictment to be preferred against any person employed under the post office, for any offence committed under this Act, it shall be lawful and sufficient to state and allege that such offender was employed under the post office at the time of the committing of such offence, without stating further the nature or particulars of his employment.

32 & 33 *Vict. c.* 73 (*Telegraph Act*, 1869), *s.* 23—*Telegraphic messages to be deemed post letters.*]—Every written or printed message or communication delivered at a post office for the purpose of being transmitted by a postal telegraph, and every transcript thereof made by any person acting in pursuance of the orders of the postmaster-general, shall be a post letter within the meaning of the *Post Office* (*Offences*) *Act*, 1837 (7 *W.* 4 & 1 *Vict. c.* 36): Provided always, that nothing in this Act contained shall have the effect of relieving any officer of the post office from any liability which would, but for the passing of this Act, have attached to a telegraph company, or to any other company or person, to produce in any court of law, when duly required so to do, any such written or printed message or communication.

Sect. 24—*Telegraph Acts to be Post Office Acts.*]—*The Telegraph Act*, 1868, and this Act shall be "*Post Office Acts*," and the provisions contained therein respectively shall be "post-office laws," within the meaning of the "*Post Office* (*Offences*) *Act*, 1837 (7 *W.* 4 & 1 *Vict. c.* 36). [*See s.* 47 of that Act, *ante*, p. 506.]

47 & 48 *Vict. c.* 76 (*Post Office* (*Protection*) *Act*, 1884), *s.* 11—*Improper disclosure of telegrams.*]—If any person being in the employment of a telegraph company as defined by this section—improperly divulges to any person the purport of any telegram; such person shall be guilty of a misdemeanor and be liable on summary conviction to a fine not exceeding 20*l.*, and on conviction on indictment to imprisonment, with or without hard labour, for a term not exceeding one year, or to a fine not exceeding 200*l.*

For the purposes of this section the expression "*telegram*" means a written or printed message or communication sent to or delivered at a post office, or the office of a telegraph company, for transmission by telegraph, or delivered by the post office or a telegraph company as a message or communication transmitted by telegraph.

The expression "*telegraph company*" means any company, corporation, or persons carrying on the business of sending telegrams for the public under whatever authority or in whatever manner such company, corporation, or persons may act or be constituted. The expression "*telegraph*" has the same meaning as in the *Telegraph Act*, 1869, and the Acts amending the same.

Indictment against an Officer of the Post Office for opening or delaying Letters (7 *W.* 4 & 1 *Vict. c.* 36 (*Post Office* (*Offences*) *Act*, 1837), *s.* 25).

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, at the parish of ——, in the county of ——, and within the jurisdiction of the said court, being then a person employed by and under the post office of the United Kingdom, did unlawfully and contrary to his duty open ("*open or procure or suffer to be opened*") [*or* unlawfully and wilfully detain ("*detain or delay, or procure or suffer to be detained or delayed*")] a post letter, the property of the postmaster-general; against the form [*as ante*, p. 465]. *The property may be laid in the "postmaster-general," and it is not necessary to allege or prove any value, or to state the nature of the defendant's employment.* 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 49. *It does not seem to be necessary to negative the exceptions contained in the proviso, for the proviso is distinct and the prohibition general.* (*See ante*, pp. 80, 303.)

As to the venue, see ante, p. 50, 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 37, *ante*, p. 504.

Misdemeanor: fine, or imprisonment, with or without hard labour, 7 *W.* 4 & 1 *Vict. c.* 36, *ss.* 25, 42. (*See ante*, pp. 237-240.)

Evidence.

Prove that the defendant was at the time of the commission of the offence a person employed by or under the post office of the United Kingdom. For this purpose evidence of his acting as such is sufficient, without proving his appointment. *R.* v. *Evan Rees*, 6 *C.* & *P.* 606. *See R.* v. *Borrett*, 6 *C.* & *P.* 124: *R.* v. *Townsend*, *C.* & *Mar.* 178. Where the defendant, a letter carrier from C. to T., had brought the C. letter bag, and safely delivered it to the postmaster at T., whose duty it was to sort the letters in time to make up the bags for the mails, the defendant's duty as a letter carrier being complete for the delivery of the letters to the postmaster; but the defendant was afterwards requested by the postmaster to assist him in the sorting, and consented to do so, and in the course of doing so stole a letter; it was held that while so engaged in sorting the letters he was a person employed under the post office, within the statute. *R.* v. *Reason*, *Dears.* 226; 23 *L. J.* (*M. C.*) 11. *See R.* v. *Glass*, 2 *C.* & *K.* 395. Then prove that the defendant opened the letter, or delayed it, according to the allegation in the indictment. The defendant may prove, in answer to the charge, any of the circumstances specified in the proviso, and which would authorize him to open or detain the letter.

Indictment against an Officer of the Post Office for stealing or embezzling Letters. (7 *W.* 4 & 1 *Vict. c.* 36 (*Post Office* (*Offences*) *Act*, 1837), *s.* 26).

Commencement as in the last precedent]—feloniously did steal, take, and carry away ("*embezzle, secrete, or destroy*")] one post letter, the property of the postmaster-general, containing therein a certain valuable security, to wit, a bill of exchange ("*any chattel, or money, or valuable security*") for the payment of ten pounds,* the property of the postmaster-general; against the form [*as ante*, p. 465].

* *This allegation may be omitted, if the letter did not contain any chattel, money, or valuable security. The property may be laid in the "postmaster-general," and it is not necessary to allege or prove any value, or to state the nature of the defendant's employment.* 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 40. *As to the venue, see ante*, p. 50; *and* 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 37 (*ante*, p. 504). *A count for embezzling or secreting letters need not aver any purpose or intent. R.* v. *Wynn*, 1 *Den.* 365, 2 *C.* & *K.* 859; 18 *L. J.* (*M. C.*) 51. [*As to form of indictment for embezzlement, see post*, p. 559].

Felony: if the letter contain any chattel, money, or valuable security, penal servitude for life or for not less than three years, or imprisonment not exceeding two years, 7 *W.* 4 & 1 *Vict. c.* 36, *ss.* 26, 41; *with or without hard labour*, 7 *W.* 4 & 1 *Vict. c.* 36, *ss.* 41, 42; 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

If the letter do not contain any chattel, money, or valuable security, penal servitude for not more than seven nor less than three years, or imprisonment not exceeding two years, with or without hard labour. 7 *W.* 4 & 1 *Vict. c.* 36, *ss.* 25, 42; 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

Evidence.

Prove that the defendant was at the time he committed the offence employed under the post office. *See R.* v. *Evan Rees*, 6 *C. & P.* 606, *ante*, p. 510; *R.* v. *Reason, Dears.* 226; 23 *L. J.* (*M. C.*) 11 (*ante*, p. 510); *R.* v. *Milner*, 4 *Cox*, 275; *R.* v. *Simpson*, 4 *Cox*, 276. It seems not to be necessary to prove his appointment if it can be proved that he acted as an employee of the post office. *R.* v. *Borrett* [1833] 6 *C. & P.* 124, 1 *Taylor, Ev.* (9th ed.), p. 148 (*and see ante*, p. 344). Then prove that he stole the letter, with its contents (*see ante*, p. 434, *et seq.*); or that he embezzled, secreted, or destroyed it. It is not necessary to prove that the letter or valuable security was of any value. 7 *W.* 4 *and* 1 *Vict. c.* 36, *s.* 40 (*ante*, p. 505). Prove that the letter was posted by calling the person who posted it, and producing the receipt or certificate, if any, given by the postal authorities of posting, or registration, or delivery (38 *& 39 Vict. c.* 22, *s.* 3; 54 *& 55 Vict. c.* 46, *s.* 4), or by producing the letter bearing a post-mark; which *semble* is *primâ facie* evidence of posting. *R.* v. *Plumer, R. & R.* 264; 15 *R. R.* 741: *Woodcock* v. *Houldsworth*, 16 *M. & W.* 124: *Roscoe, Nisi Prius Ev.* (17th ed.), 123, 218: 1 *Taylor, Ev.* (9th ed.), pp. 158, 159: *R.* v. *Johnson*, 7 *East*, 65. Any letter *posted* in the ordinary way, whatever be its address or object, is a *post letter* within the statute; *Young* v. *R.*, 1 *Den.* 194; 2 *C. & K.* 466; therefore, where a fictitious letter is sent, with money in it, to try the honesty of the defendant, the stealing of it is within the statute, *Id.*; overruling *R.* v. *Gardner*, 1 *C. & K.* 628. But the secreting, by a letter carrier, of a letter written by an inspector of the post office, for the purpose of trying the defendant's honesty, was held not to be a stealing of a post letter within the statute; it was held, however, that he might be convicted of simple larceny, in stealing a sovereign enclosed by the inspector in such letter, the sovereign being one of those which are occasionally found on the floor of the post office, having dropped out of letters, and which are carried to a fund which is under the direction of the postmaster-general; and that such sovereign might be described as the property of the postmaster-general. *R.* v. *Rathbone*, 2 *Mood. C. C.* 242; *C. & Mar.* 220. So where, suspicions being entertained against the defendant, who was a subsorter in the General Post Office, the authorities there made up a letter, and enclosed coin in it, and put upon it the usual postage stamp; and an inspector delivered it in, at the window in the outer hall, to another inspector, who handed it to a third, who, after locking it up for the night, handed it to a sorter, who placed it amongst the letters which it was the prisoner's duty to sort, and the prisoner stole the letter and the money;—the ordinary course of posting a letter at the outer hall of the General Post Office being by placing it in the receiving-box; it was held that the prisoner was not rightly convicted of stealing a post letter containing money, and that the conviction must be confined to the count for simple larceny. *R.* v. *Shepherd, Dears.* 606; 25 *L. J.* (*M. C.*) 52. Where a servant who was sent with a letter and a penny to pay the postage, finding the door of the receiving-house shut, put the penny inside the letter, fastened it by means of a pin, and then put the letter in the unpaid letter-box: it was held that a messenger in the post office, who stole this letter with the penny in it, might be convicted of stealing a post letter containing money, though the money was not put in for the purpose of being conveyed by post to the person to whom the letter was addressed. *R.* v. *Mence, C. & Mar.* 234. Where a letter containing a bank-note was received by the postmistress for registration and not registered (though the fee had been paid), but

placed by her under a glass case to which the prisoner (an officer of the post office) had access, the letter was held to be a post letter within 7 *W.* 4 & 1 *Vict.* c. 36, *s.* 47 (*ante*, p. 506). *R.* v. *Rogers*, 5 *Cox*, 293, *Cresswell*, J. But where, the post office being at an inn, the person sent to put a letter, containing bank-notes, into the post, took it to the inn, with money to prepay the postage, and laid the letter and the money on it, upon a table in the lobby of the inn, in which the letter box was, and pointed out the letter to the female servant at the inn (not authorized to receive letters), who said "she would give it to them;" and she stole the letter and its contents: it was held that this was not a post letter within the 27th or 28th section of the statute, and the defendant could be convicted only of larceny. *R.* v. *Harley*, 1 *C.* & *K.* 89. An unsealed letter, delivered by the postmistress at G. to the defendant, the letter-carrier between that place and L., with the directions to obtain at the post office at L. a money order for one pound, and after enclosing it in the letter, to post the letter at L., was held to be, while in the defendant's hands, a post letter, and the defendant to be a person employed under the post office, so as that he might be convicted under this section. *R.* v. *Bickerstaff*, 2 *C.* & *K.* 761. Where the defendant, a person employed in the post office, having committed a mistake in the sorting of the letters, put some post letters down a water-closet, in order to avoid the supposed penalty attached to such a mistake, this was held to be not only a *secreting* but a *larceny* of the letters. *R.* v. *Wynn*, 1 *Den.* 365; 2 *C.* & *K.* 859; 18 *L. J.* (*M. C.*) 51. It was the duty of a letter carrier, on returning from his round, to bring back to the post office any letters which he had failed to deliver. A letter containing money having been given to him with other letters to deliver; on his return from his round, he brought back to the office the pouch, containing some letters which he had failed to deliver, but said nothing about the money-letter. Subsequently on enquiry being made of him, he produced the money-letter from his pocket; upon these facts it was held that he was rightly convicted of stealing the letter. *R.* v. *Poynton*, *L.* & *C.* 247; 32 *L. J.* (*M. C.*) 29.

Indictment for stealing Money, etc., out of Letters. 7 *W.* 4 & 1 *Vict.* c. 36 (*Post Office* (*Offences*) *Act*, 1837), *s.* 27. (*Ante*, p. 503.)

Commencement as ante, p. 505]—a certain valuable security, to wit, one bill of exchange for the payment of ten pounds ("*any chattel, money, or valuable security*") the property of the postmaster-general, from and out of a post letter feloniously did steal, take, and carry away; against the form [*as ante*, p. 465]. *The property may be laid in the "postmaster-general" and it is not necessary to allege or prove the security to be of any value.* 7 *W.* 4 & 1 *Vict.* c. 36, *s.* 40 (*ante*, p. 505). *As to the venue, see ante*, p. 50, *and* 7 *W.* 4 & 1 *Vict.* c. 36, *s.* 37, *ante*, p. 504.

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour, 7 *W.* 4 & 1 *Vict.* c. 36, *ss.* 27, 41, 42; 54 & 55 *Vict.* c. 69, *s.* 1. (*Ante*, p. 235).

This offence is not triable at quarter sessions. 5 & 6 *Vict.* c. 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove a larceny of the chattel, money, or valuable security out of the letter, either directly or by circumstances from which it may be inferred. The mere larceny of money, etc., from a letter will not suffice to bring the case within this statute, for a post letter means a letter or packet

transmitted by the post, and it is only a post letter from the time of its being delivered to a post office to the time of its being delivered to the person to whom it is addressed. *See R.* v. *Rathbone* (*ante*, p. 511): *R.* v. *Young* (*ante*, p. 511). A delivery to a letter carrier, or other person authorized to receive letters for the post, is a delivery to the post office; and a delivery at the house or office of the person to whom the letter is addressed or to him, or his servant or agent, or other person considered to be authorized to receive the letter according to the usual manner of delivering that person's letters, is a delivery to the person addressed. 47 & 48 *Vict. c.* 76, *s.* 19 (*ante*, p. 507). The words of the statute, "every person," include those employed by the post office as well as others. *See R.* v. *Brown*, *R. & R.* 32, *n.*; overruling *R.* v. *Skutt*, 1 *Leach*, 106; 2 *Leach*, 904; *and R.* v. *Pooley*, *R. & R.* 31; *and see R.* v. *Salisbury*, 5 *C. & P.* 155.

Indictment for stealing, etc., Letters, etc., 7 *W.* 4 & 1 *Vict. c.* 36 (*Post Office (Offences) Act*, 1837), *s.* 28 (*ante*, p. 503).

Commencement as ante, p. 509]—feloniously did steal, take, and carry away one post letter ("*a post-letter bag or post letter*"), the property of the postmaster-general, from a post-letter bag ("*a post-letter bag, or a post office, or an officer of the post office or a mail*"); against the form [*as ante*, p. 465]. *The property may be laid in the "postmaster-general," and it is not necessary to allege or prove any value. As to the venue, see ante*, pp. 50, 504. *An indictment for stealing letters out of a post-office packet may easily be framed from the above precedent.* 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 29.

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour, 7 *W.* 4 & 1 *Vict. c.* 36, *ss.* 28, 41, 42 (*ante*, pp. 503, 505): 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the larceny of the letter as directed *ante*, p. 434 *et seq.* The taking away and destroying of a post letter in order to suppress inquiries supposed by the defendant to be made in it about her character, was held to be a larceny of the letter. *R.* v. *Jones*, 1 *Den.* 188; 2 *C. & K.* 236. A person who with intent to deprive another to whom a letter is addressed of such letter and to commit a fraud, induces a servant of the post office to intercept and hand over such letter, which is in course of transmission by post, is either guilty of larceny as a principal felon, or is accessory before the fact of the larceny committed by the servant of the post office, and in either view can be convicted on an indictment charging him with larceny of the letter. *R.* v. *James*, 24 *Q. B. D.* 439; 59 *L. J.* (*M. C.*) 96. Where the defendant obtained the mail bags from the post office, pretending that he was the mail guard, and then ran away with them; the jury being of opinion that he got possession of them with intent to steal them, found him guilty; and the judges held the conviction to be right. *R.* v. *Pearce*, 2 *East, P. C.* 603, 673. In this case the property did not pass, for the postmaster had no property in the mail bags to part with. 2 *East, P. C.* 673. Taking the mail bags off the horse during the momentary absence of the person employed to carry them, was held to be a taking from his possession, within the meaning of the repealed statute 52 *G.* 3, *c.* 14, *s.* 3. *R.* v. *Robinson*, 2 *Stark.* (*N. P.*) 485.

Where a letter intended to be delivered in Brighton and addressed to Mrs. Fisher, 29, Gloucester St., was delivered at 29, Gloucester St., Lambeth, where the prisoner lodged, and the prisoner who was known to some persons as Fisher opened the letter and cashed a cheque contained in it, it was held that he could not be convicted of larceny of the cheque. *R.* v. *Fish* [1900] 64 *J. P.* 137, *Bosanquet*, Common Serjeant, on the ground that there was no evidence of *animus furandi* when the prisoner received the cheque. *R.* v. *Mucklow*, 1 *Mood. C. C.* 160, *and R.* v. *Davies, Dears.* 640: 25 *L. J.* (*M. C.*) 91 (*C. C. R.*), were cited and followed. In such a case the indictment should be framed under 7 *W.* 4 *&* 1 *Vict.* c. 36, *s.* 31, (*ante*, p. 503).

The definition of a post letter is given in 48 *&* 47 *Vict.* c. 76, *s.* 19 (*ante*, p. 507). For the definition of the terms "letter," "packet," "mail," "mail bag," "officer of the post office," "post-letter bag," etc., *see* 7 *W.* 4 *&* 1 *Vict.* c. 36, *s.* 47 (*ante*, p. 506); 47 *&* 48 *Vict.* c. 76, *s.* 19 (*ante*, p. 507): 52 *&* 53 *Vict.* c. 63, *s.* 12 (*ante*, p. 507).

Indictment for stopping Mails, with intent to rob, etc. 7 *W.* 4 *&* 1 *Vict.* c. 36 (*Post Office* (*Offences*) *Act*, 1837), *s.* 28 (*ante*, p. 503).

Commencement as ante, p. 509]—a certain mail for the conveyance of post letters, feloniously did stop, with intent the same feloniously to search ("*rob or search*"); against the form [*as ante*, p. 465]. *As to the venue, see ante*, p. 50, *and* 7 *W.* 4 *&* 1 *Vict.* c. 36, *s.* 37 (*ante*, p. 504).

Felony: see the last precedent.

This offence is not triable at quarter sessions: 5 *&* 6 *Vict.* c. 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant stopped the mail, and prove the intent by circumstances from which it may be inferred. If the defendant actually robbed or searched the mail, his original intent so to do will be put beyond doubt.

Indictment for retaining Letters after Delivery. 7 *W.* 4 *&* 1 *Vict.* c. 36 (*Post Office* (*Offences*) *Act*, 1837), *s.* 31 (*ante*, p. 503).

Commencement as ante, p. 509]—unlawfully and fraudulently did retain ("*shall fraudulently retain or wilfully secrete, or keep or detain, or being required to deliver up by any officer of the post office, shall neglect or refuse to deliver up*") a certain post letter the property of the postmaster-general, which ought to have been delivered to a certain other person, to wit, one J. N. ("*or a post letter or a post-letter bag, which shall have been sent*"); against the form [*as ante*, p. 465]. *The property may be laid in the post-master-general*, 7 *W.* 4 *&* 1 *Vict.* c. 36, *s*, 40 (*ante*, p. 505). *As to the venue, see ante*, pp. 50, 504.

Misdemeanor: fine and imprisonment, 7 *W.* 4 *&* 1 *Vict.* c. 36, *s.* 31; *with or without hard labour. Id. s.* 42.

Evidence.

Prove that the letter ought to have been delivered to J. N.; that it was delivered to the defendant, and was retained by him, as stated in the indictment. *See R.* v. *Fish*, 64 *J. P.* 137 (*supra*). If the defendant secretes, or keeps, or detains the letter after request to deliver it up by an officer of the post office, it may be presumed that he does so wilfully,

unless, at the time of the refusal to deliver it up, he gives some *bonâ fide* excuse for so doing. To make out a fraudulent retainer, however, it must be shown, from the contents of the letter or other circumstances, that the defendant well knew the letter was not intended for him. It will be no defence that the letter or letter bag was found by the defendant, or any other person. 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 31 (*ante*, p. 504).

Indictment for endeavouring to procure the commission of offences against the Post Office. 7 *W.* 4 & 1 *Vict. c.* 36 (*Post Office (Offences) Act*, 1837), *s.* 36 (*ante*, p. 504).

Commencement as ante, p. 509]—unlawfully did solicit ("*solicit or endeavour to procure*") one J. S., then being a person employed by and under the post office of the United Kingdom, unlawfully and contrary to his duty to open a post letter, the property of the postmaster-general; against the form [*as ante*, p. 465]. *From this and the foregoing precedents an indictment may easily be framed for procuring the commission of any "felony or misdemeanor, punishable by the post-office Acts." As to the venue, see ante*, pp. 50, 504.

Misdemeanor: imprisonment not exceeding two years, 7 *W.* 4 & 1 *Vict. c.* 36, *s.* 36, *with or without hard labour. Id. s.* 42.

At common law, and apart from the statute, the offence is a misdemeanor (*see ante*, p. 3): *but hard labour could not be imposed. See ante*, pp. 237, 238.

Evidence.

Prove that the defendant solicited or endeavoured to procure the commission of the offence stated. It is immaterial whether the offence was completed or not.

STEALING FROM A WRECK.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 64.]—Whosoever shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . .

And the offender may be indicted and tried either in the county or place in which the offence shall have been committed or in any county or place next adjoining. [*This section is framed from* 7 & 8 *G.* 4, *c.* 29, *s.* 18, *and* 7 *W.* & 1 *Vict. c.* 87, *s.* 8.]

Indictment.

Sussex, to wit:—The jurors for our lord the King upon their oath present, that, on the first day of June, in the year of our Lord ——, a certain ship ("*any ship or vessel*"), the property of a person or persons to the jurors aforesaid unknown, was stranded ("*in distress, or wrecked, stranded or cast on shore*"), and that J. S., on the day and year aforesaid, ten pieces of oak plank ("*any part of any ship, etc.*"), being parts of the said ship [*or*, twenty pounds weight of cotton ("*any goods, merchandise or articles of any kind*"), of the goods and merchandise of a person or

persons to the jurors aforesaid unknown, belonging to the said ship], so then stranded as aforesaid, feloniously did plunder, steal, take, and carry away; against the form [*as ante*, p. 465]. *You may add a second count, stating the ship to have been* "in distress"; *a third count, stating the ship to have been* "wrecked"; *and a fourth count, stating the ship to have been* "cast on shore." *If the name of the ship be known, it should be stated in the indictment; and if the name of the owner be known, the ship should be described as his property. As to the venue, see s.* 64, *ante*, p. 515.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement (such confinement not exceeding one month at any one time, nor three months in any one year, 24 *&* 25 *Vict. c.* 96, *s.* 119, *ante*, p. 432)—24 *&* 25 *Vict. c.* 96, *s.* 64; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and to find sureties for keeping the peace,* 24 *&* 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

Evidence.

Prove that the ship or vessel in question was stranded or cast on shore, etc., as described in the indictment; if the name of the owner of the ship be stated, prove that she was his property; and prove the larceny of the goods as directed, *ante*, p. 434 *et seq.*, whilst she was stranded and cast on shore; that the goods were part of or belonging to the ship, as stated in the indictment; and if the name of the owner of the goods be stated, prove them to be his property.

LARCENY BY TENANTS OR LODGERS.

Statute.

24 *&* 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 74.]—Whosoever shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her or by her husband, or by any person on behalf of him or her or her husband, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and, if a male under the age of sixteen years, with or without whipping; and in case the value of such chattel or fixture shall exceed the sum of five pounds, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping:

And in every case of stealing any chattel in this section mentioned, it shall be lawful to prefer an indictment in the common form as for larceny,

And in every case of stealing any fixture in this section mentioned, to prefer an indictment in the same form as if the offender were not a tenant or lodger: and in either case to lay the property in the owner or person letting to hire. [*This section re-enacts* 7 *&* 8 *G.* 4, *c.* 29, *s.* 45.]

Indictment.

The indictment for stealing a chattel will be in the form ante, p. 433, *and for stealing a fixture, in the form ante*, p. 491. *The article stolen must be*

described as the property of the landlord; and in the latter case the dwelling house or lodging must, according to the circumstances, be described as the dwelling-house of the defendant, or of the landlord, as in burglary.

Felony: imprisonment not exceeding two years, with or without hard labour, and, if a male under sixteen, with or without whipping (Id.):—or if the value of the chattel or fixture exceed 5l., penal servitude for not exceeding seven and not less than three years, or imprisonment, etc., as above.—24 & 25 *Vict. c.* 96, *s.* 74; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

Evidence.

Prove a larceny of the chattel mentioned in the indictment, as directed *ante*, p. 434 *et seq.*; or, if the indictment alleged that the defendant stole a fixture, prove the allegations of that indictment, as directed *ante*, pp. 491, 492. Independently of the statute, the contract of letting, and that the goods were in his possession under that contract, would be matter of defence for the defendant; but as that circumstance would now be no defence, it is immaterial whether the contract of letting be proved or not.

HOUSEBREAKING AND STEALING IN DWELLING-HOUSES. *See post*, p. 620 *et seq.*

STEALING SILK, ETC., IN THE PROCESS OF MANUFACTURE.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 62.]—Whosoever shall steal, to the value of ten shillings, any *woollen*, linen, hempen, or cotton yarn, or any goods or article of silk, woollen, linen, cotton, *alpaca, or mohair*, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed during any stage, process or progress of manufacture, in any building, field or other place, shall be guilty of felony, and being convicted thereof shall be liable, . . . to be kept in penal servitude for any term not exceeding fourteen years, . . . [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 15, *with the additions italicized.*]

Indictment.

Commencement as ante, p. 433]—thirty yards of linen cloth, of the value of twenty shillings ("*to the value of ten shillings*"), of the goods and chattels of J. N., in a certain building ("*building, field, or other place*") of the said J. N., situate in the parish of ——, in the county of ——, feloniously did steal, take, and carry away, whilst the same were laid, placed and exposed in the said building, during a certain stage, process and progress of manufacture; against the form [*as ante*, p. 465]. *Other counts may be added, stating the particular process and progress of manufacture in which the goods where when stolen.*

Felony: penal servitude for not more than fourteen nor not less than three years, or imprisonment for not more than two years, with or without hard labour: 24 & 25 *Vict. c.* 96, *s.* 62; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances*

and find sureties for keeping the peace, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante,* p. 431).

As to summary proceedings for the embezzlement of materials or tools by persons employed in such manufactures, see 6 & 7 *Vict. c.* 40, *ss.* 2, 3, 11.

Evidence.

Prove the larceny as directed, *ante,* pp. 434 *et seq.,* except that an actual and not merely a constructive taking must be proved; prove the value of the goods taken to be ten shillings at the least; then prove that they were stolen from the building, field, or other place mentioned in the indictment, situate as described; and, lastly, prove that when stolen the goods were placed, laid, or exposed in the building, etc., described, in a certain stage, process, or progress of manufacture.

Where, upon an indictment on 18 *G.* 2, *c.* 27 (*rep.*), for stealing yarn from a bleaching-ground, it appeared in evidence that the yarn, at the time it was stolen, was in heaps, for the purpose of being carried into the house, and not spread out for bleaching, *Thompson,* B., held that the case was not within the statute. *R.* v. *Hugill,* 2 *Russ. Cr.* (6th ed.) 403. So, where the indictment was for stealing calico, placed to be printed and dried in a certain building, it was held that, in order to support a capital charge, it was necessary to prove that the building from which the calico was stolen was used either for drying or printing calico: *R.* v. *Dixon, R. & R.* 53; but it should be observed, that the repealed statute (18 *G.* 2, *c.* 27) mentioned particularly a building, etc., made use of by any calico printer, etc., "for printing, whitening, bowking, bleaching, or dyeing." Goods remain in a "stage, process, or progress of manufacture," within the meaning of 7 & 8 *G.* 4, *c.* 30, *s.* 3 (*rep.*), and therefore also within this statute, though the texture be complete, if they be not yet brought into a condition for sale. *R.* v. *Woodhead,* 1 *M. & Rob.* 549.

If you prove the larceny, but fail to prove the other circumstances, so as to bring the case within the statute, the defendant may be found guilty of simple larceny.

STEALING FROM VESSELS IN DOCKS OR FROM DOCKS, ETC.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act,* 1861), *s.* 63.]—Whosoever shall steal any goods or merchandise in any vessel, barge, or boat of any description whatsoever, *in any haven,* or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such *haven,* port, river, or canal, or shall steal any goods or merchandise from any dock, wharf, or quay adjacent to any such *haven,* port, river, canal, creek or basin, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . *This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 17, *with the additions in italics.*]

Indictment for stealing from a Vessel on a navigable River. (24 & 25 *Vict. c.* 96, *s.* 63.)

Commencement as ante, p. 433.]—twenty pounds weight of indigo ("*any goods or merchandise*") of the goods and merchandise of J. N.,

then being in a certain ship called the Rattler, ["*vessel, barge, or boat, of any description whatsoever,*") upon the navigable river Thames, ("*in any haven, or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river, or canal,*") in the said ship feloniously did steal, take, and carry away; against the form [*as ante*, p. 465.]

Felony : penal servitude for not more than fourteen nor less than three years, or imprisonment for not more than two years, with or without hard labour—24 & 25 *Vict. c.* 96, *s.* 63; 54 & 55 *Vict.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

Evidence.

Prove a larceny as directed, *ante*, pp. 434 *et seq.*, except that you must prove an actual and not merely a constructive taking. The words "goods, wares, and merchandise, in 24 *G.* 2, *c.* 45 (*rep.*), were held to extend to such goods, etc., only as are usually lodged in vessels, or on wharves and quays, *R.* v. *Grimes, Fost*, 79, *n.*; 2 *East, P. C.* 647: *R.* v. *Leigh*, 1 *Leach*, 52. The same may be said of the present statute, by reason of the substitution of the words "goods and merchandise" for the words "chattel, money, or valuable security," which are used in other parts of the Act. The luggage of a passenger going by a steam-boat was held within 7 & 8 *G.* 4, *c.* 29, *s.* 17 (*rep.*). *R.* v. *Wright*, 7 *C.* & *P.* 159. Prove that the goods, etc., were at the time *in* the ship described in the indictment. The words of the statute are "*in* any vessel," etc.; and it is therefore immaterial whether the defendant succeeded in taking the goods from the ship or not, if there was a sufficient asportation in the ship to constitute larceny. A man cannot be guilty of this offence in his own ship. *R.* v. *Madox*, *R.* & *R.* 92. Lastly, prove that the ship was at the time upon the river, etc., mentioned in the indictment. This is matter of local description, and a variance in this respect between the statement and proof will be fatal unless amended. Where it was laid to be committed in a barge on the river Thames, and proved to have been committed in a barge lying aground on the bank of one of the creeks of the river, namely, Limehouse-dock, it was held to be a fatal variance. *R.* v. *Pike*, 1 *Leach* 317: 2 *East, P. C.* 647.

If you prove a larceny, but fail in proving the other circumstances requisite to bring the case within the statute, the defendant may be convicted of simple larceny.

Indictment for stealing from a Dock, &c. (24 & 25 *Vict. c.* 96, *s.* 63.)

Commencement as ante, p. 433]—twenty pounds weight of indigo ("*any goods or merchandise*") of the goods and merchandise of J. N., then being in and upon a certain dock ("*dock, wharf, or quay*") adjacent to a certain navigable river called the Thames ("*adjacent to any haven, port, etc.: see the last precedent*), from the said dock feloniously did steal, take, and carry away; against the form [*as ante*, p. 465].

Felony, 24 & 25 *Vict. c.* 96, *s.* 63. *See the last precedent.*

Evidence.

Prove the larceny as directed, *ante*, p. 434 *et seq.*, except that there must be an actual and not merely a constructive taking. The goods must be such as are usually deposited upon dock, etc., for shipment, safe custody,

or the like, Prove that the goods were taken *from* the dock, etc.; for which purpose a mere removal, such as would be sufficient to constitute simple larceny, will not suffice, for the words of the statute are, "*from* any dock," etc., to satisfy that there must be an actual removal from the dock, etc., in the same manner as upon an indictment for stealing from the person (*infra*). Lastly, prove that the dock, etc., from which the goods were taken, is adjacent to the navigable river, etc. This, as we have seen in the last case, is a matter of local description, and must be proved strictly as laid.

If you prove the larceny, but fail in proving any of the other circumstances necessary to bring the case within the statute, the defendant may be convicted of simple larceny.

ROBBERY, OBTAINING PROPERTY BY THREATS, ETC.

Statutes.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 40—*Robbery and stealing from the person.*]—Whosoever shall rob any person, or shall steal any chattel, money or valuable security from the person of another, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . [*This section re-enacts* 7 *W.* 4 & 1 *Vict. c.* 87, *s.* 5. *For indictment, see post*, pp. 523, 529.]

Sect. 41—*Conviction for assault with intent to rob, on indictment for robbery.*]—If upon the trial of any person upon any indictment for robbery it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried. [*This section re-enacts* 14 & 15 *Vict. c.* 100, *s.* 11.]

Sect. 42—*Assaulting with intent to rob.*]—Whosoever shall assault any person with intent to rob shall be guilty of felony, and being convicted thereof shall (save and except in the cases where a greater punishment is provided by this Act) be liable . . . to be kept in penal servitude. . . . [*This section re-enacts* 7 *W.* 4 & 1 *Vict. c.* 87, *s.* 6, *on which see R.* v. *Reid*, 2 *Den.* 88; 20 *L. J.* (*M. C.*) 67: 5 *Cox*, 104, (*C. C. R.*) *For indictment, see post*, p. 530.]

Sect. 43—*Robbery, etc., with violence.*]—Whosoever shall, being armed with any offensive weapon or instrument, rob or assault with intent to rob any person, or shall, together with one or more other person or persons, rob or assault with intent to rob any person, or shall rob any person and, at the time of or immediately before or immediately after such robbery, shall wound, beat, strike, or use any other personal violence to any person, shall be guilty of felony, and being convicted thereof shall

be liable . . . to be kept in penal servitude for life . . . [*This section re-enacts* 7 *W.* 4 *&* 1 *Vict. c.* 87, *ss.* 2, 3, *omitting the words "stab" and "cut" as included in "wound." For indictments, see post,* pp. 528, 529.]

26 *&* 27 *Vict. c.* 44 (*Garrotters Act*, 1863).]—*Power to award punishment of whipping.*]—*Preamble recites the provisions of* 24 *&* 25 *Vict. c.* 96, *s.* 43, *supra, and* 24 *&* 25 *Vict. c.* 100, *s.* 21, *and proceeds: Whereas the punishment awarded by the said sections is insufficient to deter from crimes of violence: be it enacted that* where any person is convicted of a crime under either of the said sections, the court before whom he is convicted may, in addition to the punishment awarded by the said sections or any part thereof, direct that the offender, if a male, be once, twice, or thrice, privately whipped, subject to the following provisions:—1. That, in the case of an offender whose age does not exceed sixteen years, the number of strokes at each such whipping do not exceed twenty-five, and the instrument used shall be a birch rod: 2. That, in the case of any other male offender, the number of strokes do not exceed fifty at each such whipping: 3. That in each case the court in its sentence shall specify the number of strokes to be inflicted and the instrument to be used. Provided that in no case shall such whipping take place after the expiration of six months from the passing of the sentence: provided also, that every such whipping to be inflicted on any person sentenced to penal servitude shall be inflicted on him before he shall be removed to a convict prison, with a view to his undergoing his sentence of penal servitude.

21 *&* 25 *Vict. c.* 96, *s.* 44—*Sending letter demanding money, etc., with menaces.*]—Whosoever shall send, deliver, *or utter*, or directly or indirectly cause to be received, *knowing the contents thereof*, any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any *property*, chattel, money, valuable security, *or other valuable thing*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male, under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 *&* 8 *G.* 4, *c.* 29, *s.* 8, *with the alterations italicized. For indictment, see post,* p. 531.]

Sect. 45—*Demanding money, etc., with menaces or by force.*]—Whosoever shall with menaces or by force demand any property, *chattel, money, valuable security, or other valuable thing* of any person, with intent to steal the same, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude . . . or to be imprisoned . . . [*This section re-enacts* 7 *W.* 4 *&* 1 *Vict. c.* 87, *s.* 7, *with the additions italicized. For indictment, see post,* p. 534.]

Sect. 46—*Sending letter threatening to accuse of crime, with intent to extort.*]—Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, *knowing the contents thereof*, any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death *or penal servitude for not less than seven years*, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent in any of such cases to extort or gain by means of such letter or writing any property, *chattel*, money, valuable security, or other valuable thing, from any person, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping;

And the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this Act. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *ss.* 8, 9 : 10 & 11 *Vict. c.* 66, *s.* 1, *with the alterations italicized. The definition of infamous crime does not include an offence against the Criminal Law Amendment Act,* 1885 (48 & 49 *Vict. c.* 69), *s.* 11. *R.* v. *Gilgannon* [1899] 63 *J. P.* 457, *Wills,* J., *and it has not been decided what effect, if any, the changes in the scale of punishment made by the Penal Servitude Act,* 1891, *ante,* p. 235, *have had on the words "penal servitude for not less than seven years."* (*See post,* p. 537.) *For indictment, see post,* p. 535.]

Sect. 47—*Accusing or threatening to accuse, with intent to extort.*]—Whosoever shall accuse or threaten to accuse, either the person to whom such accusation or threat shall be made or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent in any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other person, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . and if a male under the age of sixteen years, with or without whipping. [*This section was framed from* 7 & 8 *G.* 4, *c.* 29, *s.* 8 : 7 *W.* 4 & 1 *Vict. c.* 87, *s.* 4; *and* 10 & 11 *Vict. c.* 66, *s.* 27. *As to former law, see R.* v. *Edward,* 1 *M. & Rob.* 257. *For indictment, see post,* p. 536.]

Sect. 48—*Inducing a person by violence or threats to execute deeds, etc., with intent to defraud.*]—Whosoever, with intent to defraud or injure any other person, shall, by any unlawful violence to or restraint of, or threat of violence to or restraint of, the person of another, or by accusing or threatening to accuse any person of any treason, felony or infamous crime as hereinbefore defined, compel or induce any person to execute, make, accept, indorse, alter, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or co-partnership, or the seal of any body corporate, company or society, upon or to any paper or parchment, in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . [*This section was new law in* 1861, *and framed to meet such cases as R.* v. *Phipoe,* 2 *Leach,* 673 : *R.* v. *Edwards,* 6 *C. & P.* 521. *For indictment, see post,* p. 538.]

Sect. 49—*Immaterial from whom the menaces proceed.*]—It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation to be caused or made by the offender or by any other person. [*This section was new law in* 1861, *and framed to dispose of doubts expressed in R.* v. *Pickford,* 4 *C. & P.* 227, *and R.* v. *Smith,* 1 *Den.* 510.]

Sect. 61—*Stealing in a dwelling house with menaces.*]—*See post,* p. 622.

Sect. 1—*Definition of property.*]—*Ante*, p. 427.

54 & 55 *Vict. c.* 69, *s.* 1.]—*Terms of penal servitude and imprisonment.*]—*Ante*, p. 235.

6 & 7 *Vict. c.* 96 (*Libel Act*, 1843, "*Lord Campbell's Act*"), *s.* 3—*Threatening to publish libel, etc., with intent to extort.*]—If any person shall publish, or threaten to publish, any libel upon any other person, or shall directly or indirectly threaten to print or publish, or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing of any matter or thing touching any other person, with intent to extort any money or security for money, or any valuable thing, from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years: Provided always, that nothing herein contained shall in any manner alter or affect the law now in force in respect of the sending or delivering of threatening letters or writings. [*For indictment and punishment, see post*, p. 538.]

Indictment for Robbery. (24 & 25 *Vict. c.* 96, *s.* 40, *ante*, p. 520.)

Commencement as ante, p. 433]—in and upon one J. N. feloniously did make an assault, and him the said J. N. in bodily fear and danger of his life then feloniously did put, and the moneys of the said J. N., to the amount of ten pounds, from the person and against the will of the said J. N., then feloniously and violently did steal, take and carry away; against the form [*as ante*, p. 465]. *The indictment may charge the defendant with having assaulted several persons, and stolen different sums from each, if the whole was one transaction. R.* v. *Giddins, C. & Mar.* 634. *The word* "violently" *is not essential if the statements in the indictment show violence to have been used. R.* v. *Smith*, 2 *East, P. C.* 783, 784.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment not exceeding two years, with or without hard labour: 24 & 25 *Vict. c.* 96, *s.* 40; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

Evidence.

Robbery consists in the felonious and forcible taking from the person of another, or in his presence against his will, of any money or goods to any value, by violence, or putting him in fear. 4 *Bl. Com.* 243; 1 *Hawk. c.* 34. *See R.* v. *Reane*, 2 *Leach*, 616: 2 *East, P. C.* 734: *R.* v. *Edwards*, 1 *Cox*, 32. And in order to maintain this indictment, you must prove a larceny, and prove it to have been committed under the circumstances which, together with it, constitute the offence of robbery, and which we shall now consider under the following heads:—

In bodily fear, etc.]—The prosecutor must either prove that he was actually in bodily fear, from the defendant's actions, at the time of the robbery, or he must prove circumstances from which the court and jury may presume such a degree of apprehension of danger as would induce the prosecutor to part with his property; *Fost.* 128; and in this latter

case, if the circumstances thus proved be such as are calculated to create such a fear, the court will not pursue the inquiry further, and examine whether the fear actually existed. Therefore, if a man knocks another down, and steals from him his property whilst he is insensible on the ground, this is robbery. *Fost.* 128. A stage-coach having frequently been robbed on a particular road, J. N. went in it for the purpose of apprehending the robber; the robber met the coach, presented a pistol and demanded money of the passengers; J. N. delivered his money but immediately afterwards jumped out of the coach, and with the assistance of others, secured the robber; and this was held to be robbery. *Norden's case, Fost.* 129. Where the defendant tore a lady's ear through, in snatching an earring from it, the judges held it to be robbery, *R.* v. *Lapier*, 1 *Leach*, 320; 2 *East, P. C.* 557, 708. So, where the prisoner tore some hair from a lady's head in snatching a diamond pin from it, the pin having a corkscrew stalk, and being twisted very much in her hair, this was held to be robbery. *R.* v. *Moore*, 1 *Leach*, 335. Where the defendant laid hold of the seals and chain of the prosecutor's watch, and pulled the watch out of his fob, but the watch, being secured by a steel chain which went round the prosecutor's neck, the defendant could not take it until, by pulling and two or three jerks, he broke the chain, and then ran off with the watch, this was held to be robbery. *R.* v. *Mason*, *R. & R.* 419. So, if there be a struggle for the property, and it be wrested from the prosecutor by superior force, it will be robbery. *R.* v. *Davies*, 2 *East, P. C.* 709. But merely snatching property from a person unawares and running away with it, will not be robbery. *R.* v. *Steward*, 2 *East, P. C.* 702: *R.* v. *Horner*, *Id.* 703: *R.* v. *Baker*, 1 *Leach*, 290: *R.* v. *Robins*, *Id., n.*: *R.* v. *Macauley*, *Id.* 287: *R.* v. *Walls*, 2 *C. & K.* 214, because fear cannot in fact be presumed in such a case. Where the prisoner caught hold of the prosecutor's watch chain, and jerked his watch from his pocket with considerable force, upon which a scuffle ensued, and the prisoner was secured, *Garrow*, B., held that the force used to obtain the watch did not make the offence amount to robbery, nor did the force used afterwards in the scuffle; for the force necessary to constitute robbery must be either immediately before or at the time of the larceny, and not after it. *R.* v. *Gnosil*, 1 *C. & P.* 304. The rule, therefore, appears to be well established, that no sudden taking or snatching of property unawares from a person is sufficient to constitute robbery unless some injury be done to the person, or there be a previous struggle for the possession of the property, or some force used to obtain it.

If a man take another's child, and threaten to destroy him unless the other give him money, this is robbery. *Per Eyre*, C. J., in *R.* v. *Reane*, 2 *East, P. C.* 735, 736; *and see R.* v. *Donnally*, *Id.* 715, 718; 1 *Leach*, 193. So, where the defendant, at the head of a mob, came to the prosecutor's house and demanded money, threatening to destroy the house unless the money were given, the prosecutor thereupon gave him 5*s.*, but he insisted on more, and the prosecutor, being terrified, gave him 5*s.* more; the defendant and the mob then took bread, cheese, and cider from the prosecutor's house, without his permission, and departed; this was held to be a robbery. *R.* v. *Simons*, 2 *East, P. C.* 731: *R.* v. *Brown*, *Id.* So, where during some riots at Birmingham, the defendant threatened the prosecutor that unless he would give him a certain sum of money he should return with the mob and destroy his house, and the prosecutor, under the impression of this threat, gave him the money, this was holden by the judges to be robbery. *R.* v. *Astley*, 2 *East, P. C.* 729. So where, in the riots of 1780, a mob, headed by the defendant, came to the prosecutor's house and demanded half-a-crown, which the prosecutor, from

terror of the mob, gave, this was held to be robbery, although no threats were uttered. *R.* v. *Taplin*, 2 *East, P. C.* 712.

Upon an indictment for robbery, it appeared that a mob came to the house of the prosecutor, and with the mob the prisoners, who advised the prosecutor to give them something to get rid of them and prevent mischief, by which means they obtained money from the prosecutor; and *Parke*, J. (after consulting *Vaughan*, B., and *Alderson*, B.), admitted evidence of the acts of the mob at other places before and after on the same day, to show that the advice of the prisoners was not *bonâ fide*, but in reality a mere mode of robbing the prosecutor. *R.* v. *Winkworth*, 4 *C. & P.* 444.

Obtaining money under a threat of charging the prosecutor with an unnatural crime had in many cases been held to be robbery; *R.* v. *Jones*, 1 *Leach*, 139; 2 *East, P. C.* 714: *R.* v. *Donnally*, 1 *Leach*, 193; 2 *East, P. C.* 715: *R.* v. *Cannon*, *R. & R.* 146: *R.* v. *Gardner*, 1 *C. & P.* 479; even where it appeared that the prosecutor parted with his money from a fear merely of losing his character or situation by such an imputation; *R.* v. *Hickman*, 1 *Leach*, 278; 2 *East, P. C.* 728: *R.* v. *Egerton*, *R. & R.* 375: *R.* v. *Elmstead*, 2 *Russ. Cr.* (6th ed.) 106. It was held that the property must be at once parted with in consequence of fear due to the threat. *R.* v. *Fuller*, *R. & R.* 308: *R.* v. *Jackson*, 1 *Leach*, 193, *n.*; 2 *Id.*, 618, *n.* This form of robbery is now punishable under 24 *&* 25 *Vict. c.* 96, *s.* 47 (*ante*, p. 522.) But it would seem that where by such accusation or threat any property is actually obtained, the offender may still be indicted for robbery. *See R.* v. *Stringer*, 2 *Mood. C. C.* 261; 1 *C. & K.* 188; doubting the earlier case of *R.* v. *Henry*, 2 *Mood. C. C.* 118. Where the property is parted with by threats to accuse, other than those specified in the statute, the indictment may also be for robbery, if the party was put in fear, and parted with his property in consequence. *R.* v. *Norton*, 8 *C. & P.* 671. *See post*, p. 536, *for an indictment on the above section.*

Where the prosecutrix was threatened by some persons at a mock auction to be sent to Bow-street, and from thence to Newgate, unless she paid for some article they pretended was knocked down to her, although she never bid for it; and they accordingly called in a pretended constable, who told her that unless she gave him a shilling she must go with him: and she gave him a shilling accordingly, not from any apprehension of personal danger, but from a fear of being taken to prison; the judges held that the circumstances of the case were not sufficient to constitute the offence of robbery; it was nothing more than a simple duress. *R.* v. *Knewland*, 2 *Leach*, 721: *R.* v. *Wood*, 2 *East, P. C.* 732. It would seem, however, that a similar state of facts would sustain an indictment under 24 *&* 25 *Vict. c.* 96, *s.* 45 (*ante*, p. 521); *R.* v. *Robertson*, *L. & C.* 483; 34 *L. J.* (*M. C.*) 35, *post*, and that it would also sustain an indictment for simple larceny. *R.* v. *MacGrath*, *L. R.* 1 *C. C. R.* 205; 39 *L. J.* (*M. C.*) 7: *R.* v. *Lovell*, 8 *Q. B. D.* 185; 50 *L. J.* (*M. C.*) 91; *ante*, p. 456. Where the defendant, with an intent to take money from a prisoner who was under his charge for an assault, handcuffed her to another prisoner, kicked and beat her while thus handcuffed, put her into a hackney-coach for the purpose of carrying her to prison, and then took four shillings from her pocket for the purpose of paying the coach hire; the jury, finding that the defendant had previously the intent of getting from the prosecutrix whatever money she had, and that he used all this violence for the purpose of carrying his intent into execution, the judges held that this was robbery. *R.* v. *Gascoigne*, 2 *East, P. C.* 709. Even in a case where it appeared that the defendant attempted to commit a rape upon the prosecutrix, and she, without any demand upon him, gave him some

money to desist, which he put into his pocket, and then continued his attempt until he was interrupted; this was held by the judges to be robbery. *R.* v. *Blackham*, 2 *East, P. C.* 711.

And it is of no importance under what pretence the robber obtains the money, etc., if the prosecutor be forced to deliver it from actual fear, or under circumstances from which the court can presume it. As, for instance, if a man with a sword drawn ask alms of me, and I give it him, through mistrust and apprehension of violence, it is as much a robbery as if he had demanded money in the ordinary way. 4 *Bl. Com.* 242. So, if thieves come to rob A., and finding little upon him, enforce him by menace to swear to bring them a greater sum, which he does accordingly, this is robbery, if, at the time he delivered the money, the fear of the menace continue to operate upon him. *Fitz. Cor. Pl.* 464: 1 *Hale*, 532. Where the defendant, at the head of a riotous mob, stopped a cart laden with cheeses, insisting upon seizing them for want of a permit; after some altercation he went with the driver, under pretence of going before a magistrate, and during their absence the mob pillaged the cart; this was held to be a robbery. *Merriman* v. *Hundred of Chippenham*, 2 *East, P. C.* 709. So, where the defendant took goods from the prosecutrix of the value of eight shillings, and by force and threats compelled her to take one shilling, under pretence of payment for them; this was held to be robbery. *R.* v. *Simons*, 2 *East, P. C.* 712; *and see R.* v. *Spencer, Id.*

The fear must precede the taking. For, if a man privately steal money from the person of another, and afterwards keep it by putting him in fear, this is no robbery, for the fear is subsequent to the taking. *R.* v. *Harman*, 1 *Hale*, 534; 1 *Hawk. c.* 34, *s.* 7; *see R.* v. *Gnosil*, 1 *C. & P.* 304 (*ante*, p. 524).

One gold watch, etc.]—The property taken must be such as may be the subject of larceny (*see ante*, p. 436), and must be proved to be the absolute or special property of the person named in the indictment. (*See ante*, pp. 58, 440.) Where a servant who was sent by his master to receive money was robbed of the money on his return home, *Alderson*, B., doubted whether it could be properly described as the money of the master, and discharged the jury, that another indictment might be preferred. *R.* v. *Rudick*, 8 *C. & P.* 237 (*see ante*, p. 59). The value is immaterial. 1 *Hale*, 532. But the goods must be of *some* value to the party robbed; and, therefore, where the defendant compelled the prosecutor, by threats, to sign a promissory note for a sum of money, it was held by the judges not to be a robbery, because the note was of no value to the prosecutor. *R.* v. *Phipoe*, 2 *Leach*, 673; 2 *East, P. C.* 599: *and see R.* v. *Edwards*, 6 *C. & P.* 515, 521: *and R.* v. *Smith*, 2 *Den.* 449; 21 *L. J.* (*M. C.*) 111. Under such circumstances, however, the defendant might now be indicted by the felony described in 24 *&* 25 *Vict. c.* 96, *s.* 48 (*ante*, p. 522.) In *R.* v. *Bingley*, 5 *C. & P.* 602, the prisoner attacked the prosecutor, and took from him a piece of paper, containing a memorandum of money that a person owed him, and *Gurney*, B., held it sufficient to constitute robbery.

From the person, etc.]—The goods must be proved to have been taken either from the person of the prosecutor or in his presence. *See R.* v. *Francis*, 2 *Str.* 1015: 2 *East, P. C.* 708: *R.* v. *Grey*, 2 *East, P. C.* 708: *R.* v. *Hamilton*, 8 *C. & P.* 49. If a thief put a man in fear, and then in his presence drive away his cattle, it is robbery. 1 *Hale*, 533. So, if a man, assaulted by a robber, throw his purse into a bush, or flying from a robber, let fall his hat, and the robber, in his presence, take up the

purse or hat and carry it away; this would be robbery. *Id.* Upon an indictment for robbery, it appeared that the prosecutor was in company with another, who had the prosecutor's bundle, and who, upon the prosecutor being attacked with great violence by the prisoner, dropped the bundle, and ran to the prosecutor's assistance, when one of the prisoners took up the bundle, and ran off with it: *Vaughan*, B., is reported to have held that this was not robbery, because the bundle was not in the prosecutor's possession at the time. *R.* v. *Fallows*, 5 *C. & P.* 508; *sed quære. See R.* v. *Thompson*, *L. & C.* 225; 32 *L. J.* (*M. C.*) 53: 9 *Cox*, 244 (*ante*, p. 463).

Against the will.]—It must appear in evidence that the goods were taken against the will of the party robbed; that is, that they were either taken from him by force and violence, or delivered up by him to the defendant, under the impression of that degree of fear and apprehension which is necessary to constitute robbery. Therefore, where the party robbed concerted and connived at the robbery, and got one of his confederates to procure two strangers to commit it, for the purpose of getting a reward upon the apprehension and conviction of the strangers, the judges held that it was not a robbery, because the property was not taken against the party's will. *R.* v. *MacDaniel*, 19 *St. Tr.* 745; *Fost.* 121, 228.

Feloniously.]—The goods must appear to have been taken *animo furandi*, as in other cases of larceny. (*See ante*, p. 440.) And therefore, if a man, by force or threats, compel another to give him goods he has to sell, and give him in return money to the amount of the value of the goods, it is very doubtful whether this be robbery; 1 *Hawk. c.* 34, *s.* 14; although undoubtedly it would be, if the goods were of greater value than the money given for them. If a person, under a *bonâ fide* impression that the property is his own, obtain it by menace, that is a trespass, but not robbery. *R.* v. *Hall*, 3 *C. & P.* 409. *See also R.* v. *Hemmings*, 4 *F. & F.* 50, where a creditor assaulted his debtor with intent to make him pay his debt (*ante*, p. 440).

Violently.]—It is not necessary to prove that the goods were taken by actual violence or force; proof that they were delivered to the defendant by the party robbed, under the impression of that degree of fear and apprehension necessary to constitute robbery, will be sufficient. *See ante*, pp. 523–526.

Take and carry away.]—An actual taking either by force or upon delivery must be proved: that is, it must appear that the robber actually got *possession* of the goods. Therefore, if a robber cut a man's girdle in order to get his purse, and the purse thereby fall to the ground, and the robber run off or be apprehended before he can take it up: this would not be robbery, because the purse was never in the possession of the robber. 1 *Hale*, 533. But it is immaterial whether the taking were by force or upon delivery; and if by delivery, it is also immaterial whether the robber have compelled the prosecutor to it by a direct demand in the ordinary way, or upon any colourable pretence. *See ante*, pp. 523-526.

A carrying away must also be proved, as in other cases of larceny. (*See ante*, p. 463). And therefore, where the defendant, upon meeting a man carrying a bed, told him to lay it down, or he would shoot him, and the man accordingly laid down the bed, but the robber, before he could

take it up so as to remove it from the place where it lay, was apprehended; the judges held that the robbery was not complete. *R.* v. *Farrell*, 1 *Leach*, 322, *n.* (*b*). But where the defendant snatched at a lady's earring, and succeeded in separating it from the ear, and it was afterwards found among the curls of her hair; the court held this a sufficient proof of asportation to support the indictment. *R.* v. *Lapier*, 1 *Leach*, 320; 2 *East, P. C.* 557, 708.

It may be necessary to add here, that if the property be once taken, the offence will not be purged by the robber's delivering it back to the owner. 1 *Hale*, 533; 1 *Hawk. c.* 34, *s.* 2; *R.* v. *Peat*, 1 *Leach*, 228; 2 *East, P. C.* 557.

On this indictment the accused can be convicted of and punished for an assault with intent to rob. 24 & 25 *Vict. c.* 96, *s.* 41 (*ante*, p. 520).

Indictment for Robbery with Violence (24 & 25 *Vict. c.* 96, *s.* 43. *ante.* p. 520).

Commencement as ante, p. 433]—in and upon one J. N. feloniously did make an assault, and him the said J. N. in bodily fear and danger of his life then feloniously did put, and the moneys of the said J. N., to the amount of ten pounds, and one gold watch, of the goods and chattels of the said J. N., from the person and against the will of the said J. N., then feloniously and violently did steal, take, and carry away; and that the said J. S., immediately before he so robbed the said J. N. as aforesaid ("*at the time of, or immediately before, or immediately after such robbery*") the said J. N. feloniously did wound ("*wound, beat, strike, or use any other personal violence to such person*"); against the form [*as ante*, p. 465]. *The particular place where the robbery was committed ought not to be stated, but if it be, and be stated incorrectly, it will be immaterial.*

Felony : penal servitude for life or for any term not less than three years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 *Vict. c.* 96, *s.* 43; 54 & 55 *Vict, c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235.) *The court may also order the convict to be whipped.* 26 & 27 *Vict. c.* 44 (*ante*, p. 521.) *As to requiring the offender to enter into recognizances, and find sureties for keeping the peace, see* 24 & 25 *Vict. c.* 96, *s.* 117, *ante*, p. 431.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

The evidence to support this indictment will be the same as in ordinary cases of robbery, *see ante*, p. 523 *et seq*. But in addition you must prove that the defendant either immediately before, at the time of, or immediately after the robbery, according to the allegation, wounded, beat, etc., the prosecutor, as the case may be. As to the nature of the evidence necessary to sustain the allegation of a wounding, *see post, tit.* "*Assaults*," *etc.* What period of time can be comprised within the words "immediately before," or "immediately after," will be a question for the court.

If the prosecutor should fail to prove the wounding, etc., the prisoner may be convicted of the robbery, and have sentence for the minor offence accordingly. And if he should fail to prove a robbery, but should prove an assault with intent to rob, the defendant may, on this indictment, be convicted and sentenced for such assault. 24 & 25 *Vict. c.* 96, *s.* 41, *ante*, p. 520. And wherever a robbery with aggravated circumstances, *i.e.* by a person armed, or by several persons together, is charged in the indictment, the jury may convict of an assault with intent to rob attended with

the like aggravation, and the defendant may, upon such conviction, be sentenced to penal servitude for life, etc., under the sections of 7 *W.* 4 & 1 *Vict. c.* 87, re-enacted in 24 & 25 *Vict. c.* 96, *ss.* 41, 43: the assault following the nature of the robbery. *R.* v. *Mitchell*, 2 *Den.* 468; 21 *L. J.* (*M. C.*) 135: *R.* v. *Greenwood*, 2 *C.* & *K.* 359: *R.* v. *Barnett*, 2 *C.* & *K.* 594; 3 *Cox*, 482.

Indictment for Robbery by a Person armed (24 & 25 *Vict. c.* 96, *s.* 43, *ante*, p. 520).

Commencement as ante, p. 433]—being then armed with a certain offensive weapon and instrument, to wit, a bludgeon, in and upon one J. N. feloniously did make an assault, and him the said J. N. in bodily fear and danger of his life then feloniously did put, and a sum of money, to wit, the sum of ten pounds, and one gold watch of the goods, moneys, and chattels of the said J. N., from the person and against the will of the said J. N., then feloniously and violently did steal, take and carry away; against the form [*as ante*, p. 465].

Felony: 24 & 25 *Vict. c.* 96, *s.* 43. *For punishment, see notes to precedent, ante*, p. 528.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

The evidence to support this indictment will be the same as in ordinary cases of robbery (*see ante*, p. 523 *et seq.*), with the additional proof that the prisoner at the time of the robbery was armed with an offensive weapon or instrument. As to what will amount to an offensive weapon or instrument, see the cases referred to under the heads *Smuggling*, and *Poaching, post.* If the offence were committed by several persons, and one of them were armed, the others being present aiding and abetting, it would seem that that would be sufficient to convict them all of the whole charge in the indictment. *See R.* v. *Smith*, *R.* & *R.* 368. The defendant may be convicted of the robbery only, or of an assault with intent to rob (*ante*, p. 520).

An indictment for robbery by two or more persons in company will be the same as an indictment for robbing alone (see infra), except that it should charge that the defendants together *robbed the prosecutor; if one of them only be apprehended, it will charge him by name,* "and a certain other person [*or* certain other persons] to the jurors aforesaid unknown," etc.: *See R.* v. *Raffety*, 2 *Lewin*, 271: *R.* v. *Ramsden*, 1 *Cox*, 37.

Indictment for Stealing from the Person (24 & 25 *Vict. c.* 96, *s.* 40, *ante*, p. 520).

Commencement as ante, p. 433]—one watch, one pocket-book, and one pocket-handkerchief ("*any chattel, money, or valuable security*") of the goods and chattels of J. N., from the person of the said J. N. feloniously did steal, take, and carry away; against the form [*as ante*, p. 465].

Felony: 24 & 25 *Vict. c.* 96, *s.* 40. *See precedent, ante*, p. 523.

Evidence.

Prove a larceny as directed *ante*, p. 434 *et seq.*, except that an actual and not merely a constructive taking must be proved; and prove the goods to have been actually severed from the person of J. N. Where the

defendant drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of the pocket, but whilst the book was still about the person of prosecutor, the prosecutor suddenly put up his hand, upon which the defendant let the book drop, and it fell into the prosecutor's pocket; this was held, by a majority of the judges, not to be a sufficient asportation to warrant a conviction for stealing from the person, because from the first to the last the book remained about the person of the prosecutor; although it was sufficient to constitute a simple larceny. *R.* v. *Thompson*, 1 *Mood. C. C.* 78. But where the prosecutor carried his watch in his waistcoat pocket, fastened to a chain, which was passed through a button-hole of the waistcoat, and kept there by a watch-key at the other end of the chain; and the defendant took the watch out of the pocket, and forcibly drew the chain and key out of the button-hole, but the point of the key caught upon another button, and the defendant's hand being seized, the watch remained there suspended, this was held a sufficient severance. *R.* v. *Simpson*, *Dears.* 421; 24 *L. J.* (*M. C.*) 7. *See R.* v. *Lapier*, 1 *Leach*, 320, *ante*, p. 528. Where a man went to bed with a prostitute, having left his watch in his hat on the table, and while he was asleep she stole the watch, this was held to be a stealing in the dwelling-house, and not a stealing from the person. *R.* v. *Hamilton*, 8 *C. & P.* 49.

Indictment for an Assault with Intent to Rob (24 & 25 *Vict. c.* 96, *s.* 42).

Commencement as ante, p. 433]—in and upon one J. N. feloniously did make an assault, with intent the moneys, goods and chattels of the said J. N., from the person and against the will of him the said J. N., then feloniously and violently to steal, take, and carry away; against the form [*as ante*, p. 465]. *This form of indictment was held good in R.* v. *Huxley*, *C. & Mar.* 596; *it need not in terms charge an intent to* rob *the prosecutor. On an indictment for an assault with intent to rob, the prisoner cannot be convicted of a common assault. R.* v. *Woodhall*, 12 *Cox*, 240, *Denman*, J.: *cf. R.* v. *King* [1900] 19 *N. Z. L. R.* 403; *and see R.* v. *Sandys*, 1 *Cox*, 8.

This count cannot be added to a count for robbery: if it be, the prosecutor will be put to his election. R. v. *Gough*, 1 *M. & Rob.* 71. *But the defendant may be convicted for this offence on an indictment for robbery; see* 24 & 25 *Vict. c.* 96, *s.* 41 (*ante*, p. 520).

Felony: penal servitude for not less than three years and not exceeding five years, or imprisonment for not more than two years, with or without hard labour. 24 & 25 *Vict. c.* 96, *s.* 42 (*ante*, p. 520); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

Indictments for an assault with intent to rob, the prisoner being armed, or for an assault with intent to rob, together with one or more person or persons, may easily be framed by comparing this with the precedents for robbery under the same circumstances. (*See ante*, p. 528.) *The punishment is the same as for such robbery.* (*See ante*, p. 520).

Evidence.

To support this indictment, you must prove the assault, and that it was coupled with an intent to rob. *See R.* v. *Barnett*, 2 *C. & K.* 594; 3 *Cox*, 432.

In proof of the former, it is not necessary to show that the defendant committed actual violence upon J. N.; for an assault is an attempt to commit a forcible crime upon another; and therefore, if the defendant, intending to rob J. N., did anything in his presence, with reference to him, in furtherance of that intent, it will be sufficient. The evidence upon this indictment usually proves a robbery with the exception of the taking and carrying away. In *R.* v. *Thomas*, 1 *Leach*, 330; 1 *East, P. C.* 417, it was held, that an indictment which alleged the assault to have been made upon J. N., was not supported by proof that the assault was made upon the driver of the post-chaise in which J. N. was; but this indictment was framed on 7 *G.* 3, *c.* 21 (*rep.*), which made it felony for any person with an offensive weapon to assault any other person, with intent to rob *such person*; and the more general words of the present statute would probably be satisfied by an indictment charging an assault upon A. with an intent to rob B.

The intent to rob must, of course, be proved from circumstances. It is a question entirely for the jury to determine, and which they will, in general, have to presume from the circumstances attending the assault, the time and place in which it was committed, the expressions or gestures of the defendant at the time, and the like. No actual demand of money, etc., is necessary to support this indictment. *R.* v. *Trusty*, 1 *East, P. C.* 418: *R.* v. *Sharwin*, *Id.* 421. Assaulting and threatening to charge with an infamous crime, with intent thereby to extort money, was held to be an assault with intent to rob. *R.* v. *Stringer*, 2 *Mood. C. C.* 261; 1 *C. & K.* 188.

Where the defendant decoyed the prosecutor into a house, and chained him down to a seat, and there compelled him to write orders for the payment of money and for the delivery of deeds, and the paper on which he wrote remained in his hands half an hour, but he was chained all the time, this was held not to be an assault with intent to rob. *R.* v. *Edwards*, 6 *C. & P.* 515, 521; *see R.* v. *Phipoe*, 2 *Leach*, 673; 2 *East, P. C.* 599. Such cases as this, however, are now provided for by 24 *&* 25 *Vict.* c. 96, *s.* 48, *ante*, p. 522.

Indictment for sending or delivering a Letter demanding Money, etc. (24 *&* 25 *Vict. c.* 96, *s.* 44, *ante, p.* 521).

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, at the parish of ——, in the county of ——, and within the jurisdiction of the said court, feloniously did send ("*send, deliver, or utter, or directly or indirectly cause to be received*") to one J. N. a certain letter ("*any letter or writing*") directed to the said J. N., by the name and description of Mr. J. N., demanding money ("*any property, chattel, money, valuable security, or other valuable thing*") from the said J. N., with menaces, and without any reasonable or probable cause, he the said J. S. then well knowing the contents of the said letter; and which said letter is as follows, that is to say [*here set out the letter verbatim*]; against the form [*as ante*, p. 465].

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S. on the day and in the year aforesaid, feloniously did utter a certain writing demanding money from the said J. N., with menaces, and without any reasonable or probable cause, he the said J. S. then well knowing the contents of the said writing; and which said writing is as follows, that is to say [*here set out the writing*

verbatim]; against the form [*as ante*, p. 465]. As to the venue, *see ante*, p. 44.

The letter must be set out in the indictment (*see R. v. Lloyd*, 2 *East, P. C.* 1122: *R. v. Hunter*, 2 *Leach*, 624, 631; *and care must be taken to set it out correctly, for a variance* (*unless amended*) *would be fatal.* (*See ante*, pp. 75, 302.)

Mr. Greaves observes (*Criminal Law Consolidation Acts* (2nd ed.), p. 50; 3 *Russ. Cr.* (6th ed.) 348, *n.*) *upon* 24 *&* 25 *Vict. c.* 100, *s.* 16, *which enacts, that whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received knowing the contents thereof, any letter or writing, threatening to kill or murder any person, shall be guilty of felony, etc., that the words "to any other person" were advisedly omitted, in order that every sending, delivering, uttering, or causing to be received might be included. He therefore advises that in every indictment on that and the similar clauses in the other Criminal Law Consolidation Acts* (*which include* 24 *&* 25 *Vict. c.* 96, *ss.* 44, 46; *c.* 97, *s.* 50; *and c.* 100, *s.* 16), *a count should be inserted alleging that the defendant uttered the writing, without stating any person to whom it was uttered. Counts for uttering forged instruments never state the person to whom they were uttered, and this shows that such a count on this clause would clearly be good. See Elsworth's case*, 2 *East, P. C.* 986. *The second count in the above indictment is framed in conformity with this suggestion of Mr. Greaves.*

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour, and, if a male under sixteen, with or without whipping (*Id.*)—24 *&* 25 *Vict. c.* 96, *s.* 44 (*ante*, p. 521); 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 *&* 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Give the letter in evidence, and prove it to have been sent or delivered by the defendant, as charged in the indictment.

Feloniously did send, etc.]—Proof that the defendant dropped the letter in a place where he knew the prosecutor would come, and that it was picked up by another person, and by him delivered to the prosecutor; *R. v. Lloyd*, 2 *East, P. C.* 1122; *R. v. Wagstaff*, *R. & R.* 398; or that the letter is in the handwriting of the defendant, and that it came to the prosecutor by the post; *R. v. Heming*, 2 *East, P. C.* 1116: *and see R. v. Jepson, Id.* 1115; was held (upon the repealed statutes, which did not contain the words in the present statute, "or directly or indirectly cause to be received") sufficient evidence of a *sending* by the defendant. So, where the prosecutor, having received such a letter, traced it to a woman who was in the habit of going errands for the prisoners in Newgate, and she proved that she received it from the defendant, then a prisoner in Newgate, to put in the post office, and the servant of the post office proved that the letter in question was brought to the office by the last witness, and forwarded in the regular course; this was held sufficient evidence, not only of the sending by the defendant, but that he also knew its contents. *R. v. Girdwood*, 2 *East, P. C.* 1120; 1 *Leach*, 142. And sending the letter to A. in order that he may deliver it to B., is a sending to B., if the letter is delivered by A. to B. *R. v. Paddle*, *R. & R.* 484. So, the leaving of a letter directed to A., near A.'s house, with an intention that it should not only reach A., but B. also, was held to be a

sending it to B., by whom it was afterwards seen. In the case of a threatening letter not properly addressed, it is for the jury to consider whether it was meant for the actual recipient. *R.* v. *Carruthers*, 1 *Cox*, 138; *R.* v. *Grimwade*, 1 *Den.* 30; 1 *C. & K.* 592; 1 *Cox*, 85. When the only evidence of sending a threatening letter was the declaration of the defendant, that he should never had written it but for W.G., it was held insufficient. *R.* v. *Howe*, 7 *C. & P.* 268. A *delivery* of a letter was not within the earlier statutes on this subject; *R.* v. *Hammond*, 2 *East, P. C.* 1119; 1 *Leach*, 444, 447; but a delivery of it, with a knowledge of its contents (which is essential in all cases under this section, *R.* v. *Girdwood, ubi supra*), is within the express terms of the present Act.

A certain letter, etc.]—The words in this statute are "any letter *or writing*," and therefore the decisions upon the earlier statutes as to what constitutes a "letter" are inapplicable to the present.

A material variance between the letter set out and that produced in evidence will be fatal, unless amended. (*See ante*, pp. 75, 302).

In *R.* v. *Harrie*, 6 *C. & P.* 105, *Bolland*, B., ordered the letter to be deposited in the hands of the clerk of the peace, in order that the defendant's witnesses might inspect it before the trial.

Demanding money.]—"Any 'property,' chattel, money, 'valuable security,' or other valuable thing." *See* 24 & 25 *Vict. c.* 96, *s.* 1 (*ante*, p. 427). If there be any doubt, which of two or three things was demanded, it may be stated differently in different counts. Where the latter contained a request only, but intimated that, if it were not complied with, the writer would publish a certain libel then in his possession, accusing the prosecutor of murder; this was held to amount to a demand. *R.* v. *Robinson*, 2 *Leach*, 749; 2 *East, P. C.* 1110. As to threatening to publish a libel, *see* 6 & 7 *Vict. c.* 96, *s.* 3 (*ante*, p. 523). A mere request, such as asking charity or the like without imposing any conditions, would not come within the meaning of the word "demand" in the statute. *Per Buller*, J., in *R.* v. *Robinson*, 2 *East, P. C.* 1114. The "valuable security" need not be negotiable. *R.* v. *John*, 13 *Cox*, 100. For its definition, *see* 24 & 25 *Vict. c.* 96, *s.* 1 (*ante*, p. 427).

By menaces.]—The demand must be with menaces. The word menaces includes "not merely threats of injury to persons or property, but menaces which would involve injury to a third person intended to be injured, and would induce the person to whom the menaces are addressed to part with money or valuable property," such as threats to accuse of misconduct not amounting to crime. *R.* v. *Tomlinson* [1895] 1 *Q. B.* 706; 64 *L. J.* (*M. C.*) 97; 18 *Cox*, 75 (*C. C. R.*): *cf. R.* v. *Miard*, 1 *Cox*, 22: *R.* v. *Chalmers*, 10 *Cox*, 450 (*C. C. R.*): *R.* v. *Smith*, 1 *Den.* 510; 2 *C. & K.* 882; 19 *L. J.* (*M. C.*) 80; 4 *Cox*, 42; *and see* 24 & 25 *Vict. c.* 96, *s.* 49 (*ante*, p. 522). The question of the meaning is for the jury: and it is the duty of the court not to direct as matter of law that a threat is a menace within the statute, but merely to lay down the principle on which the jury should proceed in considering whether the letter amounts to a menace within the statute. *R.* v. *Walton*, *L. & C.* 288: 9 *Cox*, 268; *R.* v. *Tomlinson*, *ubi supra*: *R.* v. *Carruthers*, 1 *Cox*, 138. The prosecutor may be asked what he thought the letter meant. *R.* v. *Hendy*, 4 *Cox*, 243.

Without reasonable and probable cause.]—The demand must also be without reasonable and probable cause. These words apply to the state

of the prisoner's mind when making the demand. "The question is whether the party making the demand really and honestly believed that she had good and reasonable cause for so doing." *R.* v. *Miard*, 1 *Cox*, 22, *Tindal*, C.J.; *and see R.* v. *Chalmers*, 10 *Cox*, 450 (*C. C. R.*). They apply to the money demanded, and not to the accusation threatened, the truth or falsity of which is immaterial. *R.* v. *Hamilton*, 1 *C. & K.* 212 (*under s.* 47).

Indictment for demanding Property, etc., with Menaces or by Force, with Intent to steal the same. (24 & 25 *Vict. c.* 96, *s.* 45, *ante*, p. 521.)

Commencement as ante, p. 531]—feloniously with menaces [*or* by force, *or* with menaces and by force] did demand of J. N. the money ("*any property, chattel, money, valuable security, or other valuable thing*") of him the said J. N., with intent the said money from the said J. N. feloniously to steal, take, and carry away; against the form [*as ante*, p. 465].

The property, chattel, money, valuable security, etc., demanded must be stated according to the fact. If the demand were of a specific chattel or valuable security, it may be stated thus: "a certain chattel, to wit,——," *or* "a certain valuable security, to wit,——." *Where an indictment under* 4 *G.* 4, *c.* 54, *s.* 5 (*rep.*), *which did not contain the words* "of any person," *stated that the defendant* "feloniously, by menaces, did demand the monies of the said J. N.," *it was held to be insufficient, because it did not state from whom he had demanded them. R.* v. *Dunkley*, 1 *Mood. C. C.* 90. *See the definition of the term "property" in* 24 & 25 *Vict. c.* 96, *s.* 1 (*ante*, p. 427).

Felony: penal servitude for not less than three years and not exceeding five years, or imprisonment for not more than two years, with or without hard labour.—24 & 25 *Vict. c.* 96, *s.* 45 (*ante, p.* 521); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

Evidence.

To support this indictment, the prosecutor must prove a demand by the defendant of the money or other thing stated in the indictment, "by menaces or force," with intent to steal it. As to what constitute menaces *see ante*, p. 533. It is not necessary to prove an express demand in words; the statute says, "if any person shall, with menaces or by force demand," etc.; and menaces are of two kinds—by words or by gestures; so that, if the words or gestures of the defendant at the time were plainly indicative of what he required, and tantamount in fact to a demand, it should seem to be sufficient proof of the allegation of demand in the indictment. *See R.* v. *Jackson*, 1 *Leach*, 269.

Where the defendant demanding a shilling, and on being refused threatened to burn up the prosecutor, and actually tried to fire one of his stacks, it was held that he had demanded money by menaces. *R.* v. *Taylor*, 1 *F. & F.* 511, *Pollock*, C.B.

If a person, with menaces, demand money of another, who does not give it him, because he has it not with him, this is a felony within the statute.

In order to bring a case within 24 & 25 *Vict. c.* 96, *s.* 45, the demand, if successful, must amount to stealing, and to constitute a menace within that section it must be of such a nature as to unsettle the mind of the person upon whom it operates, and to take away from his acts that

element of voluntary action which alone constitutes consent; it must therefore be left to the jury to say whether the conduct of the prisoner is such as to have had that effect on the prosecutor. *R.* v. *Walton, L. & C.* 288; 32 *L. J.* (*M. C.*) 79: 9 *Cox*, 268. Where a policeman, professing to act under legal authority, threatens to imprison a person on a charge not amounting to an offence in law, unless money be given him, and the person believing him gives him money, the policeman may be indicted under that section, although he might also have been indicted for stealing the money. *R.* v. *Robertson, L. & C.* 483; 34 *L. J.* (*M. C.*) 35: 10 *Cox*, 9.

Indictment for sending a Letter threatening to accuse, with Intent, etc.
(24 & 25 *Vict. c.* 96, *s.* 46, *ante*, p. 521.)

Commencement as ante, p. 531, *to the words* "Mr. J. N." threatening to accuse ("*accusing or threatening to accuse*") him the said J. N. (*or* one A. B. "*any other person*") of a certain infamous crime as defined by the forty-sixth section of the *Larceny Act*, 1861, to wit, of having attempted and endeavoured to commit the abominable crime of buggery with the said J. S. ("*any crime punishable by law with death, or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape or of any infamous crime as hereinafter defined*") with a view and intent by means of the said letter ("*such letter or writing*") to extort and gain ("*extort or gain*") money (*any property, chattel, money, valuable security, or other valuable thing*) from the said J. N. (or A. B. "*from any person*"), he the said J. S. then well knowing the contents of the said letter ("*letter or writing*"), and which said letter ("*letter or writing*") is as follows, that is to say [*here set out the letter verbatim*]; against the form [*as ante*, p. 465].

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S. on the day and in the year aforesaid, feloniously did utter a certain writing ("*letter or writing*"), threatening to accuse him, the said J. N. [*proceed as in the first count, substituting* "*writing*" *for* "*letter*"]. *As to this second count, see the observations following the second count of the indictment, ante*, p. 532.

Third and fourth counts.—And the jurors [*proceed as in the first and second counts, omitting the specific description of the infamous crime*]. *Counts may also be added, varying such description. In R.* v. *Tucker*, 1 *Mood. C. C.* 134, *it was held by all the judges that an indictment under* 4 *G.* 4, *c.* 54 (*rep.*), *for sending a letter threatening to accuse a man of an infamous crime need not specify such crime, for the specific crime the defendant threatened to charge might intentionally be left in doubt: but that statute contained no definition of* "*infamous crime.*" *The indictment, before* 10 & 11 *Vict. c.* 66, *s.* 1 (*which has been replaced by the* 24 & 25 *Vict. c.* 96, *s.* 46), *must have alleged that the defendant threatened to accuse the person to whom the letter was sent, but the words of the present statute are* "*any other person.*" *Care should be taken to set out the letter correctly. See ante*, pp. 75, 302. *If there be a doubt as to whether the letter sent is within s.* 46, *an indictment should be preferred* (*if the facts warrant*) *under s.* 44 (*ante*, p. 521).

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour, and if a male under sixteen, with or without whipping (*Id.*).—24 & 25 *Vict. c.* 96, *s.* 46 (*ante*, p. 521); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 285). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant sent, delivered, or uttered, or caused to be received, the letter, as directed, *ante*, p. 532. Whether the letter amounts to a threat to accuse the prosecutor of the offence mentioned, is a fact to be determined by the jury. *See R.* v. *Girdwood*, 2 *East, P. C.* 1120; 1 *Leach*, 142. If it does not appear from the letter itself of what offence the defendant threatened to accuse the prosecutor, the defendant's declaration of meaning of the letter may be given in evidence to explain it. *R.* v. *Tucker*, *ubi supra*. The threat need not be to accuse before a court of justice. *R.* v. *Robinson*, 2 *M. & Rob.* 14; 2 *Lewin*, 273.

The intent must also be proved, as in the last case; and in order to prove it, other letters received by the prosecutor from the defendant upon the same subject may be given in evidence, or from the previous contemporaneous or even subsequent conduct and expressions to third persons. *R.* v. *Menage*, 3 *F. & F.* 310; *cf. R.* v. *Cooper*, 3 *Cox*, 547.

Punishable with penal servitude for not less than seven years.]—See observations on evidence under *s.* 47, *post*, p. 537.

Infamous crime.]—These words are defined in *s.* 46. They first occur in 4 *G.* 4, *c.* 54 (*rep.*) (*see R.* v. *Hickman*, 1 *Mood. C. C.* 34); that statute repealed 30 *G.* 2, *c.* 24, which contained the words "any crime punishable with death, transportation, pillory, or other infamous punishment." As to evidence of a threat to accuse within *s.* 46, see the cases under *s.* 47, *post*, p. 537.

Indictment for threatening to accuse a Man of a Crime with Intent, etc. (24 & 25 *Vict. c.* 96, *s.* 47, *ante*, p. 522).

Commencement as in the last precedent]—feloniously did threaten one J. N. to accuse ("*accuse or threaten to accuse*") him the said J. N. ("*either the person to whom such accusation or threat shall be made, or any other person*") of a certain infamous crime as defined by the forty-sixth section of the *Larceny Act*, 1861, to wit, of having attempted and endeavoured to commit the abominable crime of buggery with the said J. S. ("*any crime punishable by law with death or penal servitude for not less than seven years, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any crime in and by the* 24 & 25 *Vict. c.* 96, *s.* 46, *defined to be an infamous crime*"), with a view and intent thereby then to extort and gain money ("*any property, chattel, money, valuable security, or other valuable thing,*" *see* 24 & 25 *Vict. c.* 96, *s.* 1, *ante*, p. 427) from the said J. N.; against the form [*as ante*, p. 465].

Second count.—And the jurors [*see the observations as to the third and other counts of the indictment under s.* 46, *ante*, p. 521]. *It is not necessary to state the property in the security or money to be obtained: R.* v. *Tiddeman*; 4 *Cox*, 389.

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour, and, if a male under sixteen, with or without whipping.—24 & 25 *Vict. c.* 96, *s.* 47 (*ante*, p. 522); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the threat or accusation, and the intent. It is for the jury to decide what the defendant meant by the threatened accusation: *R.* v. *Cooper*, 3 *Cox*, 547: *R.* v. *Braynell*, 4 *Cox*, 402. It is submitted that the meaning of the words in 24 & 25 *Vict. c.* 96, *s.* 46, "any crime punishable by law with penal servitude for not less than seven years" is any crime for which a sentence of seven years or more may be awarded; and therefore that where the threatened accusation is one of indecent assault upon a male person such an accusation is within the above statute, the maximum punishment for an indecent assault upon a male person being penal servitude for ten years by virtue of 24 & 25 *Vict. c.* 100, *s.* 62, *post*, *ch. ii. s.* 8. Before the passing of 24 & 25 *Vict. c.* 96 it was held that where the threatened accusation was one of indecent assault (upon a male person) it was for the jury to determine whether such an accusation might not amount to an "infamous crime" within 7 & 8 *G.* 4, *c.* 29, *s.* 8, as being "a solicitation to permit or commit such crime." *R.* v. *Cooper*, *ubi supra*, *Cresswell*, J.: *cf. R.* v. *Braynell*, *ubi supra*: *R.* v. *Middleditch*, 1 *Den.* 92; 2 *Cox*, 313. It is to be observed that the offence of gross indecency between male persons created by 48 & 49 *Vict. c.* 69, *s.* 11 is not within *ss.* 46 or 47: *see R.* v. *Gilgannon*, 53 *J. P.* 457.

The words "any other person" in *ss.* 46 and 47 render it unnecessary to consider the earlier cases as to proof of the person threatened.

The threat must be a threat to accuse, or an accusation: if J. N. be indicted, or in custody for an offence, and the defendant threaten to procure witnesses to prove the charge, this will not be a threat to accuse within the meaning of the statute. *R.* v. *Gill*, 1 *Archbold's Peel's Acts*, 302. But it need not be a threat to accuse before a judicial tribunal; a threat to charge before any third person is sufficient. *R.* v. *Robinson*, 2 *M.* & *Rob.* 14. And it is immaterial whether the prosecutor be innocent or guilty of the offence imputed to him; *R.* v. *Gardner*, 1 *C.* & *P.* 479; if the prisoner intended to extort money by the accusation, *R.* v. *Richards*, 11 *Cox*, 43. And therefore, although the prosecutor may be cross-examined as to his guilt of the offence imputed to him, with a view to shake his credit, yet no evidence will be allowed to be given, even in cross-examination, by another witness, to prove that the prosecutor was guilty of such offence. *R.* v. *Cracknell*, 10 *Cox*, 408. If the prisoner makes the accusation believing it to be true and without any purpose at that time to extort money thereby, and afterwards endeavours to compromise it by payment of money, he may be guilty of the offence of compounding a felony, but not of an offence under *s.* 47. *R.* v. *Richards*, 11 *Cox*, 43, *Blackburn*, J. The last-named case appears to be hardly reconcilable with the above cited cases of *R.* v. *Gardner* and *R.* v. *Cracknell*, but the facts in *R.* v. *Richards* were exceptional. Proof that the prisoner went to the prosecutor and threatened to accuse his son of an unnatural offence with a mare unless the prosecutor would buy the mare for 3*l.*, was held to sustain an indictment under 24 & 25 *Vict. c.* 96, *s.* 47. *R.* v. *Redman*, *L. R.* 1 *C. C. R.* 12; 35 *L. J.* (*M. C.*) 89; 10 *Cox*, 159.

The intent must be proved as laid; a variance will be fatal, unless amended. Where the intent laid was to extort money, and the intent proved was to extort a bill of exchange, it was (before 14 & 15 *Vict. c.* 100) held a fatal variance. *R.* v. *Major*, 2 *East*, *P. C.* 1118; 2 *Leach*, 772. If the intent do not appear sufficiently from the accusation or threat itself, it must be proved by circumstances from which the jury may fairly

presume it (*see ante*, p. 303); as by subsequent expressions of the defendant. *R.* v. *Kain*, 8 *C. & P.* 187. Evidence of an exactly similar act committed by the prisoner on a previous occasion has been held admissible as evidence of intent. *R.* v. *Cooper*, 3 *Cox*, 547, *Cresswell*, J., *and see ante*, pp. 303, 308-312.

Indictment for inducing another by Threats to execute Documents with Intent to defraud. (24 & 25 *Vict. c.* 96, *s.* 48, *ante*, p. 522.)

For precedent, see R. v. *John*, 13 *Cox*, 100.

Felony: penal servitude for life, or not less than three years, or imprisonment with or without hard labour for not more than two years. 24 & 25 *Vict. c.* 96, *s.* 48 (*ante, p.* 522); 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace, see* 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

The offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the threats as directed (*ante*, p. 537), that the document was executed in consequence of the threats, etc., and that it is a valuable security within the section. A document in the following terms:—"London, July 19th, 1875.—I hereby agree to pay you 100*l.* sterling on the 27th inst. to prevent any action against me," has been held to be a valuable security within *s.* 48. *R.* v. *John*, 13 *Cox*, 100, *Brett*, J.

Indictment for threatening to publish a Libel, etc., with Intent to extort Money, etc. (6 & 7 *Vict. c.* 96, *s.* 3, *ante*, p. 523.)

Commencement as ante, p. 531]—unlawfully did threaten one J. N. to publish a certain libel of and concerning him the said J. N. [*or* one E. F. —*if any person shall publish, or threaten to publish, any libel upon any other person, or shall directly or indirectly threaten to print or publish or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing of any matter or thing touching any other person*"] with intent thereby then to extort money from the said J. N. [" *with intent to extort any money or security for money, or any valuable thing, from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust*"]; against the form [*as ante*, p. 465]. *If it be doubtful whether the matter threatened to be published be libellous, and a count charging that the defendant* " did propose to the said J. N. to abstain from printing and publishing a certain matter and thing touching the said J. N. [*or* one E. F.], with intent," etc.

Misdemeanor: imprisonment, with or without hard labour, not exceeding three years. 6 & 7 *Vict. c.* 96, *s.* 3 (*ante*, p. 523). *The punishment seems not to be affected by* 54 & 55 *Vict. c.* 69, *s.* 1; *see ante*, pp. 235, 236.

Evidence.

Prove the threat by the defendant to publish libellous or other matter concerning the prosecutor. Or, if the indictment be for proposing to the prosecutor to abstain from publishing matter concerning him, prove the proposal, and the nature of the matter proposed to be suppressed. Prove the intent as directed (*ante*, pp. 303, 308, 312). The intent to extort money may be implied from the circumstances, and does not require an express

demand of money. *R.* v. *Coghlan*, 4 *F. & F.* 316. But, if it appears that the object is to compel the delivery of accounts of moneys honestly believed to be due and owing, there is no evidence of the intent to extort money. *Id.* An intent to extort *bank-notes* may be given in evidence under this indictment. 14 *&* 15 *Vict. c.* 100, *s.* 18 (*ante*, p. 54).

PIRACY JURE GENTIUM.

Indictment.

Yorkshire, to wit:—The jurors for our lord the King upon their oath present, that J. S., K. S., and L. T., on the first day of August, in the year of our Lord ——, with force and arms, upon the high seas, to wit, in and on board of a certain ship, called the Windsor Castle, in a certain place upon the high seas, distant about ten leagues from Cutcheen in the East Indies, then being, in and upon certain mariners, to the jurors aforesaid unknown, in the peace of God and of our lord the King, then and there being, piratically and feloniously did make an assault, and then the said mariners in bodily fear and danger of their lives on the high seas aforesaid then and there piratically and feloniously did put, and the said ship called the Windsor Castle, and the apparel and tackle of the said ship, of the value of twelve hundred pounds, and seventy chests of opium, of the value of fourteen hundred pounds, in and on board the said ship then being, of the goods and chattels of certain subjects of our said lord the King, to the jurors aforesaid unknown, and then in the custody and possession of the mariners aforesaid, from the care, custody, and possession, and against the will of the mariners aforesaid, then, to wit, on the day and year last aforesaid, upon the high seas aforesaid, piratically, feloniously and violently did steal, take and carry away, against the peace of our lord the King, his crown and dignity. [*Framed from the indictment in R.* v. *Kidd*, 14 *St. Tr.* 147; *and see R.* v. *Bonnet*, 15 *St. Tr.* 1231. *As to the venue and place of trial, see ante*, p. 39.]

Piracy jure gentium is robbery within the Admiralty jurisdiction; Att.-Gen. for Hong-Kong v. *Kwok a Sing* (*L. R.* 5 *P. C.* 179, 200; 42 *L. J. P. C.* 64; 12 *Cox*, 565: *R.* v. *Dawson*, 13 *St. Tr.* 451; *Holt*, C.J.). *Unlike piracy under municipal law, it is justiciable by the courts of every nation. In England it was justiciable only by the admiral* (2 *Hale*, 370), *until by* 28 *H.* 8, *c.* 15, *it was made triable according to the course of the common law, and punishable with death, and with loss of lands and goods, in the same manner as upon an attainder for robbery on land. The Offences at Sea Act*, 1799 (39 *G.* 3, *c.* 37), *ss.* 1, 2, *made all offences committed within the jurisdiction of the Admiralty punishable in the same manner as if they had been committed on land. See R.* v. *Curling*, *R. & R.* 123. *The Offences at Sea Act*, 1820 (1 *G.* 4, *c.* 90), *s.* 1, *extended to such offences the benefit of clergy, as if committed on land; and subjected the offences so made clergyable to the same punishment as if committed on land. And the Criminal Law Act*, 1827 (7 *&* 8 *G.* 4, *c.* 28), *s.* 12, *enacts that "all offences prosecuted in the High Court of Admiralty of England should, upon every first and subsequent conviction, be subject to the same punishment, whether of death or otherwise, as if such offences had been committed upon the land." See now* 7 *W.* 4 *&* 1 *Vict. c.* 88, *s.* 3 (*post*, p. 544). *The law as to piracy jure gentium and the mode of trying that offence is not altered by the Territorial Waters Jurisdiction Act*, 1878 (41 *&* 42 *Vict. c.* 73); *see s.* 6. *But where such offence is also an offence defined by that Act it may be tried under the Act.*

The procedure as to arraignment, pleading, etc., on the trial of piracy is the same as in the case of felony. See 7 & 8 *G.* 4, *c.* 28, *ss.* 1, 2, 3 (*ante*, pp. 179, 183, 200). 12 *G.* 3, *c.* 20, *as to the consequences of standing mute on arraignment, is virtually repealed as to England.*

Evidence.

Prove a robbery, and prove it to have been committed within the jurisdiction of the Admiralty. Attend also to the following particulars of evidence:—

Upon the high seas.]—The offence must be proved to have been committed within the jurisdiction of the court of Admiralty, that is, upon some part of the sea which is not *infra corpus comitatûs*. *See* 13 *R.* 2, *st.* 1, *c.* 5; 15 *R.* 2, *c.* 3. According to *Coke*, all rivers in this country, until they flow past the furthest point of land next the sea, are within the jurisdiction of the courts of common law, and not of the court of Admiralty (*see* 3 *Co. Inst.* 113; *Velthasen* v. *Ormsley*, 3 *T. R.* 315); and the Admiralty jurisdiction does not extend to any haven, creek, arm of the sea, or other place within the body of a county: 3 *Co. Inst.* 113; 1 *Hawk. c.* 37, *s.* 16; thus, where the sea flows in between two points of land in this country, a straight imaginary line being drawn from one point to the other, the courts of common law have jurisdiction of all offences committed within, the court of Admiralty of all offences without it. According to *Hale*, whose opinion seems to be better, the Admiralty had concurrent jurisdiction in such waters as to murder and maiming, and exclusive jurisdiction as to piracy. *R.* v. *Bonnet*, 15 *St. Tr.* 1231; *and see ante*, p. 39. And if a robbery be committed in creeks, harbours, ports, etc., in foreign countries, the court of Admiralty indisputably has jurisdiction of it, and such offence is consequently piracy. *R.* v *Jemot*, *Old Bailey*, 28*th Feb.* 1812, *MS.* For the court of Admiralty has jurisdiction over British ships in foreign rivers, below the bridges, where the tide ebbs and flows, and where great ships go, although the municipal authorities of the foreign country may be entitled to exercise concurrent jurisdiction. *R.* v. *Anderson*, *L. R.*, 1 *C. C. R.* 161; 38 *L. J.* (*M. C.*) 12, *ante*, pp. 39, 40: *R.* v. *Carr*, 10 *Q. B. D.* 76; 52 *L. J.* (*M. C.*) 12, *ante*, p. 40. Indeed, on an indictment for larceny out of a vessel lying in a river at Wampu, in China, the prosecutor gave no evidence as to the tide flowing or otherwise where the vessel lay; but the judges held that the Admiralty had jurisdiction, it being a place where great ships go. *R.* v. *Allen*, 1 1 *Mood. C. C.* 494. As to offences committed on the coast, the Admiralty have exclusive jurisdiction of offences committed beyond the low water-mark; and between that and the high water-mark the court of Admiralty has jurisdiction over offences done upon the water when the tide is in; and the courts of common law over offences committed upon the strand when the tide is out. *But see Embleton* v. *Brown*, 3 *E. & E.* 234; 30 *L. J.* (*M. C.*) 1, *and ante*, p. 39 *et seq.* All the other parts of the high seas are indisputably within the jurisdiction of the Admiralty. *See ante*, p. 39.

In and on board, etc.]—This must be proved as laid. If the name of the ship be unknown, it must be stated so in the indictment. (*See ante*, p. 56).

In the peace of our lord the King.]—Some evidence must be given of this; for if the persons robbed be subjects of a state at enmity with this

country, although it may perhaps be piracy, yet it is not cognizable as such in any court of Admiralty within this realm. 4 *Co. Inst.* 154; *Y. B.* 2 *Ric.* 3, *f.* 2. *See R.* v. *Sawyer, R. & R.* 294.

In bodily fear, etc.]—This must be proved in the same manner as in robbery. *Sir L. Jenk.* xciv.

And the said ship, etc.]—The things stolen are proved in the same manner as in ordinary cases of larceny. The value is immaterial, as in a robbery upon land. *Molloy de Jure Maritimo, p.* 64, *s.* 18; *Beawes*, 231. It is said, that if one or more of the crew or passengers in a vessel be taken for the purpose of being sold as slaves, it is piracy. *Molloy*, p. 63, *s.* 16; (*and see the Slave Trade Act*, 1824 (5 *G.* 4, *c.* 113), *s.* 9, *post*, p. 545).

Of the goods and chattels of, etc.]—These must be stated to be the goods of a subject or subjects of this realm, or of some state in amity with it; and the allegation must be proved as laid. (*See ante*, pp. 56, 300).

Piratically, feloniously, and violently.]—The goods must be proved to have been taken *animo furandi*, as in other cases of larceny. *Molloy*, 71, *s.* 73. (*See ante*, p. 440.) And they must be proved to have been either taken with force and violence, or delivered to the pirates under the impression of that degree of fear and apprehension which is necessary to constitute robbery upon land. (*See ante*, p. 523).

The taking, to be piracy, must be without authority from any prince or state. If a party making a capture at sea do so by the authority of any prince or state, it cannot be considered piracy; for a nation never can be deemed pirates; fixed domain, public revenue, and a certain form of government exempt a people from that character. Even a capture by authority of the states of Algiers, Tunis, or Tripoli, was not treated as piracy. 2 *Sir L. Jenk.* 790.

At common law, if a subject of this realm committed acts of hostility against another subject, under the authority of a commission from a foreign prince, it was not piracy; 2 *Sir L. Jenk.* 754; but the law has been altered in this respect by 11 *W.* 3, *c.* 7, *and* 18 *G.* 2, *c.* 30, *s.* 1 (*post*, p. 544). *See R.* v. *Evans*, 2 *East, P. C.* 798. As to trials for piracy of persons acting under the commission of Jas. 2, after his deposition, *see R.* v. *Golding*, 12 *St. Tr.* 1269.

If the subjects of the same state commit robbery upon each other, upon the high sea, it is piracy. If the subjects of different states commit robbery upon each other, upon the high sea, if their respective states be in amity, it is piracy; if at enmity, it is not; for it is a general rule, that enemies can never commit piracy on each other, their depredations being deemed mere acts of hostility. 1 *Sir L. Jenk.* xciv.; 4 *Co. Inst.* 154.

But if a commissioned ship, by mistake, capture a vessel belonging to the subjects of a friendly power, imagining it to belong to an enemy, and bring it into port for condemnation, that is not piracy. *See* 1 *Sir L. Jenk.* xciv.

Steal, take, and carry away.]—This is proved in the same manner as in robbery. *Molloy*, p. 64, *s.* 18. If persons at sea force the captain of a vessel to sell part of his cargo for less than its value, it is piracy. 28 *H.* 8, *c.* 15, *s.* 4, exempts from the penalties of piracy, the taking, when compelled by necessity, from a ship which can conveniently spare them victuals or equipment if payment is made by bill on the terms there prescribed. If a pirate attack a vessel, and before he obtains possession of her, the captain, in order to redeem her, give an oath to pay a sum

certain, this is no piracy, for there was no taking. *Molloy*, p. 64, *s.* 18. But if there be an actual taking, it is piracy, although the pirate afterwards allow the party to proceed on his voyage. *Sir L. Jenk.* xcviii.

PIRACY BY STATUTE.

Statutes.

28 *H.* 8, *c.* 15—*Trial of Piracy according to the course of the Common Law.*]—*See ante*, pp. 38, 39, 539.

11 *W.* 3, *c.* 7, *s.* 7—*Piratical acts done under colour of foreign commission.*]—If any of his Majesty's natural born subjects or denizens of this kingdom shall commit any piracy or robbery or any act of hostility against other his Majesty's subjects upon the sea under colour of any commission from any foreign prince or state, or pretence of authority from any person whatsoever, such offenders, and every of them, shall be deemed, adjudged, and taken to be pirates, felons, and robbers, and they and every of them being duly convicted thereof according to this Act or the aforesaid statute of King Henry the Eighth (28 *H.* 8, *c.* 15) shall have and suffer such pains of death, loss of lands, goods and chattels, as pirates, felons, and robbers, upon these as ought to have and suffer. [*See R.* v. *Quelch*, 14 *St. Tr.* 1067, *and for present punishment*, 7 *W.* 4 *&* 1 *Vict. c.* 88, *s.* 3, *post*, p. 544].

Sect. 8—*Certain acts of commanders, seamen, etc., to be piracy.*]—. . . If any commander or master of any ship, or any seaman or mariner shall, in any place where the admiral has jurisdiction, betray his trust and turn pirate, enemy, or rebel, and piratically and feloniously run away with his or their ship or ships, or any barge, boat, ordnance, ammunition, goods, or merchandizes, or yield them up voluntarily to any pirate; or shall bring any seducing messages from any pirate, enemy or rebel; or consult, combine or confederate with, or attempt, or endeavour to corrupt any commander, master, officer, or mariner to yield up or run away with any ship, goods, or merchandizes, or turn pirate, or go over to pirates; or if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship, and goods committed to his trust, or that shall confine [*R.* v. *Jones*, 11 *Cox*, 393, *post*, p. 546] his master, or make, or endeavour to make a revolt in the ship, he shall be adjudged, deemed, and taken to be a pirate, felon, and robber, and being convicted thereof according to the directions of this Act shall have and suffer pains of death, losses of lands, goods and chattels, as pirates, felons, and robbers upon the seas ought to have and suffer. [*See R.* v. *Dawson*, 13 *St. Tr.* 454, 478: *and as to present punishment*, 7 *W.* 4 *&* 1 *Vict. c.* 88, *s.* 3, *post*, p. 544].

Sect. 9—*Accessories before the fact to piracy.*] . . . All and every person and persons, whatsoever, who after the 24th day of September, 1700, shall, either on the land or upon the seas, wittingly or knowingly set forth any pirate, or aid or assist, or maintain, procure, command, counsel, or advise any person or persons, whatsoever, to do or commit any piracies or robberies upon the seas, and (*? if*) such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such

person or persons, whatsoever, so as aforesaid, setting forth any pirate, or aiding, assisting, maintaining, procuring, commanding, counselling, or advising the same, either on the land or on the sea shall be, and are hereby declared, and shall be deemed and adjudged to be accessory to such piracy and robbery done and committed.

Sect. 10—*Concealing pirates or vessels taken by them.*]— . . . after any piracy or robbery is, or shall be, committed by any pirate or robber whatsoever, every person and persons who knowing that such pirate or robber has done or committed such piracy and robbery, shall on the land or upon the sea, receive, entertain, or conceal any such pirate or robber, or take or receive into his custody any ship, vessel, goods, or chattels, which have been by such pirate or robber piratically and feloniously taken, shall be, and are hereby declared, deemed, and adjudged to be accessory to such piracy and robbery. . . . [*Trial to be under* 28 *H.* 8, *c.* 15.]

4 *G.* 1, *c.* 11 (*Piracy Act*, 1717), *s.* 7—*Mode of trial.*]—"And be it hereby declared that all and every person and persons who have committed or shall commit any offence or offences for which they ought to be judged, deemed, and taken to be pirates, felons, or robbers by 11 *W.* 3, *c.* 7 (*ante*, p. 542) may be tried and judged for every such offence in such manner and form as is by [28 *H.* 8, *c.* 15] directed and appointed for the trial of pirates. . . ."

8 *G.* 1, *c.* 24 (*Piracy Act*, 1721), *s.* 1—*Certain acts of commanders, seamen, etc. to be piracy.*]— . . . If any commander or master of any ship or vessel, or any other person or persons shall anywise trade with any pirate, by truck, barter, exchange, or in any other manner, or shall furnish any pirate, felon, or robber upon the seas with any ammunition, provisions, or stores of any kind, or shall fit out any ship or vessel knowingly, and with a design to trade with or supply or correspond with any pirate, felon, or robber on the seas, or if any person or persons shall anyways consult, combine, confederate, or correspond with any pirate, felon, or robber on the seas, knowing him to be guilty of any such piracy, felony, or robbery, such offender and offenders, and every of them, shall in each and every of the said cases be deemed, adjudged, and taken to be guilty of piracy, felony, and robbery, and he and they shall and may be inquired of, tried, heard, and adjudged of and for all or any of the matters aforesaid, according to [28 *H.* 8, *c.* 15] and [11 *W.* 3, *c.* 7] . . . [*punishment rep., see post*, p. 544] . . . and in case any person or persons belonging to any ship or vessel whatsoever, upon meeting any merchant ship or vessel on the high seas, or in any port, haven, or creek whatsoever, shall forcibly board or enter into such ship or vessel, and though they do not seize or carry off such ship or vessel, shall throw overboard or destroy any part of the goods or merchandizes belonging to such ship or vessel, the person or persons who shall be guilty thereof shall in all respects be deemed and punished as pirates as aforesaid.

Sect. 3—*Accessories to be deemed as principals.*]—And whereas there are some defects in the laws for bringing persons who are accessories to piracy and robbery upon the seas to condign punishment, if the principal who committed such piracy and robbery is not nor cannot be apprehended and brought to justice. Be it therefore enacted . . . that every person and persons whatsoever who, by [11 *W.* 3, *c.* 7], are declared to be accessory or accessories to any piracy or robbery therein mentioned are

hereby declared and shall be deemed and taken to be principal pirates, felons, and robbers, and shall and may [from and after March 25, 1758] be inquired of, heard, determined, and adjudged in the same manner as persons guilty of piracy may and ought to be inquired of, tried, heard, determined, and adjudged by the said statute [11 *W.* 3, *c.* 7] . . . [*As to punishment, see W.* 4 *&* 1 *Vict. c.* 88, *s.* 3, *infra.*]

18 *G.* 2, *c.* 30 (*Piracy Act*, 1744), *s.* 1—*Piracy committed under enemy's commission.*]— . . . all persons being the natural born subjects or denizens of his Majesty who during the present or any future wars have committed or shall commit any hostilities upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction against his Majesty's subjects by virtue of or under colour of any commission from any of his Majesty's enemies, or have been, or shall be any other ways adherent or giving comfort to his Majesty's enemies upon the sea [or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction] may be tried as pirates, felons, and robbers in the said Court of Admiralty, upon shipboard, or upon the land in the same manner as persons guilty of piracy, felony, and robbery are by the said Act [28 *H.* 8, *c.* 15] directed to be tried. . . . [*As to punishment, see* 7 *W.* 4 *&* 1 *Vict. c.* 88, *s.* 3, *infra. See R.* v. *Golding*, 12 *St. Tr.* 1269: *R.* v. *Vaughan*, 13 *St. Tr.* 485, 503, 524. *As to adhering to the King's enemies, see post, Book III. Part II. ch. i. tit.* "*High Treason.*"]

Sect. 2—*Persons acquitted or convicted not to be retried on the same facts for high treason.* [*See* 52 *&* 53 *Vict. c.* 63, *s.* 33, *ante*, p. 170.]

Sect. 3—*Persons offending against the Act and not tried under it to be triable under* 28 *H.* 8, *c.* 15, *for high treason.*

12 *G.* 3, *c.* 20. *Proceedings against persons standing mute on arraignment for felony or piracy.*]—*Virt. rep.* 7 *&* 8 *G.* 4, *c.* 28, *s.* 2 (E); 9 *G.* 4. *c.* 54, *s.* 8 (I) (*see ante*, p. 183).

7 *W.* 4 *&* 1 *Vict. c.* 88 (*Piracy Act*, 1837), *s.* 2—*Piracy with violence.*] —Whosoever, with intent to commit, or at the time of, or immediately before, or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of or belonging to such ship or vessel, or shall stab, cut or wound any such person, or unlawfully do any act, whereby the life of such person may be endangered, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

Sect. 3—*Punishment of piracy.*]—Whosoever shall be convicted of any offence which by any of the Acts hereinbefore referred to amounts to the crime of piracy, and is thereby made punishable with death, shall be liable . . . to be transported beyond the seas for the term of the natural life of such offender. . . . [" *The acts hereinbefore referred to*" *are those mentioned in s.* 1 *of* 7 *W.* 4 *&* 1 *Vict. c.* 88 (*which section is repealed by* 37 *&* 38 *Vict. c.* 35), *and are as follows*:—28 *H.* 8, *c.* 15; 11 *W.* 3, *c.* 7; 4 *G.* 1, *c.* 11; 8 *G.* 1, *c.* 24, *and* 18 *G.* 2, *c.* 30. *Penal servitude was substituted for transportation by* 20 *&* 21 *Vict. c.* 3, *s.* 2, *ante*, p. 235.]

Sect. 4—*Punishment of accessories.*]—*See post, tit.* "*Accessories.*"

5 *&* 6 *Vict. c.* 28, *ss.* 16, 18, *punishment for piracy in Ireland.*]—*assimilated to that in England under* 7 *W.* 4 *&* 1 *Vict. c.* 88, *s.* 3, *supra.*

13 & 14 *Vict. c.* 26 (*Piracy Act*, 1850), *s.* 2—*Jurisdiction of Admiralty Court and Vice Admiralty Courts to adjudge as to alleged pirates attacked or captured by King's ships. See The Magellan Pirates*, 1 *Spinks* (*Eccl. & Adm.*) 81 : 16 *Jur.* 1145.

5 *G.* 4, *c.* 113 (*Slave Trade Act*, 1824), *s.* 9.]—If any subject or subjects of his Majesty, or any person or persons residing or being within any of the dominions, forts, settlements, factories, or territories, now or hereafter belonging to his Majesty, or being in his Majesty's occupation or possession, or under the government of the United Company of Merchants of England trading to the East Indies, shall upon the high seas, or in any haven, river, creek, or place, where the admiral has jurisdiction, knowingly and wilfully carry away, convey, or remove, or aid or assist in carrying away, conveying or removing any person or persons as a slave or slaves, or for the purpose of his, her, or their being imported or brought as a slave or slaves into any island, colony, country, territory or place whatsoever, or for the purpose of his, her or them being sold, transferred, used or dealt with as a slave or slaves, or shall upon the high seas, or within the jurisdiction aforesaid, knowingly and wilfully ship, embark, receive, detain or confine, or assist in shipping, embarking, receiving, detaining, or confining on board any ship, vessel or boat, any person or persons for the purpose of his, her or their being carried away, conveyed or removed as a slave or slaves, or for the purpose of his, her or their being imported or brought as a slave or slaves into any island, colony, country, territory or place, whatsoever, or for the purpose of his, her or their being sold, transferred, used or dealt with as a slave or slaves, then and in every such case, the person or persons so offending, shall be deemed and adjudged guilty of piracy, felony and robbery . . .

33 & 34 *Vict. c.* 90—*Fitting out expeditions against friendly states.*]—*See post, tit.* "*Foreign Enlistment.*"

36 & 37 *Vict. c.* 88, *s.* 26—*Jurisdiction and procedure on offences against Slave Trade Acts.*]—*Ante*, p. 39.

41 & 42 *Vict. c.* 73 (*Territorial Waters Jurisdiction Act*, 1878), *s.* 6.]—This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto: and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the admiral, such offence may be tried in pursuance of this Act or in pursuance of any other Act of Parliament law or custom relating thereto.

20 & 21 *Vict. c.* 3, *s.* 2—*Substitution of penal servitude for transportation.*]—*See ante*, p. 235.

54 & 55 *Vict. c.* 69, *s.* 1—*Terms of penal servitude and imprisonment.*]—*See ante*, p. 235.

Indictment for Piracy with Violence. (7 *W.* 4 & 1 *Vict. c.* 88, *s.* 2.)

This indictment may easily be framed from the precedent of an indictment for piracy jure gentium (*ante*, p. 539) *by adding an allegation*, "that the defendant, with intent to commit [*or* 'at the time of,' *or*, 'immediately

before,' *or* 'immediately after the committing'] such piracy as aforesaid, in and upon one J. N., then and there being on board of [*or* 'belonging to'] the said ship, feloniously did make an assault, with intent him the said J. N. feloniously, wilfully, and of his malice aforethought to kill and murder" [*or otherwise as the case may be*]; *and concluding* against the form of the statute, etc. *See an abstract of an indictment for piracy under* 11 *W.* 3, *c.* 7, *s.* 8 (*ante*, p. 542). *R.* v. *Jones*, 11 *Cox*, 393. *The evidence will be the same as stated ante*, p. 510, *with the addition of the proof necessary to sustain the above allegation. An indictment against sailors for "confining their master" under* 11 *W.* 3 *c.* 7, *s.* 8, *will be supported by evidence that, although no force was used, the master was restrained by the presence and gestures of the prisoners, and deprived of his lawful command, and compelled to remain in certain parts of the vessel. R.* v. *Jones*, 11 *Cox*, 393, *Bovill*, C.J., *and cf. R.* v. *McGregor*, 1 *C. & K.* 429.

Felony: death. 7 *W.* 4 *& 1 Vict. c.* 88, *s.* 2. *This sentence may be recorded.* 4 *G.* 4, *c.* 48, *s.* 1 (*ante*, p. 233).

The offence is not triable at quarter sessions. 5 *& 6 Vict. c.* 38, *s.* 1 (*ante*, p. 126).

As to offences made piracy by other statutes, see ante, pp. 542–545. *As to the offence of fitting out vessels, etc., for the slave trade, etc., see* 5 *G.* 4, *c.* 113, *ss.* 10, 11, *and* 36 *& 37 Vict. c.* 88, *and R.* v. *Zulueta*, 1 *C. & K.* 215. *See further as to the offence of piracy*, 1 *East, P. C.* 792; 1 *Russ. Cr.* (6th ed.) p. 260; 3 *Burn's*, J., pp. 1265 *et seq.* (30th ed.); *Wheaton* (4th Eng. ed.), p. 198; (8th Amer. ed., by *Dana*), *ss.* 122–125: 1 *Phillimore, Int. Law*, 411.

RECEIVING STOLEN PROPERTY.

Statutes.

24 *& 25 Vict. c.* 96 (*Larceny Act*, 1861), *s.* 91—*Receivers may be tried as accessories after the fact or for substantive felony.*]—Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, *extorting, obtaining, embezzling, or otherwise disposing whereof* shall amount to a felony, either at common law or by virtue of this Act, knowing the same to have been feloniously stolen, taken, *extorted, obtained, embezzled, or disposed* of, shall be guilty of felony, and may be indicted and convicted, either as an accessory after the fact or for a substantive felony, and, in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping: provided that no person, howsoever tried for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence. [*This section re-enacts* 7 *&* 8 *G.* 4, *c.* 29, *s.* 54, *with the addition of the words in italics. For definition of valuable security and property, see ante*, p. 427. *For indictment, see post*, p. 549.]

Sect. 92.—*Joining counts against principal felons and receivers.*]—In any indictment *containing a charge* of feloniously stealing any property, it shall be lawful to add a count, *or several counts*, for feloniously receiving the same, *or any part or parts thereof*, knowing the same to have been

stolen; and in any indictment for feloniously receiving any property knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing the same; and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty either of stealing the property, or of receiving the same, *or any part or parts thereof*, knowing the same to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing the property, or of receiving the same, *or any part or parts thereof*, knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same *or any part or parts thereof*, knowing the same to have been stolen. [*This section re-enacts* 11 *&* 12 *Vict. c.* 46, *s.* 8, *with the addition of the words in italics. There is no statute authorizing the joinder of three counts for receiving stolen goods the property of the same person within six months analogous to the provisions of s.* 5 *of* 24 *&* 25 *Vict. c.* 96 (*ante*, p. 428), *as to three distinct larcenies; it would seem that an indictment containing three such counts must also contain three counts for larceny of the same goods; but on a single charge of receiving evidence of other receivings of property by the prisoner from the same person may under certain circumstances be admissible to prove guilty knowledge. See post*, p. 552.]

Sect. 93—*Several counts against separate receivers.*]—Whenever any property whatsoever shall have been stolen, taken, *extorted, obtained, embezzled or otherwise disposed of* in such a manner as to amount to a felony, either at common law, or by virtue of this Act, any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive felonies in the same indictment, and *may be tried together*, notwithstanding that the principal felon shall not be included in the same indictment, or shall not be in custody, or amenable to justice. [*This section re-enacts* 14 *&* 15 *Vict. c.* 100, *s.* 15, *with the addition of the words in italics.*]

Sect. 94—*Conviction for separate, on indictment for joint, receiving.*]—If upon the trial of any two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part or parts of such property. [*This section re-enacts* 14 *&* 15 *Vict. c.* 100, *s.* 14.]

Sect. 95—*Receivers, where principal offence is a misdemeanor.*]—Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting or disposing whereof is made a misdemeanor by this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted or disposed of, shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This*

section is framed on 7 & 8 *G.* 4, c. 29, *s.* 55; *and* 20 & 21 *Vict. c.* 54, *s.* 9. *For indictment, see post,* p. 554.]

Sect. 96—*Venue in indictment against receivers.*]—Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, converted, or disposed of, may, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, be dealt with, indicted, tried, and punished, in any county or place, in which he shall have or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in the county or place where he actually received such property [*This section re-enacts* 7 & 8 *G.* 4, c. 29, *s.* 56.]

Sect. 100—*Restitution of stolen property.*]—*See ante,* p. 265.

Sect. 114—*Receiving in one part of the United Kingdom of property stolen in another part of the United Kingdom.*]—*Ante,* p. 430.

59 & 60 *Vict. c.* 52 (*Larceny Act,* 1896)—*Receiving in the United Kingdom property stolen, etc., outside United Kingdom.*]—*Ante,* p. 433.

34 & 35 *Vict. c.* 112 (*Prevention of Crimes Act,* 1871), *s.* 19—*Proof of knowledge that goods were stolen by evidence of possession of other stolen property, or of previous conviction.*]—Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen, which forms the subject of the proceedings taken against him.

Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen; provided that not less than seven days' notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction: and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused. [*See post,* p. 552, *Evidence of guilty knowledge.*]

35 & 36 *Vict. c.* 93 (*Pawnbrokers Act,* 1872), *s.* 38—*Pawnbroker convicted of receiving stolen goods.*]—If a pawnbroker is convicted on indictment of any fraud in his business, or of receiving stolen goods knowing them to be stolen, the court before which he is convicted may, if it thinks fit, direct that his licence shall cease to have effect, and the same shall so cease accordingly.

Indictment against a Receiver of Stolen Goods as for a Substantive Felony. (24 & 25 *Vict. c.* 96, *s.* 91, *ante*, p. 546.)

Commencement as ante, p. 433]—one silver tankard ("*chattel, money, valuable security, or other property whatsoever*"), of the goods and chattels of J. N., before then feloniously stolen, taken and carried away, feloniously did receive and have, he the said J. S., at the time when he so received the said silver tankard as aforesaid then well knowing the same to have been feloniously stolen, taken, and carried away; against the form [*as ante*, p. 465]. *Any number of receivers at different times of stolen property may now be charged with substantive felonies in the same indictment:* 24 & 25 *Vict. c.* 96, *s.* 93 (*ante*, p. 547). *And before the passing of that statute where the indictment contains several counts for larceny, describing the goods stolen as the property of different persons, it might contain the like number of counts, with the same variations, for receiving the same goods. R.* v. *Beeton*, 1 *Den.* 415; 2 *C. & K.* 960, 961; 18 *L. J.* (*M. C.*) 117; 3 *Cox*, 451. *It is not necessary to state by whom the principal felony was committed; R.* v. *Jervis*, 6 *C. & P.* 156; *and, if stated, it is not necessary to aver that the principal has not been convicted. R.* v. *Baxter*, 5 *T. R.* 83: 2 *East, P. C.* 781. *It is not necessary for the purposes of s.* 19 *of* 34 & 35 *Vict. c.* 112 (*ante*, p. 548), *to charge in the indictment the previous conviction of the prisoner.*

The defendant may be convicted both on a count charging him as accessory before the fact and on a count for receiving: R. v. *Hughes, Bell*, 242; 29 *L. J.* (*M. C.*) 71. *And where the first count of the indictment charged the defendant with stealing certain goods, and the second with receiving "the goods and chattels aforesaid so as aforesaid feloniously stolen," it was held that a conviction on the latter count was good, the words "so as aforesaid feloniously stolen" being immaterial. R.* v. *Huntley, Bell*, 238; 29 *L. J.* (*M. C.*) 70. *As to the venue, see ante*, pp. 48, 49, 548; *R.* v. *Martin*, 1 *Den.* 398; 2 *C. & K.* 950; 18 *L. J.* (*M. C.*) 137; *and R.* v. *Cryer, Dears. & B.* 324; 26 *L. J.* (*M. C.*) 192; *R.* v. *Rogers, L. R.* 1 *C. C. R.* 136, *post*, p. 552.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment not exceeding two years, with or without hard labour; if a male under sixteen years of age, with or without whipping—24 & 25 *Vict. c.* 96, *s.* 91; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431). *If a pawnbroker is convicted on indictment of receiving stolen goods, knowing them to be stolen, the court before which he is convicted may, if it thinks fit, direct that his licence shall cease to have effect, and the same shall so cease accordingly.* 35 & 36 *Vict. c.* 93, *s.* 38 (*ante*, p. 550).

The statute extends to "chattels, money, valuable securities (see ante, p. 546), *and other property whatsoever;" and the receiver or receivers may be indicted and convicted as an accessory or accessories after the fact, or for a substantive felony, whether the principal be or be not convicted, or be or be not amenable to justice.* 24 & 25 *Vict. c.* 96, *ss.* 91, 93 (*ante*, p. 547).

The owner on prosecuting the receiver to conviction is entitled to restitution of his property, except in the case of a valuable security bonâ fide paid or transferred, if a negotiable security, for a valuable consideration. 24 & 25 *Vict. c.* 96, *s.* 100 (*ante*, p. 265 *et seq.*). *As to summary proceedings for purchasing or receiving materials or tools embezzled by persons employed in the woollen, worsted, linen, cotton, flax, mohair, or silk manufacturers, see* 6 & 7 *Vict. c.* 40, *ss.* 4, 5, 11.

Evidence.

Prove a larceny of the goods mentioned in the indictment, as directed *ante*, p. 434 *et seq.*, for which purpose the principal felon is a competent

witness, and indeed to prove the whole case. *R.* v. *Haslam*, 1 *Leach*, 418. Where the only evidence, however, against the alleged receiver is that of the thief, the presiding judge will advise the jury to acquit. *R.* v. *Robinson*, 4 *F. & F.* 43. And the mere fact that the stolen goods were found upon the alleged receiver's premises on the day of the theft, is not sufficient to confirm the evidence of the thief, so as to make it proper to convict. *R.* v. *Pratt*, 4 *F. & F.* 315. The confession of the principal (unless made in the presence of and assented to by the receiver, *R.* v. *Cox*, 1 *F. & F.* 90) is not admissible evidence against the receiver for any purpose. *R.* v. *Turner*, 1 *Mood. C. C.* 347 (*ante*, p. 338); *R.* v. *Kelly*, 64 *J. P.* 84; *and see R.* v. *Smith*, 18 *Cox*, 470. It is competent to the defendant to disprove the guilt of the principal. *Fost.* 365. A conviction of the principal for *embezzlement* is sufficient to warrant a conviction of the receiver, by virtue of the express words of 24 & 25 *Vict. c.* 96, *s.* 91: and was held to be so before the passing of that statute. *See R.* v. *Frampton*, *Dears. & B.* 585; 27 *L. J.* (*M. C.*) 229. But it is not a crime punishable under *s.* 91 of 24 & 25 *Vict. c.* 96 (*ante*, p. 546) to receive stolen goods, knowing them to have been stolen, if the stealing is not a crime either at common law or under 24 & 25 *Vict. c.* 96, although the stealing is a felony under the *Larceny Act*, 1868 (31 & 32 *Vict. c.* 116), *s.* 1 (*ante*, p. 432). *R.* v. *Smith*, *L. R.* 1 *C. C. R.* 266; 39 *L. J.* (*M. C.*) 112: *R.* v. *Streeter*, *infra*. And therefore where A. and B. were in partnership, and B. stole the partnership goods, and disposed of them to the prisoner, who received them knowing them to have been so stolen, and the prisoner was afterwards indicted and convicted as a receiver under 24 & 25 *Vict. c.* 96, *s.* 91, the conviction was quashed. *R.* v. *Smith*, *ubi supra*. It was intimated by the court that the proper course in that case would have been to indict the prisoner as an accessory before or after the fact to the felony, either at common law or under 24 & 25 *Vict. c.* 94, *ss.* 1, 3, there being circumstances, independent of the receipt of the stolen goods, from which the jury might have drawn the conclusion that he was such accessory. *Id.* The *mere* receipt of stolen goods, however, does not at common law constitute the receiver an accessory, but it is a misdemeanor punishable by fine and imprisonment. *See ante*, p. 21, *and Fost.* 370. And it would seem that if, in the case of *R.* v. *Smith*, *L. R.* 1 *C. C. R.* 266; 39 *L. J. Q. B.* 112, the only thing that could have been proved against the prisoner was the receiving with a guilty knowledge, he ought to have been indicted for this common law misdemeanor. A wife, although she may have committed adultery, could not *at common law* steal her husband's goods; and therefore the adulterer, receiving from her the goods which she had taken from her husband, could not be guilty of receiving stolen goods. *R.* v. *Kenny*, 2 *Q. B. D.* 307; 46 *L. J.* (*M. C.*) 156. This case was decided before the passing of 45 & 46 *Vict. c.* 75, *s.* 16, by virtue of which a married woman may under certain circumstances be guilty of stealing her husband's goods (*see R.* v. *James* [1902] 1 *K. B.* 540, and *ante*, p. 459, 460); but the receiver from her with a guilty knowledge cannot be indicted for receiving under 24 & 25 *Vict. c.* 96, *s.* 91, but may, it would seem, be indicted for a common law misdemeanor. *R.* v. *Streeter* [1900] 2 *Q. B.* 601 *C. C. R.*, 69 *L. J. Q. B.* 915: 19 *Cox*, 570; 64 *J. P.* 537, explaining statements in *Roscoe*, *Cr. Ev.* (12th ed.), 485: *and see Steph. Dig. Cr. Law* (6th ed.), 317–320.

Having proved the larceny, you must prove the goods stolen to have been received by the defendant. And though there be proof of a criminal intent to receive, and a knowledge that the goods were stolen, if the *exclusive* possession still remain in the thief, a conviction for receiving cannot be sustained. *R.* v. *Wiley*, 2 *Den.* 37; 20 *L. J.* (*M. C.*) 4; *and see R.* v. *Hill*, 1 *Den.* 453; 2 *C. & R.* 978. So, a principal in the second degree, *particeps*

criminis, cannot at the same time be treated as a receiver. *R.* v. *Perkins*, 2 *Den.* 459; 21 *L. J.* (*M. C.*) 152: *R.* v. *Coggins*, 12 *Cox*, 517 (*C. C. R.*). But a person having a *joint* possession with the thief may be convicted as a receiver. *R.* v. *Smith*, *Dears.* 494; 24 *L. J.* (*M. C.*) 135. Before 1851 (14 & 15 *Vict. c.* 100, *s.* 14 *rep.*), if two defendants were indicted jointly for receiving, a joint act of receiving must have been proved in order to convict both. *R.* v. *Messingham*, 1 *Mood. C. C.* 257. *See R.* v. *Archer*, *Id.* 143: *R.* v. *Parr*, 2 *M. & Rob.* 346: *R.* v. *Matthews*, 1 *Den.* 596: *R.* v. *Dovey*, 2 *Den.* 86; 20 *L. J.* (*M. C.*) 105; but this was altered by the above section, which, although now repealed, was re-enacted by 24 & 25 *Vict. c.* 96, *s.* 94 (*ante*, p. 547), which enables the jury, on the trial of an indictment against two or more persons for jointly receiving any property, if it be proved that one or more of such persons separately received any part of such property, to convict them separately of receiving such property. Where A., knowing that goods had been stolen, directed B., his servant, to receive them into his premises, and B., in pursuance of that direction, afterwards received them in A.'s absence, B. also knowing that they had been stolen, they were held to be indictable jointly. *R.* v. *Parr*, 2 *M. & Rob.* 346. Two or more persons may be indicted jointly for receiving stolen property, though each successively received the whole of the same at different times; and it makes no difference whether the receipt was direct from the thief or from an intermediate person. *R.* v. *Reardon*, *L. R.* 1 *C. C. R.* 21; 35 *L. J.* (*M. C.*) 171. Proof that the goods were found in the defendant's possession is good presumptive evidence of the fact; or it may be proved by the principal felon. If it be proved that the defendant not only received the articles, but also assisted in stealing them, he may still be convicted, provided some other person assisted in the theft; because the stealing and receiving are both felonious, and a theft by several is a theft by each. *See R.* v. *Dyer*, 2 *East*, *P. C.* 767: *R.* v. *Attwell*, *Id.* 768 (*ante*, p. 13). If a husband, knowing that his wife has stolen goods, receives them from her, he may be convicted of receiving. *R.* v. *M'Athey*, *L. & C.* 250; 32 *L. J.* (*M. C.*) 35. Husband and wife were indicted jointly for receiving. The jury found both guilty, and found also that the wife received the goods without the control or knowledge of the husband, and apart from him, and that "he afterwards adopted his wife's receipt." It was held that this finding did not necessarily mean that the husband took an active part in the matter and therefore did not warrant his conviction. *R.* v. *Dring*, *Dears. & B.* 329; 7 *Cox*, 382. A wife, in her husband's absence, and without his knowledge, received stolen goods, and paid money on account of them. The thief and the husband afterwards met, and the latter then learnt that the goods were stolen, and agreed on the price to be paid for them, and paid the balance to the thief. On these facts the husband was held to have been properly convicted of receiving. *R.* v. *Woodward*, *L. & C.* 122; 31 *L. J.* (*M. C.*) 91. A wife indicted jointly with her husband for receiving, may be convicted if there is evidence that she acted independently in receiving the stolen goods. *R.* v. *Baines*, 69 *L. J. Q. B.* 681; 19 *Cox*, 524.

Constructive possession.]—The actual manual possession or touch of the goods by the defendant, however, is not necessary to the completion of the offence of receiving; it is sufficient if they are in the actual possession of a person over whom the defendant has a control, so that they would be forthcoming if he ordered it. *R.* v. *Smith*, *Dears.* 494; 24 *L. J.* (*M. C.*) 135: *cf. R.* v. *Miller*, 6 *Cox*, 353 (*Ir.*). The prisoner stole a watch at Liverpool, and sent it by rail to a confederate in London: it was held that the constructive possession still remained in the prisoner, and that

he was triable in London. *R.* v. *Rogers, L. R.* 1 *C. C. R.* 136; 37 *L. J.* (*M. C.*) 83; 6 *Cox*, 38.

Evidence of guilty knowledge.]—And, lastly, it must be proved that the defendant, at the time he received, or bought the goods, knew them to be stolen. This is proved, either directly, by the evidence of the principal felon, or circumstantially, by proving that the defendant bought them very much under their value, 1 *Hale*, 619, or denied their being in his possession, or the like. *See ante*, p. 340.

By the first paragraph of 34 & 35 *Vict. c.* 112 (the *Prevention of Crimes Act*, 1871), *s.* 19 (*ante*, p. 548), "Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such party knew the property to be stolen, which forms the subject of the proceedings taken against him." *R.* v. *Oddy*, 2 *Den.* 264; 20 *L. J.* (*M. C.*) 198, is therefore no longer law. Under this section on the trial of an indictment for larceny and receiving stolen goods, evidence may be given that there was found in the possession of the prisoner other property stolen within the preceding period of twelve months, although such other property is the subject of another indictment against him, to be tried at the same assizes. *R.* v. *Jones*, 14 *Cox*, 3, *Lopes*, J. But in order to show guilty knowledge it is not sufficient merely to prove that "other property stolen within the preceding period of twelve months" had at some time previously been dealt with by the prisoner, but it must be proved that such "other property" was *found in the prisoner's possession* at the time when he was found in possession of the property which is the subject of the indictment. *R.* v. *Carter*, 12 *Q. B. D.* 522; 53 *L. J.* (*M. C.*) 96: *R.* v. *Drage*, 14 *Cox*, 85, *Bramwell*, L.J. Therefore, where the prisoner was indicted for receiving stolen goods, and to show guilty knowledge, evidence was tendered, under 34 & 35 *Vict. c.* 112 *s.* 19, to show that a short time previously the prisoner had sold for half its value, and had otherwise disposed of, other property stolen within the preceding period of twelve months, it was held that the statute did not extend to such evidence, which was therefore inadmissible. *R.* v. *Drage, ubi supra.* Where, however, evidence was tendered on behalf of the prosecution to prove receipt by the prisoner at different times *from the same person* of articles which were not those the subject of the charge and had been stolen on different occasions antecedent to the date of the receiving charged in the indictment, this was held to be admissible. *R.* v. *Dunn*, 1 *Mood. C. C.* 146. So, where evidence was tendered that on various former occasions portions of the commodity stolen had been missed by the prosecutor, and that the prisoners, the alleged thief and receiver, had after such occasions been found selling such a commodity, that which was sold on the last of these occasions being identified as part of the commodity missed by the prosecutor, this was held to be admissible as proof of guilty knowledge. *R.* v. *Nicholls*, 1 *F. & F.* 51, *Cockburn*, C.J., in which case the attention of the court was called on behalf of the prisoner to *R.* v. *Oddy, ubi supra.* The prisoner was indicted for receiving certain jewellery knowing the same to have been stolen. No stolen jewellery was proved to have been found in his possession, but evidence that he had received large quantities of stolen jewellery *from the same person* (who had acted as intermediary between the thief and the receiver) on various occasions antecedent and on one occasion subsequent to the receiving charged in

the indictment was held to be admissible on the authority of *R.* v. *Dunn*, *ubi supra*: *R.* v. *Hobinstock* [1902] 135 *Cent. Crim. Court, Sess. Pap.* 169, *Fulton* Recorder. *See* 37 *Law Journ. Newsp.* 106.

Upon the second paragraph of the same section (34 & 35 *Vict. c.* 112, *s.* 19: *ante*, p. 548) it would appear that on an indictment for receiving stolen goods, service of a notice under that paragraph, and proof of a previous conviction, do not relieve the prosecution from the necessity of proving that the prisoner knew that the goods had been stolen. *R.* v. *Davis*, *L. R.* 1 *C. C. R.* 272. That case was, however, decided upon 32 & 33 *Vict. c.* 99. *s.* 11 (*rep.*), which is somewhat differently worded from *s.* 19 of 34 & 35 *Vict. c.* 112. Before the passing of 34 & 35 *Vict. c.* 112, other instances of receiving goods of the prosecutor might, under certain circumstances, have been proved. *R.* v. *Dunn*, 1 *Mood. C. C.* 146: *R.* v. *Nicholls*, 1 *F. & F.* 51; *see ante*, p. 552.

Resumption of possession by owner.]—Where stolen goods were returned to the thief, who then on the owner's instructions sold them to D., it was held that D. was not liable to conviction under such circumstances, inasmuch as at the time of the receipt the goods were not *stolen goods*. *R.* v *Dolan*, *Dears.* 436; 24 *L. J.* (*M. C.*) 59; overruling *R.* v. *Lyons*, *C. & Mar.* 217; *cf. R.* v. *Hancock*, 14 *Cox*, 119 (*C. C. R.*). Stolen goods were sent by the thief in a parcel by railway addressed to the prisoner. An officer of the railway company, from information he had received, examined the parcel at the railway station at the place of its destination, and stopped it. It was called for by the thief on the day of its arrival and refused to him. Next day a porter of the company, by the officer's direction, took it to a house which the thief had designated, and it was there received by the prisoner. It was held that the prisoner could not be convicted of receiving, as the goods had ceased to be stolen goods at the time when he received them. *R.* v. *Schmidt*, *L. R.* 1 *C. C. R.* 15; 35 *L. J.* (*M. C.*) 94; *R.* v. *Villensky* [1892] 2 *Q. B.* 597 (*C. C. R.*)

If the goods stolen have been altered between the time of the larceny and that of the receipt, so as to pass under a new denomination, the indictment should correspond with the fact. And where the principal was indicted for sheep-stealing, and the accessory charged with receiving "twenty pounds of mutton, parcel of the goods," etc., it was held good. *R.* v. *Cowell*, 2 *East*, *P. C.* 617, 781.

Recent possession.]—Recent possession of stolen property is evidence, either that the person in possession stole the property, or that he received it knowing it to be stolen, according to the circumstances of the case (*see ante*, p. 340). Where the prisoner was found in the recent possession of stolen property, of which he could give no satisfactory account, and it might reasonably be inferred from the circumstances that he was not the thief, it was held that there was evidence for the jury that he received it knowing it to have been stolen. *R.* v. *Langmead*, *L. & C.* 427; 9 *Cox*, 464. So also where the prisoner was indicted for larceny and also for receiving, and the evidence against her consisted of the fact of the stolen property having been found concealed on her person at about ten o'clock in the morning after the night on which it was stolen, and of her having made two contradictory statements as to how she became possessed of it, and the jury acquitted her on the count of larceny, but convicted her on the count for receiving, it was held that the evidence was sufficient to sustain the conviction. *R.* v. *McMahon*, 13 *Cox*, 275 (*C. C. R. Ir.*). *See also R.* v. *Deer*, *L. & C.* 240; 32 *L. J.* (*M. C.*) 33, *ante*, p. 460.

Indictment against a Receiver where the principal Offence is a Misdemeanor (24 & 25 *Vict. c.* 96, *s.* 95, *ante*, p. 547).

Commencement as ante, p. 433]—one silver *tankard* ("*any chattel, money, valuable security, or other property whatsoever*") of the goods and chattels of J. N., before then unlawfully, knowingly, and designedly obtained ("*stolen, taken, obtained, converted, or disposed of*") from the said J. N. by false pretences unlawfully did receive and have, he the said J. S., at the time when he so received the said silver tankard as aforesaid, then well knowing the same to have been unlawfully, knowingly, and designedly obtained [from the said J. N.] by false pretences; against the form [*as ante*, p. 465]. *The indictment must allege the goods to have been obtained by false pretences, and known to have been so; it is not enough to allege them to have been "unlawfully obtained, taken, and carried away." R.* v. *Wilson*, 2 *Mood. C. C.* 52. *But in an indictment for receiving goods knowing them to have been obtained by false pretences it is not necessary to set out the false pretences. Taylor* v. *R.* [1895], 1 *Q. B.* 25: 64 *L. J.* (*M. C.*). 11, *overruling R.* v. *Mackay*, 17 *Cox*, 713. *The venue may be laid as in the last case: see ante*, pp. 48, 49, 548.

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment not exceeding two years, with or without hard labour, and, if a male under sixteen years of age, with or without whipping (Id.)—24 & 25 *Vict. c.* 96, *ss.* 95, 119; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to finding the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour, see* 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, *p.* 431).

The statute extends to "chattels, money, valuable securities, and other property whatsoever," the stealing, etc., whereof is a misdemeanor; and the receiver may be indicted and convicted, whether the principal shall or shall not have been previously convicted, or shall or shall not be amenable to justice. 24 & 25 *Vict. c.* 96, *s.* 95.

Evidence.

Prove the principal offence, and the receipt and guilty knowledge of the defendant, as in the last case.

Indictment against the Principal and Receiver jointly. (24 & 25 *Vict. c.* 96, *s.* 91, *ante*, p. 546.)

After the conclusion of the indictment against the principal, continue it in the same paragraph thus:]—and the jurors aforesaid, upon their oath aforesaid, do further present that J. S. afterwards, to wit, on the first day of June, in the year aforesaid, the goods and chattels aforesaid ("*chattels, money, valuable security, or other goods whatsoever*") before then feloniously stolen, taken, and carried away, feloniously did receive and have, he the said J. S. then well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away; against the form [*as ante*, p. 465].

Receivers, where the stealing is felony at common law or by 24 & 25 *Vict. c.* 96, *may be indicted as accessories after the fact, and are punishable with penal servitude for not more than fourteen and not less than three years, or imprisonment not exceeding two years, with or without hard labour; and, if a male under sixteen years of age, with or without whipping*—24 & 25 *Vict. c.* 96, *ss.* 91 (*ante* p. 546), 119 (*ante*, p. 432); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace, Id. s.* 117 (*ante*, p. 431).

A precedent of indictment of a receiver as accessory after the fact, the

principal having been convicted, was contained in the 21st ed. of this work at p. 504. *It has been omitted in this edition as obsolete.*

Evidence.

Prove the larceny as directed *ante*, p. 434 *et seq.*, and prove the offence against the receiver, as directed under the last precedent but one.

RECEIVING STOLEN LETTERS, ETC.

Statute.

7 *W.* 4 & 1 *Vict. c.* 36 (*Post Office Offences Act*, 1837), *s.* 30]—Every person who shall receive any post letter or post-letter bag, or any chattel or money, or valuable security, the stealing, or taking, or embezzling, or secreting whereof shall amount to a felony under the "Post Office Acts" (*see ante*, p. 506, knowing the same to have been feloniously stolen, taken, embezzled, or secreted, and to have been sent or to have been intended to be sent by the post shall, in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable to be *transported beyond the seas* for life. [*As to terms of penal servitude or imprisonment, see* 7 *W.* 4 & 1 *Vict. c.* 36, *ss.* 41, 42 (*ante*, p. 505), *and* 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235)].

Indictment against a Receiver of Stolen Letters, etc., as for a Substantive Felony.

Commencement as ante, p. 433]—one post letter ("*any post letter or post-letter bag, or any chattel or money, or valuable security*," *etc.*) the property of the postmaster-general, before then from and out of a certain post-letter bag feloniously stolen, taken, and carried away [*as the case may be* (*see ante*, pp. 502, 503)] ("*stolen, taken, embezzled, or secreted*") feloniously did receive and have, he the said J. S. then well knowing the same post letter to have been feloniously stolen, taken, and carried away, from and out of the said post-letter bag, as aforesaid, and to have been sent ("*sent or intended to be sent*") by the post; against the form [*as ante*, p. 465]. *As to the venue, see ante*, pp. 50, 504. *The property may be laid in the post-master-general, and it is not necessary to allege or prove any value. See ante*, p. 505.

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour.—7 *W.* 4 & 1 *c.* 36, *s.* 30; 20 & 21 *Vict. c.* 3, *s.* 2 (*ante*, p. 235); (54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2, (*ante*, p. 235).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the felony as directed (*ante*, p. 511); then prove the receipt and guilty knowledge, as directed (*ante*, pp. 549, 552); and also prove that the defendant at the time he received the letter, etc., knew that it had been sent, or that it was intended to have been sent by the post. This may

be shown by the post-mark on the letter, or by the contents of the letter, if brought to the defendant's knowledge, or by other circumstances from which it may be inferred. (*See ante*, pp. 300, 340).

SECT 2.—EMBEZZLEMENT.

BY CLERKS, SERVANTS, PARTNERS, ETC.

Statutes.

55 *G.* 3, *c.* 137, *s.* 2—*Embezzlement of property supplied for use of poor.*] —*See ante*, p. 63.

7 *G.* 4, *c.* 16, *ss.* 34, 35—*Embezzlement, etc., of stores of Chelsea Hospital.*] —*See ante*, p. 65.

7 *G.* 4, *c.* 46, *s.* 9—*Embezzlement, etc., by members and officers of certain banks.*]—*See Ante*, p. 62.

7 *W.* 4 *&* 1 *Vict. c.* 37, *s.* 26—*Embezzlement of letters by officers of the post office.*]—*See ante*, p. 503.

3 *&* 4 *Vict. c.* 111. *s.* 2—*Embezzlement, etc., by members of certain country banking companies.*]—*Ante*, pp. 62, 432.

12 *&* 13 *Vict. c.* 103, *s.* 15—*Embezzlement by rate collectors.*]— . . . In respect of any indictment or other criminal proceeding, every collector or assistant overseer appointed under the authority of any order of the Poor Law Commissioners or the Poor Law Board (*now the Local Government Board*) shall be deemed and taken to be the servant of the inhabitants of the parish whose money or other property he shall be charged to have embezzled or stolen, and shall be so described; and it shall be sufficient to state any such money or property to belong to the inhabitants of such parish without the names of any such inhabitants being specified (*see ante*, p. 63).

14 *&* 15 *Vict. c.* 100, *s.* 5—*How embezzled instrument may be described in indictments.*]—*Ante*, p. 54.

Sect. 18—*How money and bank notes may be described in indictment—Not necessary to prove particular species of coin or particular nature of bank note.*] —*Ante*, p. 55.

24 *&* 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 68—*Embezzlement by clerks or servants generally.*]—Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security which shall be *delivered to or* received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer, otherwise than by the actual possession of his clerk, servant, or other person so employed: and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years . . ,

or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*For the history of the offence, see* 3 *Steph. Hist. Cr. L.* 151. *This section re-enacts* 7 *&* 8 *G.* 4, *c.* 29, *s.* 47, *with the additions in italics, and the omission of the words "by virtue of such employment," to get rid of. R.* v. *Snowley*, 4 *C. & P.* 390: *R.* v. *Thorley*, 1 *Mood. C. C.* 343: *R.* v. *Hawtin*, 7 *C. & P.* 781: *R.* v. *Mellish*, *R. & R.* 80, *and R.* v. *Crow*, 1 *Lewin*, 88. *See Greaves Crim. Cons. Acts* (2nd ed.) 156. *For indictment, see post*, p. 559.]

Sect. 70—*Embezzlement by persons in public service or police.*]—*Post*, p. 574.

Sect. 71—*Distinct acts of embezzlement may be charged in same indictment.*] —For preventing difficulties in the prosecution of offenders in any case of embezzlement, fraudulent application or disposition, hereinbefore mentioned, it shall be lawful to charge in the indictment and proceed against the offender, for any number of distinct acts of embezzlement, or of fraudulent application or disposition, not exceeding three, which may have been committed by him against [his] Majesty or against the same master or employer, within the space of six months from the first to the last of such acts; and in every such indictment, where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement, or fraudulent application or disposition, to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled, *or fraudulently applied or disposed of*, any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled, *or fraudulently applied or disposed of*, any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly. [*This section re-enacts* 7 *&* 8 *G.* 4, *c.* 29, *s.* 48, *and* 2 *&* 3 *W.* 4, *c.* 4, *s.* 3, *with the additions italicized.*]

Sect. 72—*Person indicted not to be acquitted if larceny be proved, and* vice versâ.]—If upon the trial of any person indicted for embezzlement, *or fraudulent application or disposition as aforesaid*, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, *or fraudulent application or disposition*, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, or *as a person employed in the public service or in the police*, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and, if upon the trial of any person indicted for larceny, it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, *or fraudulent application or disposition* as aforesaid, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, *or fraudulent application or disposition, as the case may be*, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an

indictment for such embezzlement, *fraudulent application or disposition*; and no person so tried for embezzlement, fraudulent application or disposition, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny, *fraudulent application or disposition*, or embezzlement, upon the same facts. [*This section re-enacts* 14 & 15 *Vict. c.* 100, *s.* 13, *with the additions italicized.*]

Sect. 73—*Embezzlement by officers of the banks of England or Ireland.*]—Whosoever being an officer or servant of the Governor and Company of the Bank of England or of the Bank of Ireland, and being intrusted with any bond, deed, note, bill, dividend, warrant or warrant for payment of any annuity or interest, or money, or with any security, money, or other effects of, or belonging to the said Governor and Company, or having any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest, or money, or any security, money, or other effects of any other person, body politic or corporate, lodged or deposited with the said Governor and Company, or with him as an officer or servant of the said Governor and Company, shall secrete, embezzle, or run away with such bond, deed, note, bill, dividend, or other warrant, security, money, or other effects as aforesaid, or any part thereof, shall be guilty of felony, and being convicted thereof, shall be liable . . . to be kept in penal servitude for life . . . [*As to other punishments, see* 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235). 24 & 25 *Vict. c.* 96, *ss.* 71, 72, *infra, do not apply to this offence. For decisions on former statutes in like terms, see R. v. Aslett, R. & R.* 67; 2 *Leach*, 958: 1 *B. & P.* (*N. R.*) 1: *R. v. Bakewell, R. & R.* 35.]

31 & 32 *Vict. c.* 116, *s.* 1—*Embezzlement by partners or joint owners of the partnership or joint property.*]—*Ante*, p. 432.

38 & 39 *Vict. c.* 25—*Embezzlement of public stores.*]—*See post, Part II. ch. i. s.* 10.

39 & 40 *Vict. c.* 36 (*Customs Consolidation Act*, 1876, *s.* 29—*Embezzlement by officers of customs.*]—*See ante*, p. 467.

Sect. 85.]— . . . Every person who shall destroy or embezzle any goods duly warehoused [*i.e. in a bonded customs warehouse*] shall be deemed guilty of a misdemeanor, and shall upon conviction suffer the punishment by law inflicted in cases of misdemeanor (*ante*, pp. 237-240); but if such person shall be an officer of customs or excise not acting in the due execution of his duty, and shall be prosecuted to conviction by the importer consignee or proprietor of such goods no duty shall be payable for or in respect of such goods, and the damage occasioned by such destruction or embezzlement shall with the sanction of the Treasury be repaid or made good to such importer consignee or proprietor by the commissioners of customs.

57 & 58 *Vict. c.* 60 (*Merchant Shipping Act*, 1894), *s.* 248—*Embezzlement by officers of local boards.*]—(1) A person appointed to any office or service by or under a local marine board (*section* 244) shall be deemed to be a clerk or servant within the meaning of *s.* 68 of the *Larceny Act*, 1861 (relating to embezzlement) [*ante*, pp. 556, 557].

(2) If any person so appointed to an office or service—

(*a*) Fraudulently applies or disposes of any chattel, money, or valuable security received by him (whilst employed in such office or service) for or on account of any local marine board, or for or on account of any other

public board or department, for his own use, or any use or purpose other than that for which the same was paid, intrusted to, or received by him; or,

(*b*) Fraudulently withholds, retains, or keeps back the same or any part thereof contrary to any lawful directions or instructions which he is required to obey in relation to his office or service aforesaid, that person shall be guilty of embezzlement within the meaning of the said *s.* 68 of the *Larceny Act*, 1861 (*ante*, p. 556).

(3) In an indictment under this section, it shall be sufficient to charge any such chattel, money, or valuable security as the property either of the local marine board by whom the person was appointed, or of the board or department for or on account of whom the same was received.

(4) *Sect.* 71 of the *Larceny Act*, 1861 (relating to the manner of charging embezzlement), shall apply as if an offence under this section were embezzlement under that Act.

[*Cf. with this*, 1 *Edw.* 7, *c.* 10 (*the Larceny Act*, 1901), *s.* 1, *post*, p. 575.]

Indictment for embezzlement by clerk or servant (24 *&* 25 *Vict. c.* 96, *s.* 68, *ante*, p. 556).

Central Criminal Court, to wit: The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, then being clerk and servant ("*clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant*") to J. N., did receive and take into his possession certain money ("*chattel, money, or valuable security*") to a large amount, to wit, to the amount of ten pounds, for and in the name and on the account of the said J. N., his master ("*master or employer*"), and the said money then fraudulently and feloniously did embezzle; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., then in manner and form aforesaid, the said money, the property of the said J. N., his said master, from the said J. N., his said master, feloniously did steal, take, and carry away; against the form [*as ante*, p. 465]. *If the defendant has been guilty of other acts of embezzlement within the period of six months, the following count may be added*:—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, and within six calendar months from and after the time of the committing of the said offence in the first count of this indictment charged and stated, to wit, on the —— day of ——, in the year aforesaid, then being clerk and servant to the said J. N., did receive and take into his possession certain other money to a large amount, to wit, to the amount of ten pounds, for and in the name and on the account of the said J. N., his said master, and the said last-mentioned money then, and within the said six calendar months, fraudulently and feloniously did embezzle; and so, etc., *as in the first count to the end.*

Venue:]—*Where the money was received or the accused denied its receipt, or was called on to account for it.* *R.* v. *Hobson*, *R.* & *R.* 56; 2 *Leach*, 975; *R.* v. *Taylor*, 3 *B.* & *P.* 596; *R.* & *R.* 63: *R.* v. *Murdock*, 2 *Den.* 298; 21 *L. J.* (*M. C.*) 22; 5 *Cox*, 360: *R.* v. *Rogers*, 3 *Q. B. D.* 28; 47 *L. J.* (*M. C.*) 11; 14 *Cox*, 22: *R.* v. *Treadgold*, 48 *L. J.* (*M. C.*) 102: 14 *Cox*, 220 (*post*, p. 572). *As to venue generally, see ante*, p. 48.

Joinder of counts:]—*Any number of acts, not exceeding three, committed against the same master within six calendar months from the first to the last*

of such acts, may be charged in the indictment. 24 & 25 *Vict. c.* 96, *s.* 71, *ante*, p. 557. *And the proper course is to charge them in separate counts; and if this is not done the indictment is demurrable. R. v. Purchase, C. & Mar.* 617. *The indictment must show by express words that the different sums were embezzled within the six months. Id.; R. v. Noake,* 2 *C. & K.* 620. *As to counts joined for embezzlement from different persons, see R. v. Woolley,* 4 *Cox,* 255, *and ante, p.* 90.

Description of property:]—*Under* 24 & 25 *Vict. c.* 96, *s.* 71 (*ante*, p. 557) *in every case (except where the offence relates to a chattel, which must be described as in an indictment for larceny), it is sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; nor is it necessary that the exact amount or value of the thing embezzled should be stated; R. v. Carson, R. & R.* 303; *and in case the indictment alleges the embezzlement of money, such allegation, so far as regards the description of the property, is sustained by proof that the offender embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or by proof that he embezzled any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly.* 24 & 25 *Vict. c.* 96, *s.* 71 (*ante, p.* 557); 14 & 15 *Vict. c.* 100, *s.* 18 (*ante*, p. 54). *These statutes overrule the former decisions requiring the indictment to state in all cases specifically same article embezzled. R. v. Furneaux, R. & R.* 335; *R. v. Flower,* 8 *D. & R.* 512: *R. v. Tyers, R. & R.* 402. *As to where there is a general deficiency of moneys, see post,* p. 573. *But an indictment alleging the embezzlement of money is not sustained by evidence of the embezzlement of a cheque unless it be also proved that the prisoner cashed the cheque and so converted it into money. R. v. Keena, L. R.,* 1 *C. C. R.* 113; 37 *L. J.* (*M. C.*) 43. *The indictment must allege the goods, etc., embezzled to be the property of the master or employer; R. v. M'Gregor,* 3 *B. & P.* 106: *R. & R.* 23: *R. v. Beacall,* 1 *Mood. C. C.* 15. *As to mode of description, see R. v. Adey,* 1 *Den.* 571: 19 *L. J.* (*M. C.*) 149: 4 *Cox,* 208; *and ante,* pp. 54, 55. *As to amending misdescription, see R. v. Marks,* 10 *Cox,* 367, *and ante,* p. 52. *It has been said that it must show that the defendant was servant, etc., at the time. R. v. Somerton,* 7 *B. & C.* 463: *see, however, R. v. Lovell,* 2 *M. & Rob.* 236 (*post*, p. 574), *and ante*, p. 84. *It is usual and prudent to state that the defendant feloniously did embezzle, etc.; but it is not absolutely necessary, if the conclusion state that he feloniously stole. R. v. Crighton, R. & R.* 62. *It is not necessary to state from whom the money, etc., was received. R. v. Beacall,* 1 *C. & P.* 313, 454. *But as this may operate as a hardship upon the prisoner, the judge before whom he is to be tried will, upon application, order the prosecutor to furnish the prisoner with particulars of the charge. R. v. Bootyman,* 5 *C. & P.* 300: *R. v. Hodgson,* 3 *C. & P.* 422.

Punishment.]—*Declared to be larceny, and punishable with penal servitude for not more than fourteen nor less than three years, or by imprisonment for any term not exceeding two years with or without hard labour; and, in the case of a male under sixteen years of age, with or without whipping*—24 & 25 *Vict. c.* 96, *s.* 68; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante, p.* 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

Verdict.]—*If it be proved that the defendant took the property in question*

in any such manner as to amount in law to larceny, he is not by reason thereof entitled to be acquitted, but the jury may return as their verdict that he is not guilty of embezzlement, but is guilty of simple larceny, or of larceny as a clerk, servant, etc., and thereupon he is liable to be punished as for such larceny. 24 & 25 *Vict. c.* 96, *s.* 72 (*ante*, p. 557). *But it would seem that a general verdict of guilty cannot be sustained upon evidence of larceny only. R.* v. *Gorbutt, Dears. & B.* 166; 26 *L. J.* (*M. C.*) 47. *The provisions of* 24 & 25 *Vict. c.* 96, *s.* 72, *apply to indictments framed upon* 31 & 32 *Vict. c.* 116, *s.* 1 (*ante, p.* 432), *relating to larcenies or embezzlements by partners of partnership property. R.* v. *Rudge*, 13 *Cox*, 17.

Summary proceedings.]—*As to summary proceedings for embezzlement of materials, tools, etc., by persons employed in the woollen, linen, cotton, flax, mohair, or silk manufacture, see* 6 & 7 *Vict. c.* 40, *ss.* 2, 3, 11. *As to summary proceedings for certain forms of embezzlement, see* 37 & 38 *Vict. c.* 42, *s.* 31: (*building societies*), *R.* v. *Redford*, 11 *Cox*, 367; *R.* v. *Hastie, L. & C.* 269; 32 *L. J.* (*M. C.*) 63; 9 *Cox*, 264; 34 & 35 *Vict. c.* 31, *s.* 12; 39 & 40 *Vict. c.* 22, *s.* 5 (*trade unions*): 56 & 57 *Vict. c.* 39, *s.* 64 (*industrial societies*); 59 & 60 *Vict. c.* 25, *s.* 87; 59 & 60 *Vict. c.* 26, *s.* 14 (2) (*friendly and collecting societies*): *R.* v. *Marsh*, 3 *F. & F.* 523: *R.* v. *Bennett*, 63 *L. J.* (*M. C.*) 181; *and post*, p. 563. 57 & 58 *Vict. c.* 60, *s.* 225 (*seamen*). *And as to summary trial of embezzlement, see* 42 & 43 *Vict. c.* 49, *ss.* 11–14, *sched.* 1.

Evidence.

"*Clerk or servant.*"]—Prove that the defendant, at the time he received the chattel, money, or valuable security, was clerk or servant to J. N., or employed for the purpose or in the capacity of a clerk or servant as stated in the indictment, acting under and bound to obey the orders of his master or employer. *See R.* v. *Negus, L. R.* 2 *C. C. R.* 34; 42 *L. J.* (*M. C.*) 62; 12 *Cox*, 492. This may be proved by evidence that he acted as such. *See R.* v. *Beacall*, 1 *C. & P.* 312: *R.* v. *Wellings*, 1 *C. & P.* 454: *R.* v. *Welch*, 1 *Den.* 199; 2 *C. & K.* 296; 2 *Cox*, 85. If the contract of service was in writing, parol evidence of it is inadmissible, unless notice to produce has been given. *R.* v. *Clapton*, 3 *Cox*, 126: *R.* v. *Dodson*, 62 *J. P.* 729, *Kennedy*, J. Where the prisoner was charged with embezzlement, but his employer, who made the engagement with him, was not called to prove the terms thereof, but only his managing clerk, who knew him through repute alone, having been informed of them by his employer, it was held that there was no evidence to go to the jury that the prisoner was servant to the prosecutor. *R.* v. *Taylor*, 10 *Cox*, 544, *per Russell Gurney*, Recorder. Whether the defendant was clerk or servant is a question of fact for the jury. *R.* v. *Negus, ubi supra: R.* v. *Chater*, 9 *Cox*, 1; *and see Steph. Dig. Cr. L.* (6th ed.), 271, *n.* A female servant is within the meaning of the Act. *R.* v. *Smith, R. & R.* 267. So is an apprentice, though under age. *R.* v. *Mellish, R. & R.* 80. "*In the capacity of clerk or servant*" only applies when the prisoner is employed on temporary occasions, and does not usually fill the situation. *R.* v. *Woolley*, 4 *Cox*, 255, *per Patteson*, J.; *sed quære* "only." A son who lives with his father, and performs for him duties usually performed by a clerk, "employed for the purpose or in the capacity of a clerk or servant" within the statute, although he receives no salary, and although there is no contract binding him to go on doing those duties. *R.* v. *Foulkes, L. R.* 2 *C. C. R.* 150; 44 *L. J.* (*M. C.*) 65, 13 *Cox*, 63. A butty collier, paid so much for every ton of coal he raised, was allowed to sell coal for his employer. It was his duty to pay over the gross price received, and

he was subsequently allowed a poundage. He converted to his own use money received for coal. Held that he was servant to the colliery owner. *R.* v. *Thomas*, 6 *Cox*, 403. As to the distinction between servants and mere bailees, *see R.* v. *Gibbs*, *Dears.* 445; 24 *L. J.* (*M. C.*) 62; 6 *Cox*, 455 (*ante*, p. 462). The statute was not confined to the clerks and servants of persons in trade, but extends to the clerks and servants of all persons whomsoever, if they be employed to receive money, etc.: and therefore a person employed as accountant and treasurer to the overseers of the poor, whose duty it is to receive and pay monies receivable and payable to them, is a clerk and servant within the statute. *R.* v. *Squire*, *R. & R.* 349; 2 *Stark.* (*N. P.*) 348. *See R.* v. *Townsend*, 1 *Den.* 167; 2 *C. & K.* 168; 2 *Cox*, 224: *R.* v. *Adey*, 1 *Den.* 578; 19 *L. J.* (*M. C.*) 149; 4 *Cox*, 210: *but see R.* v. *Harris*, 17 *Cox*, 656 (*C. C. R.*) *post*, p. 567. A collector of poor and other rates within the parish of St. Paul, Covent Garden, was held to be rightly described as servant to the committee of management of the affairs of that parish (appointed under 10 *G.* 4, *c.* 87), though he was elected by the vestrymen of the parish. *R.* v. *Callahan*, 8 *C. & P.* 154. *See now* 12 *& 13 Vict. c.* 103, *s.* 15, *ante*, p. 556. So, a clerk of a savings-bank was held to be properly described as clerk to the trustees, though elected by the managers. *R.* v. *Jenson*, 1 *Mood. C. C.* 434. An assistant overseer, elected by the parishioners in vestry under 59 *G.* 3, *c.* 12, *s.* 7, who fixed his duties and salary, was held to be rightly described as the servant of the inhabitants of the parish, in an indictment charging him with embezzling monies collected by him for the poor-rate. *R.* v. *Carpenter*, *L. R.* 1 *C. C. R.* 29; 35 *L. J.* (*M. C.*) 169; 10 *Cox*, 246. But he is not clerk or servant of the overseers; *and see R.* v. *Sampson*, 1 *Cox*, 355. The appointment is now made in rural parishes by the parish council or parish meeting, 56 *& 57 Vict. c.* 73, *ss.* 5 (1), 19 (5); but a rural assistant overseer may still be described as servant of the inhabitants. *R.* v *Smallman* [1897] 1 *Q. B.* 4; 66 *L. J.* (*Q. B.*) 82; 18 *Cox*, 451. The mode of appointment in many urban parishes has been altered under 56 *& 57 Vict. c.* 73, *s.* 33. Where, however, C. had been nominated by the inhabitants of a township as an assistant overseer, and the nomination did not specify as one of the duties he was to perform the duty of receiving money, it was held that he could not be convicted as a clerk or servant of the inhabitants of embezzling rates collected by him. *R.* v. *Coley*, 16 *Cox*, 226 (*C. C. R.*): *but see* p. 230, *n.* The learned reporter in a note on this case, after reviewing other cases on the same subject, concludes that the "decision appears open to question," and it is not reported in the *Law Reports*. In *R.* v. *Truman*, 2 *Cox*, 306, it was held by *Maule*, J. that a rate collector appointed by guardians of the poor under 4 *& 5 W.* 4, *c.* 76, *s.* 46, was not their clerk or servant: *cf. R.* v. *Townsend*, *ubi supra*; *but see* section 97 of that Act. In *R.* v. *Welch*, 1 *Den.* 199: 2 *C. & K.* 296; 2 *Cox*, 85; a treasurer to guardians of the poor appointed under a local act was held to be their servant.

It is not necessary that the employment should be permanent; if it be only occasional it will be sufficient. Where the prosecutor, having agreed to let the defendant carry out parcels when he had nothing else to do, for which the prosecutor was to pay him what he pleased, gave him an order to receive two pounds, which he received and embezzled, he was held to be a servant within 39 *G.* 3, *c.* 85 (*rep.*). *R.* v. *Spencer*, *R. & R.* 299. So, where a servant usually employed to receive sums of one description at one place was employed in one instance to receive at a different place a sum of a different description, *R.* v. *Smith*, *R. & R.* 516, *and see R.* v. *Beechey*, *Id.* 319. And where a drover, who was employed to

drive two cows to a purchaser, and receive the purchase-money, embezzled it, he was held to be a servant within the meaning of 7 & 8 *G.* 4, *c.* 29, *s.* 47 (*rep.*). *R.* v. *Hughes*, 1 *Mood. C. C.* 370; but *cf. R.* v. *Goodbody*, 8 *C. & P.* 665. The duties of the secretary of a money club were held to be sufficiently cognate to that of the receipt of money for and on the account of the club, to make his employment to receive money in a particular instance an employment by him as clerk or servant within the same enactment, although he had recourse to an action in his own name to get in the money. *R.* v. *Tongue*, *Bell*, 289; 30 *L. J.* (*M. C.*) 49; 8 *Cox*, 386 (*C. C. R.*). But where the treasurer of a charitable institution, in his individual capacity, directed the defendant (who was the schoolmaster of the charity school, appointed by a committee of which the treasurer was a member, and whose sole duty was confined to the instruction of the children) in one single instance to receive a voluntary contribution, for which he was to have no remuneration; it was held that he was not a clerk or servant, or person employed for the purpose or in the capacity of a clerk or servant. *R.* v. *Nettleton*, 1 *Mood. C. C.* 259. A member of, and secretary to, a society, who fraudulently withheld money received from a member to be paid over to the trustees, was held to be guilty of embezzlement, and to be properly described as the clerk and servant of the trustees, and it was held that money was properly described as their property, although it ought, in the ordinary course, to have been received by the steward, and although the articles of the society were not enrolled, and the society was not conducted strictly according to the Act of Parliament. *R.* v. *Hall*, 1 *Mood. C. C.* 474: *R.* v. *Miller*, 2 *Mood. C. C.* 249: *R.* v. *Woolley*, 4 *Cox*, 255, *Patteson*, J.: *R.* v. *Proud*, *L. & C.* 97; 31 *L. J.* (*M. C.*) 71; 9 *Cox*, 22 (*C. C. R.*). Cases of this kind appear to be covered by the *Larceny Act*, 1901 (1 *Edw.* 7, *c.* 10), *s.* 1 (*post*, p. 575).

Cases prior to the Larceny Act, 1868.]—But a mere unpaid treasurer of a friendly society, not appointed by the trustees of the society, is not a clerk or servant of the trustees in whom the monies of the society are vested, and cannot be indicted under 24 & 25 *Vict. c.* 96, *s.* 68, for embezzling the monies of the society. *R.* v. *Tyree*, *L. R.* 1 *C. C. R.* 177; 38 *L. J.* (*M. C.*) 58; 11 *Cox*, 241. "I believe," says *Bovill*, C.J. (*see L. R.* 1 *C. C. R.* at p. 181), "there is no case to show that the treasurer of a friendly society can be indicted for embezzlement. The essence of the indictment in this case is this, that the prisoner was a clerk or servant of the trustees. The trustees have all monies of the society vested in them by statute, as well as by one of their rules, and the prisoner must account to them; but this does not make him their servant. The treasurer is an accountable officer, but not a servant." And the secretary, who was also a member of a friendly society, established under 18 & 19 *Vict. c.* 63 (*rep.*), for which no trustees had been appointed, could not, previously to the *Larceny Act*, 1868 (31 & 32 *Vict. c.* 116, *ante*, p. 432), be convicted on an indictment for embezzling the society's monies, laying the property in A. B. (another member of the society) and others, and describing him as their servant, because the "others" would have comprised himself, and so the indictment would in fact have charged him with embezzling his own money as his own servant. *R.* v. *Diprose*, 11 *Cox*, 185 (*C. C. R.*): *R.* v. *Taffs*, 4 *Cox*, 169, *Maule*, J.: *and cf. R.* v. *Blackburn*, 11 *Cox*, 157. So where a committee, formed of the members of two friendly societies, for the purpose of conducting an excursion, appointed certain persons to sell the excursion tickets, and the money received from their sale was to be paid over to a specified person, and

was to belong to the two societies: the prisoner, who was a member of the committee, was one of those appointed to sell tickets without any remuneration for his services; he sold some of the tickets, and fraudulently misappropriated the money received for the sale to his own use, it was held (previously to 31 & 32 *Vict.* c. 116) that he could not be convicted on an indictment charging him, as servant to the other members of the committee, with embezzling their monies. *R.* v. *Bren*, *L. & C.* 346; 33 *L. J.* (*M. C.*) 59; 9 *Cox*, 398 (*C. C. R.*).

Effect of Larceny Act, 1868.]—The *Larceny Act*, 1868 (31 & 32 *Vict.* c. 116, s. 1, *ante*, p. 432), was passed to meet the difficulties which arose in the above three cases. An association having for its object not the acquisition of gain but the spiritual and mental improvement of its members is not a "co-partnership" within the meaning of the term as used in 31 & 32 *Vict.* c. 116, s. 1. Consequently a member of such an association who has embezzled money belonging to it cannot be convicted on an indictment charging him with embezzling the monies of a "co-partnership," and containing no count describing the monies as monies of which he was a joint beneficial owner. *R.* v. *Robson*, 16 *Q. B. D.* 137; 55 *L. J.* (*M. C.*) 55; 15 *Cox*, 772. A member and secretary of a *fête* committee, the members of which had guaranteed the expenses of the *fête*, may be a "beneficial owner" of the entrance monies so as to make him criminally liable for their misappropriation within 31 & 32 *Vict.* c. 116, s. 1. *R.* v. *Neat*, 69 *L. J. Q. B.* 118; 12 *Cox*, 424; 16 *T. L. R.* 109.

Unlawful societies.]—A person cannot be convicted of embezzlement as clerk or servant to a society which, in consequence of administering an unlawful oath to its members, is an unlawful combination and confederacy within the 37 *G.* 3, c. 123, and 57 *G.* 3, c. 19: *R.* v. *Hunt*, 8 *C. & P.* 642. Registered friendly societies which comply with the Act of 1896 are not within these Acts (59 & 60 *Vict.* c. 25, s. 32). And a society which is of the nature of a friendly society, although not enrolled or certified under the *Friendly Societies Act*, some of the rules of which are in restraint of trade, and therefore void, is not an illegal society in the sense that it is disabled from prosecuting a servant for embezzling its funds under 24 & 25 *Vict.* c. 96, s. 68. *R.* v. *Stainer*, *L. R.* 1 *C. C. R.* 230; 39 *L. J.* (*M. C.*) 54; 11 *Cox*, 483, and the members of such a society are clearly "beneficial owners" within 31 & 32 *Vict.* c. 116 (*ante*, p. 432). *R.* v. *Tankard* [1894] 1 *Q. B.* 548; 63 *L. J.* (*M. C.*) 61; 17 *Cox*, 719: *and see R.* v. *Frankland*, *L. & C.* 276; 32 *L. J.* (*M. C.*) 69; 9 *Cox*, 273 (*C. C. R.*): *R.* v. *Webb* [1893] 9 *T. L. R.* 199 (*C. C. R.*).

A prisoner, who had been employed sometimes as a regular labourer, sometimes as a roundsman for a day at a time, and had on several occasions been sent to a banker's to receive the amount of cheques, was sent to the banker's with a cheque for payment, for which he was to receive 6*d.*, he not being in the prosecutor's employment at the time; he received the money for the cheque and embezzled it; and being indicted for the embezzlement, *Park*, J. (after consulting *Taunton*, J.), held, that he was not a clerk or servant within the meaning of the Act of Parliament. *R.* v. *Freeman*, 5 *C. & P.* 534. The person employed to collect sacrament money from the communicants is not the servant of the minister, churchwardens, or poor. *R.* v. *Burton*, 1 *Mood. C. C.* 237.

Where several employers.]—If the clerk of several partners embezzle the private money of one of them, it is an embezzlement within the Act: for he is a servant of each. *R.* v. *Leech*, 3 *Stark.* (*N. P.*) 70. So where a

clerk was appointed and paid by a joint committee of directors of several railway companies, and employed at a joint station of the companies. *R.* v. *Bayley, Dears. & B.* 121; 26 *L. J.* (*M. C.*) 4; 7 *Cox*, 179 (*C. C. R.*). So where a traveller is employed by several persons, and paid wages, to receive money, he is the individual servant of each. *Id.*: *R.* v. *Carr, R. & R.* 198. So where a clerk in the employ of a railway company at one of their stations was also employed separately by W. and G. to sell coals for them, it was held that he could be convicted of embezzlement as the servant of W. *R.* v. *Batty*, 2 *Mood. C. C.* 257. So, a coachman, employed by one proprietor of a coach to drive a certain part of the journey, and to receive money and hand it over to him, may be charged with embezzling the money of that proprietor, though the money, when received, would belong to him and his partners. *R.* v. *White*, 2 *Mood. C. C.* 91; 8 *C. & P.* 742.

A county court bailiff, who had fraudulently misappropriated the proceeds of levies made under county court process, could not formerly be indicted for embezzling the monies of the high bailiff his master. *R.* v. *Glover, L. & C.* 466; 33 *L. J.* (*M. C.*) 169; 9 *Cox*, 501 (*C. C. R.*). That case, however, was decided upon the county court Rules then in existence, setting forth the duties of the bailiff, but it has been held that by virtue of the county court Rules of 1875, a county court bailiff, misappropriating monies as did the bailiff in *R.* v. *Glover*, might be indicted for embezzling the monies of the high bailiff his master. *R.* v. *Parsons*, 16 *Cox*, 498, *Cave*, J. The county court Rules of 1903 are in the same terms on this as those of 1875. And under *s.* 33 of the *County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), the bailiffs appear to be servants of the high bailiff. A distraining broker employed exclusively by the prosecutor, and paid by a weekly salary and by a commission, is a servant within 24 & 25 *Vict. c.* 96, *s.* 68. *R.* v. *Flanagan*, 10 *Cox*, 561.

The mode by which the defendant is remunerated for his service is immaterial. Where a defendant, who was employed as a master of a barge, to carry out and sell coals, and was allowed a portion of the profits, after deducting the price of the coals at the colliery, for his labour, took a quantity of coals, sold them, received the price, and absconded with the money; it was held by a majority of the judges, that he was a servant within 39 *G.* 3, *c.* 85 (*rep.*). *R.* v. *Hartley, R. & R.* 139. So, where the defendant was employed as a traveller to take orders and collect money, was paid by a percentage upon the orders he got, paid his own expenses, did not live with the prosecutors, and was employed as traveller by other persons also; he was held to be a clerk to the prosecutors, within the meaning of the Act. *R.* v. *Carr, R. & R.* 198: *R.* v. *Hoggins, Id.* 145: *see R.* v. *Tite, L. & C.* 29; 30 *L. J.* (*M. C.*) 142; 8 *Cox*, 458 (*C. C. R.*) The prisoner agreed with the prosecutor, an earthenware manufacturer, to act as his traveller, to employ himself in going from town to town in England, Ireland, and Scotland, and soliciting orders for the goods manufactured by the prosecutor, and that he would not, without the prosecutor's consent, take or execute any order for selling any goods of the kind manufactured by the prosecutor, for or on account of himself or any other person, except the prosecutor. And it was further agreed that the prisoner should pay his own travelling expenses, that he should be paid a commission, and should render weekly accounts. The prosecutor afterwards gave the prisoner permission to take orders for two other manufacturers. It was held on these facts, that the prisoner was a clerk or servant of the prosecutor. *R.* v. *Turner*, 11 *Cox*, 551, *Lush*, J. And where the cashier of a firm had, besides his salary, a percentage on the profits made by the firm, but was not to be liable for its losses, and had

no control over the management of the business, it was held that he might be indicted as a servant for embezzling the firm's monies. *R.* v. *M'Donald*, *L. & C.* 85; 31 *L. J.* (*M. C.*) 67; 9 *Cox*, 10 (*C. C. R.*). The defendant entered into an agreement with the prosecutor, whereby he undertook to take charge of the prosecutor's glebe land, his wife undertaking the dairy and poultry, at 15*s.* a week, till Michaelmas, 1850, and afterwards at a salary of 25*l.* a year, and a third of the clear annual profits, after all expenses of rent, rates, labour, and interest on capital, etc., were paid, on a fair valuation, made from Michaelmas to Michaelmas; three months' notice on either side to be given, at the expiration of which time a cottage, which was to be occupied by the defendant as bailiff, in addition to his salary, was to be vacated. It was held that this was not a contract of partnership, but an agreement for the hire of the defendant as a labourer: and that he was rightly convicted of embezzlement, in fraudulently denying the receipt of monies which he had received for and on account of the prosecutor, though such denial was after Michaelmas, the period agreed on for the valuation to be made and the profits ascertained. *R.* v. *Wortley*, 2 *Den.* 333; 21 *L. J.* (*M. C.*) 44; 5 *Cox*, 382 (*C. C. R.*). *R.* v. *Hartley* (*ante*, p. 565), *R.* v. *M'Donald*, and *R.* v. *Wortley* were decided before the *Larceny Act*, 1868 (31 *& 32 Vict. c.* 116, *s.* 1, *ante*, p. 432), which renders partners and joint beneficial owners liable to the same punishment as if they were not partners or joint beneficial owners in the event of their embezzling the joint property. Where the prosecutors, manure manufacturers, engaged the defendant, who kept a refreshment house at B., to get orders for the manure, on which orders they supplied it from their stores: the defendant was to collect the money, and pay it over to them, and send a weekly account, and was called agent for the B. district: "he was to go through the county and see the farmers, and get orders, and to be continually during the season among the farmers:" subsequently the prosecutors sent large quantities of manure to stores at B., which were under the defendant's control, who took them in his own name, and paid the rent for them, being repaid such rent by the prosecutors when their accounts were adjusted: and the defendant signed a proposal to a guarantee society to insure the prosecutors, which stated that his salary was 1*l.* a year, besides commission, which was estimated at 65*l.* a year; and the prosecutors deposed that at this time they had agreed to give the salary of 1*l.* a year; the defendant was held to be an agent, and not a servant within the statute. *R.* v. *Walker*, *Dears. & B.* 600; 27 *L. J.* (*M. C.*) 207; 8 *Cox*, 1 (*C. C. R.*). So, where the defendant was employed to obtain orders for the sale of iron manufactured by the prosecutors, and was to receive a commission on the orders he got; it being his duty to account to the prosecutors for all money he should receive, but it was not expressly found to be his duty to receive money; he was held not to be a clerk or servant, etc., within the statute. *R.* v. *May*, *L. & C.* 13; 30 *L. J.* (*M. C.*) 81; 8 *Cox*, 421 (*C. C. R.*). Where a man assigned his estate to trustees for the benefit of creditors, and was employed by the trustees to manage the business and collect the book debts, he was held not to be their clerk or servant. *R.* v. *Barnes*, 8 *Cox*, 129, *Byles*, J. As to persons employed by a debtor acting under such an arrangement with his creditors, *see R.* v. *Dixon*, 11 *Cox*, 178 (*C. C. R.*). A solicitor engaged as land agent to a limited company at 300*l.* a year to collect rents, etc., was held to be a clerk or servant of the company. *R.* v. *Gibson*, 8 *Cox*, 436.

The conclusion to be drawn from the cases appears to be that a commercial traveller, whether paid by commission or salary, who is under orders to go here and there, or is bound to devote the whole or at least some portion of his time to the service of his employer, *is*—but

that a commission agent who is not under orders to go here and there, and who is not bound to devote any portion of his time to the service of his principal, but who may get or abstain from getting business for his principal as he chooses, *is not*—a clerk or servant, or person employed for the purpose or in the capacity of a clerk or servant within 24 & 25 *Vict. c.* 96, *s.* 68. Thus, where the prisoner was employed by the prosecutor to solicit orders and collect monies, for which he was paid by commission, being at liberty to get orders when and where he pleased, but to be exclusively in the employ of the prosecutor, *and to give the whole of his time to the prosecutor's service*, he was held to be the servant of the prosecutor. *R.* v. *Bailey*, 12 *Cox*, 56 (*C. C. R.*). And the prisoner would still have been the servant of the prosecutor, if he was a traveller under orders to go here and there, even although he might have been at liberty to obtain orders for other persons beside the prosecutor, and so was not bound to devote all his time to the prosecutor's service. *R.* v. *Tite, L. & C.* 29; 30 *L. J.* (*M. C.*) 142; 8 *Cox*, 458 (*C. C. R.*). But where the prisoner was employed by the prosecutors as their agent for the sale of coals on commission, and to collect monies in connection with his orders, but he was at liberty to dispose of his time as he thought best, *and to get or abstain from getting orders as he might choose*, he was held not to be clerk or servant within the statute. *R.* v. *Bowers, L. R.* 1 *C. C. R.* 41; 35 *L. J.* (*M. C.*) 206; 10 *Cox*, 250. In delivering judgment in that case, *Erle*, C.J., observed, "The cases have established that a clerk or servant must be under the orders of his master, or employed to receive the monies of his employer, to be within the statute; but if a man be intrusted to get orders and to receive money, getting the orders when and where he chooses, and getting the money when and where he chooses, he is not a clerk or servant within the statute." *Id.* Where the prisoner was employed by one of the overseers of a parish to collect the poor-rate and keep the rate books, but was left complete liberty as to the method of collection and keeping the books, he was held not to be a clerk or servant. *R.* v. *Harris*, 17 *Cox*, 656 (*C. C. R.*). *See also R.* v. *Mayle*, 11 *Cox*, 150: *R.* v. *Marshall*, 11 *Cox*, 490 (*C. C. R.*). The test whether a person charged with embezzlement was the clerk or servant of his alleged master, is—Was he under the control of and bound to obey his alleged master? See the judgment of *Blackburn*, J., in *R.* v. *Negus, L. R.* 2 *C. C. R.* 34; 42 *L. J.* (*M. C.*) 62; 12 *Cox*, 492. And, therefore, where the prisoner was employed to solicit orders for the prosecutors, and was to be paid by a commission on the sums received through his means, and he was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any others persons than the prosecutors, it was held that these facts alone did not show him to be a clerk or servant within the meaning of 24 & 25 *Vict. c.* 96, *s.* 68. *Id.* The distinction between the case last cited, and *R.* v. *Bailey* (*supra*), is, that in *R.* v. *Bailey* the prisoner was under the prosecutor's control, having to devote his whole time to the service, whereas in *R.* v. *Negus*, although the prisoner was not to employ himself for any other persons than the prosecutors, he might go away to amuse himself whenever he liked. See the remarks of *Bovill*, C.J., and *Blackburn*, J., *L. R.* 2 *C. C. R.* 35. The prosecutors employed the prisoner, who carried on an independent business as an accountant and debt collector, to collect certain debts for them at a commission on the amount recovered, the time and mode of collecting the debts being in the prisoner's discretion, and it being his duty to pay over the amounts received by him to the prosecutors as soon as he had collected them. It was held that he was not employed in the capacity of clerk to the prosecutors. *R.* v. *Hall*, 13 *Cox*, 49.

A director and shareholder in a limited company, who is employed at a salary to superintend its business and collect monies due to the company, may be convicted of embezzlement of such monies as a servant of the company. *R.* v. *Stuart* [1894] 1 *Q. B.* 310; 63 *L. J.* (*M. C.*) 63; 17 *Cox*, 723 (*C. C. R.*). *And see also* 24 & 25 *Vict. c.* 96, *s.* 81 (*post*, p. 585).

"*For on in the name or on account of his master.*"]—Prove that the defendant received the money, etc., stated in the indictment, for or in the name or on account of his master or employer.

Where the defendant misappropriates money received by him from his master himself, for the purpose of paying it to a third person, this is not embezzlement. *R.* v. *Smith*, *R. & R.* 267; *R.* v. *Hawkins*, 1 *Den.* 584; 4 *Cox*, 224 (*C. C. R.*), *and see now* 1 *Edw.* 7, *c.* 10 (*post*, p. 575). Nor is it embezzlement where the money misappropriated is constructively in the possession of the master, by the hands of any other clerk or servant. *R.* v. *Murray*, 1 *Mood. C. C.* 276; 5 *C. & P.* 145. *See R.* v. *Hayward*, 1 *C. & K.* 518: *R.* v. *Watts*, 2 *Den.* 14; 19 *L. J.* (*M. C.*) 192: *R.* v. *Reed*, *Dears.* 168, 257; 23 *L. J.* (*M. C.*) 25: 6 *Cox*, 284 (*C. C. R.*). But the fraudulent appropriation of money, which has never been in the master's own possession, and which the defendant has received from a fellow-servant to give to his master, is embezzlement. *R.* v. *Masters*, 1 *Den.* 332; 2 *C. & K.* 930; 18 *L. J.* (*M. C.*) 2; 3 *Cox*, 178 (*C. C. R.*).

A conductor of a tramway car was charged with embezzling 3*s.* It was proved that on a certain journey there were fifteen threepenny fares and twenty-five twopenny fares (altogether 7*s.* 11*d.*), and the prisoner was seen to give tickets to each fare and to receive money from each, but what sum did not appear. He made out a way-bill for the journey, debiting himself only with nine threepenny fares and sixteen twopenny fares (altogether 4*s.* 11*d.*) The mode of accounting was to deliver the way-bills for each journey to a clerk and to hand in all the money received during each day on the following morning. The prisoner's way-bills for the day showed the receipt by him of 3*l.* 1*s.* 9*d.*, but he paid in only 3*l.* 0*s.* 8*d.* It was held that there was sufficient evidence of the receipt of 7*s.* 11*d.*, the total amount of fares of the particular journey, and of the embezzlement of 3*s.*, part thereof. *R.* v. *King*, 12 *Cox*, 73 (*C. C. R.*). If the indictment allege that the defendant received chattels, the articles described, or some part of them, must be proved, as in larceny; but if the receipt of "money" be alleged, the prosecutor may give in evidence the receipt of any species of coin or valuable security, or a receipt of any amount, although the particular species of coin, or valuable security, of which such amount was composed, shall not be proved; 24 & 25 *Vict. c.* 96, *s.* 71 (*ante*, p. 557); and in case the indictment alleges the embezzlement of money, such allegation, so far as regards the description of the property, will be sustained by proof that the defendant embezzled any amount, although the particular species of coin or valuable security, of which such amount was composed shall not be proved; or by proof that he embezzled any piece of coin or any valuable security or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part has been returned accordingly. *Id.*; 14 & 15 *Vict. c.* 100, *s.* 18 (*ante*, p. 54). But an indictment alleging the embezzlement of money is not sustained by evidence of the embezzlement of a cheque, unless it be also proved that the prisoner cashed the cheque, and so converted it into money. *R.* v. *Keena*, *L. R.* 1 *C. C. R.* 113; 37 *L. J.* (*M. C.*) 43; 11 *Cox*, 123. Where the defendant's duty was to place

every night in an iron safe, provided by his employers for that purpose, in an office where he conducted the business of his employers (though in his own house) the monies received by him on their account and not used during the day, it was held that by placing it there he determined his own exclusive possession of the money, and that, by afterwards taking some of it out of the safe, *animo furandi*, he was guilty of larceny. *R.* v. *Wright, Dears. & B.* 431; 27 *L. J.* (*M. C.*) 65 (*C. C. R.*). Where a son acted as clerk to his father, who himself held the office of clerk to a local board, and whose duty it was to receive monies on account of such board, and some of such monies were received by the son as his father's clerk in the ordinary course of business and appropriated by him to his own use, it was held that he was rightly convicted on an indictment charging him with embezzling such monies, and alleging them to be the monies of the father. *R.* v. *Foulkes, L. R.* 2 *C. C. R.* 150; 44 *L. J.* (*M. C.*) 65; 13 *Cox*, 63. Where the master gave a stranger some marked money, for the purpose of purchasing goods from the master's shopman, in order to try the shopman's fidelity, which he doubted; the stranger bought the goods, and the shopman embezzled the money: the judges held this to be a case within the Act. *R.* v. *Whittingham*, 2 *Leach*, 912: *R.* v. *Headge, Id.*, 1033; *R. & R.* 160, confirmed in *R.* v. *Gill, Dears.* 289; 23 *L. J.* (*M. C.*) 50; 6 *Cox*, 295 (*C. C. R.*). Where the defendant's duty was to sell his master's goods, entering the sales in a book, and settling accounts with his master weekly, and upon such a sale the defendant fraudulently omitted to make an entry of it in the book, and appropriated the money which he received from the buyer, this was held to be embezzlement and not larceny. *R.* v. *Betts, Bell*, 90; 28 *L. J.* (*M. C.*) 69; 8 *Cox*, 140 (*C. C. R.*). A defendant whose business it was to receive orders, to take the materials from his master's shop, work them up, deliver the goods, receive the price for them, and pay it over to his master, who, at the end of the week, paid the defendant a proportion of the price for his work, received an order for certain goods, took his master's materials, worked them up on his premises, delivered them, and received the price, but concealed the transaction, and embezzled the money; upon a conviction for embezzlement, it was doubted whether this was not a larceny of the materials, rather than a case within the statute; the judges held the conviction right. *R.* v. *Hoggins, R. & R.* 145. But where it appeared that the defendant was employed as a town traveller and collector, to receive orders from customers, and enter them in the books and receive the money for the goods supplied thereon, but had no authority to take or direct the delivery of the goods from his master's shop, and a customer having ordered two articles of the defendant, he entered one of them only in the order-book, for which an invoice was made out by the prosecutor to the customer; but the defendant entered the price of the other at the bottom of the invoice, and, having caused both to be delivered to the customer, received the price of both, and accounted to the prosecutor only for the former: this was held not to be embezzlement but larceny. *R.* v. *Wilson*, 9 *C. & P.* 27. The prosecutor had contracted with a railway company to find and provide them with necessary horses and carmen for the purpose of conveying and delivering to the company's customers the coals of the company, in their own waggons; and that he or his carmen should daily account for and deliver to the company's coal manager all monies received in payments for coals so delivered; the delivery-notes, as well as receipted invoice, for the coals, being handed to the carman, and the former taken to the prosecutor's office, the latter left with the customers on payment. The defendant, one of the prosecutor's carmen, delivered coals of the company to a customer, and brought back the

delivery-order to the prosecutor's office to be entered; he received 5*l.* 10*s.* from the customer for the coals, leaving with him the receipted invoice, and embezzled the money. It was held that there was such a privity as to make the defendant the agent of the company in receiving the money, and that it was not received for or on the account of the prosecutor, his master, but for and on account of the company. *R.* v. *Beaumont, Dears.* 270; 23 *L. J.* (*M. C.*) 54; 6 *Cox*, 269 (*C. C. R.*). H., the defendant's master, was the agent of a railway company for delivering goods, and employed his own servants, of whom the defendant was one, and used his own drays and horses, and was answerable to the company for monies collected by his servants for carriage. It was the defendant's duty to go out with a dray, to take with him goods and a delivery-book handed to him by a clerk of the company, and to receive the amount of carriage therein specified as due to the company, and then to account for the sums so received with the company's clerk. The sums charged as being embezzled were sums received by the defendant for carriage, and entered in the delivery-book, and such sums were paid to the defendant and received by him as due to the company, and he gave receipts for the same in the name of the company. It was held that the defendant was properly convicted on an indictment charging that he received the money for and in the name and on the account of H., his master; for that, although he received it *in the name* of the company, he received it for and on account of his master. *R.* v. *Thorpe, Dears. & B.* 562; 27 *L. J.* (*M. C.*) 64; 8 *Cox*, 29 (*C. C. R.*). The defendant was the miller of a mill in a county gaol, being paid a weekly salary as such out of the county rate, and it was his duty to direct persons who brought grain to be ground at the mill to obtain at the porter's lodge a ticket specifying the quantity of grain brought, and his business then was to receive the grain with the ticket, to grind it, to receive the money for the grinding, and to account for it to the governor of the gaol, who in his turn accounted to the county treasurer. The defendant received and ground grain brought without a ticket, and, without directing the persons who brought it to obtain one, received the money for grinding it, and did not account for it, but applied it to his own use. It was held that upon these facts he could not be convicted of embezzlement, as the conclusion to be drawn from them was that he had made an improper use of the mill by grinding the corn for his own benefit, and so he did not receive the money for or on behalf of his masters. *R.* v. *Harris, Dears.* 344; 23 *L. J.* (*M. C.*) 110; 6 *Cox*, 363 (*C. C. R.*): *and see R.* v. *Cullum* (*post*, p. 571). It is not necessary, however, that the person paying the money to the servant should have paid it to him on account of his master; it is sufficient if the servant received it on account of his master. The prisoner was the clerk of an insurance company, and head manager at their chief office at L. In course of business he received several cheques payable to his order from the managers of branch offices, and it was his duty to indorse these cheques and hand them over to the company's cashier. Instead of doing so, he indorsed the cheques and obtained money for them from friends of his own, who paid the cheques into their own banks. The money thus obtained the prisoner appropriated to his own use, and, having been convicted of embezzling it, it was held that the proceeds of the cheques, though received by the prisoner, not from the bankers, but from third persons who knew nothing of the prisoner's masters in the transactions, were received by him on account of the company, and that he was rightly convicted. *R.* v. *Gale*, 2 *Q. B. D.* 141; 46 *L. J.* (*M. C.*) 134; 13 *Cox*, 340 (*C. C. R.*): *cf. R.* v. *Wheeler*, 14 *W. R.* 848 (*C. C. R. Ir.*).

As it must have appeared, in order to satisfy 7 & 8 *G.* 4, *c.* 29, *s.* 47

(*rep.*), that the money, etc., embezzled was never, even constructively, in the possession of the master, since, if it was, the offence would amount to larceny at common law, nice and difficult questions frequently arose on this point. *See R.* v. *Murray* (*ante*, p. 568): *R.* v. *Watts*, 2 *Den.* 15; 19 *L. J.* (*M. C.*) 192, *and other cases.* But this distinction is rendered practically immaterial by 24 & 25 *Vict. c.* 96, *s.* 72 (*ante*, p. 557), under which, upon an indictment for embezzlement, the defendant is not entitled to be acquitted if the offence turn out to be larceny, be convicted and punished as for larceny, and *vice versâ*. Where, however, the prisoner is indicted for larceny a *general* verdict of guilty cannot be sustained upon evidence of embezzlement only. *R.* v. *Gorbutt, Dears. & B.* 166; 26 *L. J.* (*M. C.*) 47; 7 *Cox*, 221 (*C. C. R.*). Though it is not necessary under 24 & 25 *Vict. c.* 96, *s.* 68, that the money, etc., alleged to have been embezzled should have been received by the servant *by virtue of his employment* (*see note ante*, p. 557), it is necessary that it should when received by the servant be the master's property, and therefore a servant cannot be guilty of embezzling money which he has earned by an unauthorized and wrongful use of his master's implements of trade from a person who contracted with the servant only and knew nothing of the master in the transaction. *R.* v. *Cullum*, *L. R.* 2 *C. C. R.* 28; 42 *L. J.* (*M. C.*) 64; 12 *Cox*, 469. Therefore where a servant whose duty it was to take a barge belonging to his master with cargo from A. to B., and receive back such return cargo, and from such persons as his master should direct, and such only, contrary to the express orders of his master, which were to return empty from B. to C., part of the return voyage to A., took nevertheless a return cargo from B. to C., and received the freight from the owner of the cargo (who knew only the prisoner in the transaction), and did not account to his master for the freight, and denied having carried such return cargo; it was held, that an indictment against the servant for embezzling the money received by him as freight for such return cargo could not be sustained. *Id.* And where a gamekeeper, not authorized to kill or take rabbits for his own use, took and killed some wild rabbits upon his master's land, and dishonestly converted them to his own use by selling them,—the taking, killing, removing, and selling, being parts of one continuous action; it was held that a conviction of the gamekeeper for embezzling the rabbits could not be sustained, apparently on the ground that the rabbits could not be said to have been received or taken into possession by him for or in the name or on the account of his master. *R.* v. *Read*, 3 *Q. B. D.* 131; 47 *L. J.* (*M. C.*) 50; 14 *Cox*, 17 (*C. C. R.*).

And, lastly, prove that the defendant embezzled the money, etc., so received, or some part of it. An unstamped receipt for the money given by the defendant is admissible as evidence against him (*see ante*, p. 383). As to the constructive receipt of the money, *see R.* v. *Baxter*, 5 *Cox*, 302. The usual presumptive evidence of this fact is, that the defendant never accounted with his master for the money, etc., so received by him, or that he denied his having received it. Where the defendant charged himself in his master's book with money received by him, it was held that an embezzlement was not proved *merely* by his not paying it over to the master. *R.* v. *Hodgson*, 3 *C. & P.* 422. On the other hand, the defendant is not exempted from the operation of the statute *merely* by entering the receipt of the money correctly in his master's book. *R.* v. *Lister, Dears. & B.* 118; 26 *L. J.* (*M. C.*) 26; 7 *Cox*, 203 (*C. C. R.*): *R.* v. *Guelder, Bell*, 284; 30 *L. J.* (*M. C.*) 34; 8 *Cox*, 372 (*C. C. R.*). If, instead of denying the appropriation of the money, the party in rendering his account admits it, alleging a right in himself, however unfounded, or setting up an excuse, however frivolous, he ought not to be convicted of embezzlement;

R. v. *Norman*, *C. & Mar.* 501, *Cresswell*, J.; even though he afterwards abscond, and do not *pay over* the money. *R.* v. *Creed*, 1 *C. & K.* 63. But where it is the servant's duty to account for and pay over the monies received by him at stated times, his not doing so wilfully is an embezzlement, although he do not actually deny the receipt of them. *R.* v. *Jackson*, 1 *C. & K.* 384, *Coleridge*, J. *R.* v. *Jones*, 7 *C. & P.* 833, which seems to the contrary, must be taken to be overruled. And even where no precise time can be fixed at which it was his duty to pay them over, his not accounting for them, if found by the jury to have been done fraudulently, is equally an embezzlement. *R.* v. *Welch*, 1 *Den.* 199; 2 *C. & K.* 296; 2 *Cox*, 85 (*C. C. R.*). *See R.* v. *Squire*, (*ante*, p. 562): *R.* v. *Wortley* (*ante*, p. 566), *and see as to where there is a general deficiency*, *post*, p. 573.

Venue.]—The defendant, who was employed as a travelling salesman by a tradesman living at Nottingham, received two sums for his master in the county of Derby, appropriated them to his own use, and neglected to return and account to his master for the money as it was his duty to do. Two months afterwards he was met by his master in Nottingham; and being asked by him respecting the two sums of money, said he was very sorry for what he had done, that he had spent the money. It was held that there was evidence to go to the jury of an embezzlement in Nottingham, and therefore that the defendant was rightly tried there. *R.* v. *Murdock*, 2 *Den.* 298; 21 *L. J.* (*M. C.*) 22; 5 *Cox*, 360 (*C. C. R.*). It was the duty of the prisoner, a commercial traveller, to remit daily to his employers, who resided in London, the money which he collected. The prisoner on the 1st and 2nd March, 1878, collected at Newark two sums of money, which he never remitted and did not account for till the first week in April, when one of his employers went to Grantham, where the prisoner resided, saw him, and taxed him with receiving monies and not accounting for them. The prisoner then and there handed to his employer a list of monies he had collected and not accounted for, including the above two sums. There was no evidence that the prisoner returned from Newark (which is within fifteen miles of Grantham) to Grantham on either of the days on which he received the money, nor indeed that he was ever at Grantham between the time when he received the sums of money and the time when he met his employer there. It was held upon these facts that there was no evidence of embezzlement at Grantham, and therefore that the defendant could not be tried at the quarter sessions for that borough. *R.* v. *Treadgold*, 48 *L. J.* (*M. C.*) 102; 14 *Cox*, 220 (*C. C. R.*). A clerk whose duty it was to remit at once to his employers in Middlesex all monies collected by him, collected at York, on the 18th April, a sum of money, but never remitted it. On the 21st April, he wrote and posted at Doncaster to his employers in Middlesex a letter which was intended to make them believe that he had not then collected the money in question. The letter was received by the employers in Middlesex. It was held that the receipt of such letter in Middlesex was evidence of embezzlement in that county, and that the prisoner was rightly tried there. *R.* v. *Rogers*, 3 *Q. B. D.* 28; 47 *L. J.* (*M. C.*) 11; 14 *Cox*, 22 (*C. C. R.*). *Semble*, also that on these facts there was evidence of embezzlement in Yorkshire, and that the prisoner might have been tried there. *Id.* Where the defendant received payment of a debt from one of his master's customers in Bank of England notes, but accounted with his master for 6*l.* less than he received, and afterwards delivered some Bank of England notes to his master upon another account (it being argued for the defendant that these must be presumed to be the same bank-notes which were received from the customer, and being actually delivered to

the master could not be said to be embezzled), *Bayley*, J., ruled, that these notes, to the amount of 6*l.*, must be deemed to have been embezzled within the meaning of the Act, the moment the defendant accounted for 6*l.* less than he received, and that his afterwards paying these identical notes to his master in another account made no difference: which decision was afterwards confirmed by the judges. *R.* v. *Hall*, 3 *Stark.* (*N. P.*) 67; *R. & R.* 463. The difficulty in that case, which arose from the necessity of proving the embezzlement of some specific note or coin, has been removed by 24 *&* 25 *Vict. c.* 96, *s.* 71 (*ante*, p. 557).

Where general deficiency of monies.]—In *R.* v. *Grove*, 1 *Mood. C. C.* 447; 7 *C. & P.* 635, a majority of the judges (eight against seven) are reported to have held that, since 7 *&* 8 *G.* 4, *c.* 29, *s.* 48 (*rep.*, but re-enacted in substance in 24 *&* 25 *Vict. c.* 96, *s.* 71), an indictment for embezzlement might be supported by proof of a general deficiency of monies that ought to be forthcoming, without showing any particular sum received and not accounted for. *See also R.* v. *Lambert*, 2 *Cox*, 309, *Erle*, J.: *R.* v. *Moah*, *Dears.* 626; 25 *L. J.* (*M. C.*) 66; 7 *Cox*, 60 (*C. C. R.*): *R.* v. *King*, 12 *Cox*, 73 (*C. C. R.*), *ante*, p. 568. But in *R.* v. *Lloyd Jones*, 8 *C. & P.* 288, where upon an indictment for embezzlement, it was opened that the prisoner had been shopman to the prosecutrix, and it would be proved that there was a deficiency in the prisoner's accounts, but that there was no proof of the embezzlement of any particular sum, *Alderson*, B., said, "Whatever difference of opinion there might be in *R.* v. *Grove* (*ubi supra*), that proceeded more upon the particular facts of that case than upon the law. It is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen." *See also R.* v. *Chapman*, 1 *C. & K.* 119; 1 *Cox*, 47, *Williams*, J.: *R.* v. *Wolstenholme*, 11 *Cox*, 313, *Brett*, J. Where embezzlement of a cheque was charged and the cheque could not be found the counterfoil was admitted in evidence. *R.* v. *Wilkinson*, 10 *Cox*, 537.

Where the indictment contains only one count, charging the receipt of a gross sum on a particular day, and it appears in evidence that the money was received in different sums on different days, the prosecutor will be put to his election and must confine himself to one sum and one day. *R.* v. *Williams*, 6 *C. & P.* 626. If, however, in that case, it had appeared that although the gross amount had been received in different sums on different days, the prisoner's duty was, on a certain day, to render an account and pay over the gross amount received, and that the prisoner had on that day failed to account or to pay over the gross amount, but embezzled the money, the prisoner might have been indicted in only one count for embezzling the gross amount, and evidence of the different sums received on different days might have been admitted to show how such gross amount was made up. *R.* v. *Balls*, *L. R.* 1 *C. C. R.* 328; 40 *L. J.* (*M. C.*) 148; 12 *Cox*, 96 (*C. C. R.*). And in *R.* v. *Wright*, *Dears. & B.* 431 (*ante*, p. 569), which was an indictment for larceny by a bank clerk, where the evidence showed a deficiency of over 3000*l.*, and the prisoner admitted that he had taken over 3000*l.*, it was held that the jury need not find that a specific sum was taken on any specific day, but might find that he stole some money. *In R.* v. *Balls*, *ubi supra*, the prisoner was a member of a co-partnership, and was indicted under 31 *&* 32 *Vict. c.* 116, *s.* 1 (*ante*, p. 432), for embezzling the co-partnership monies. It was his duty to receive money for the co-partnership, and once a week to render an account and pay over the

gross amount received during the previous week. During each of three several weeks, within six months, the prisoner received various small sums, and failed to account for them at the end of the week, or to pay over the gross amount, but embezzled the money. It was held that he might be properly charged with embezzling the weekly aggregates; that three acts of embezzlement of such weekly aggregates within six months might be charged and proved under one indictment; and that evidence of the small sums received during each week was admissible to show how these aggregates were made up. The difficulties arising in the above cases with regard to the embezzlement of gross amounts can now often be surmounted by indicting the defendant under 38 & 39 *Vict. c.* 24 (*The Falsification of Accounts Act*, 1875): *post*, p. 591.

Where an indictment for embezzlement charged three offences, and it appeared that the prisoner had made correct entries of a number of payments made by him in one week, but had cast up the whole 2*l.* less than the correct amount; and in another week there was a precisely similar error of the same amount, and the same in a third week, and these were the cases charged in the indictment: it was held that evidence of a series of similar errors, both before and after those which formed the subject of the indictment was admissible in order to anticipate the defence that the three cases contained in the indictment were merely accidental errors. *R.* v. *Richardson*, 2 *F.* & *F.* 343; 8 *Cox*, 448. *See R.* v. *Proud*, *L.* & *C.* 97; 31 *L. J.* (*M. C.*) 71; 9 *Cox*, 22 (*C. C. R.*), *R.* v. *Stephens*, 16 *Cox*, 387 (*C. C. R.*); *and for the general rules as to such evidence, ante*, pp. 308–312. While the receipt of the money must have taken place during the service—*R.* v. *Hoare*, 1 *F.* & *F.* 647—it seems not to be necessary to allege or prove the embezzling to have taken place while the prisoner continued clerk or servant to the prosecutor. *R.* v. *Lovell*, 2 *M.* & *Rob.* 236, *Coleridge*, J.: *see* 2 *Russ. Cr.* (6th ed.) 373.

An indictment for embezzling money will not be sustained by evidence of embezzling goods. *R.* v. *Clarke*, *C. C. R.*, 28*th Jan.* 1905.

EMBEZZLEMENT BY PERSONS EMPLOYED IN THE PUBLIC SERVICE, OR BY POLICE CONSTABLES.

7 *W.* 4 & 1 *Vict. c.* 86, *s.* 26—*Embezzlement by officers of the post office.*]—*See ante*, p. 503.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 70—*Embezzlement by persons in the King's service or by the police—Venue—Form of indictment.*]—Whosoever, being employed in the public service of [his] Majesty, or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever, and intrusted by virtue of such employment with the receipt, custody, management or control of any chattel, money or valuable security, shall embezzle any *chattel, money, or valuable security which shall be intrusted to or received or taken into possession by him by virtue of his employment*, or any part thereof, or in any manner fraudulently apply or dispose of the same or any part thereof to his own use or benefit, or for any purpose whatsoever except for the public service, shall be deemed to have feloniously stolen the same from [his] Majesty, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years; . . .

And every offender against this or the last preceding section [*ante*, p. 467] may be dealt with, indicted, tried and punished either in the

county or place in which he shall be apprehended or be in custody, or in which he shall have committed the offence;

And in every case of larceny [*ante*, p. 467], embezzlement, or fraudulent application or disposition of any chattel, money, or valuable security in this and the last preceding section [*ante*, p. 467] mentioned, it shall be lawful in the warrant of commitment by the justice of the peace before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money, or valuable security in [his] Majesty. [*This section is framed on* 2 *&* 3 *W.* 4, *c.* 4, *ss.* 1, 4, 5, *and* 22 *&* 23 *Vict. c.* 32, *s.* 23, *with the alterations italicized. In R.* v. *Parsons*, 16 *Cox*, 498, *a county court bailiff appointed by the high bailiff was held by Cave*, J., *not to be in the public service of her late Majesty: and see ante*, p. 565. *In R.* v. *Graham*, 13 *Cox*, 57 (*C. C. R.*), *a man employed under an inspector of prisons to collect and pay in to the Bank of England, to the credit of the Paymaster-General, contributions by parents under* 29 *&* 30 *Vict. cc.* 117, 118, *towards the maintenance of their children in reformatory and industrial schools, was held to be employed in such public service. See ante*, p. 467.]

Sect. 71—*Distinct acts of embezzlement, etc., may, under certain circumstances, be charged in same indictment.*]—*Ante*, p. 557.

Sect. 72—*Person indicted for embezzlement, etc., not to be acquitted if the offence turn out to be larceny, and vice versâ.*]—*Ante*, p. 557.

39 *&* 40 *Vict. c.* 36 (*Customs Consolidation Act*, 1876), *s.* 29—*Embezzlement by custom-house officers.*]—Any moneys, chattels, or other valuable securities which shall or may be received by any officer, clerk, or other person in the service of the customs, either as duties of customs, or under or by virtue of any statute, or in virtue of his office or employment, or otherwise, for the use or service of his Majesty, or of any public department, shall be deemed to be moneys, chattels, or valuable securities for the public service, and shall be considered as such within the *Larceny Act*, 1861 (24 *&* 25 *Vict. c.* 96), and in any information, indictment, or other instrument in relation thereto, the same may be laid as the property of his Majesty. [*See ante*, p. 467.]

54 *&* 55 *Vict. c.* 69, *s.* 1—*Punishment.*]—*See ante*, p. 235.

FRAUDULENT CONVERSION OF PROPERTY.

Statute.

1 *Edw.* 7, *c.* 10 (*Larceny Act*, 1901), *s.* 1—*Fraudulent misappropriation of property*].

(1) Whosoever—

(*a*) being entrusted, either solely or jointly with any other person, with any property, in order that he may retain in safe custody, or apply, pay, or deliver, for any purpose or to any person, the property or any part thereof or any proceeds thereof; or

(*b*) having, either solely or jointly with any other person, received any property for or on account of any other person,

fraudulently converts to his own use or benefit, or the use or benefit of any other person, the property or any part thereof or any proceeds thereof, shall be guilty of a misdemeanor, and be liable on conviction

to penal servitude for a term not exceeding seven years, or to imprisonment, with or without hard labour, for a term not exceeding two years.

(2) Nothing in this section shall apply to or affect any trustee on any express trust created by a deed or will, or any mortgagee of any property, real or personal, in respect of any act done by the trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgagee.

Sect. 2—*Repeals, and construction, citation, commencement of Act.*]—(1) Sections 75 & 76 of the *Larceny Act*, 1861, are hereby repealed.

(2) This Act shall have effect as part of the *Larceny Act*, 1861, and section 1 of this Act shall be deemed to be substituted for *ss.* 75 and 76 of that Act, and references in any enactment to those sections shall be construed as references to *s.* 1 of this Act.

(3) This Act shall come into operation on the first day of January, 1902.

(4) This Act may be cited as the *Larceny Act*, 1901, and the *Larceny Act*, 1861, the *Larceny Act*, 1868, the *Larceny Act*, 1896; and this Act may be cited together as the *Larceny Acts*, 1861 to 1901.

[*By the passing of this statute many difficulties in the way of proof of offences against the repealed sections* 75 & 76 *of the Larceny Act*, 1861, *have been removed: see R.* v. *Christian, L. R.* 2 *C. C. R.* 94; 43 *L. J.* (*M. C.*) 1; 12 *Cox*, 502: *R.* v. *Cooper, L. R.* 2 *C. C. R.* 123; 43 *L. J.* (*M. C.*) 89; 12 *Cox*, 600: *R.* v. *Cosser*, 13 *Cox*, 187: *R.* v. *Brownlow*, 14 *Cox*, 216 (*C. C. R.*): *R.* v. *Fullagar*, 14 *Cox*, 370; 42 *L. T.* (*N. S.*) 448: *R.* v. *Cronmire*, 16 *Cox*, *C. C. R.*: *R.* v. *Tatlock*, 2 *Q. B. D.* 157; 40 *L. J.* (*M. C.*), 17: *R.* v. *Newman*, 8 *Q. B. D.* 706; 51 *L. J.* (*M. C.*) 817: *In re Bellencontre* [1891] 2 *Q. B.* 122: *R.* v. *Portugal*, 16 *Q. B. D.* 487: *R.* v. *Kane* [1901] 1 *K. B.* 472: *and the* 22*nd edition of the work*, p. 547, *et. seq. Prosecutions under the Act of* 1901 *can be undertaken only in respect of offences committed after its commencement. Offences against the repealed ss.* 75, 76 *of the Larceny Act*, 1861, *committed before the repeal took effect* (1 *Jan.* 1902) *can still be prosecuted under these sections by virtue of s.* 38 *of the Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *q. v. ante*, p. 7: *and see R.* v. *Webb* (1904), 197 *Cent. Crim. Ct. Sess. Pap.*, 627, *Walton*, J.; *R.* v. *Parsons, Lewes assizes, Nov.* 1904, *Bigham*, J.]

45 & 46 *Vict. c.* 50 (*Municipal Corporations Act*, 1882), *s.* 117: *Misappropriation of borough securities, etc.*]—If any person authorized to receive money to arise from the sale of any annuities or securities purchased or transferred under the foregoing provisions of this part (*Part V. relating to property and liabilities of municipal boroughs*) or under any Act repealed by this Act, or any dividends thereon, or any other such monies as aforesaid, appropriates the same otherwise than is directed by this Act, or by the Treasury in pursuance thereof, he shall be guilty of misdemeanor, and shall be subject in respect thereof to the provisions of the *Larceny Act*, 1861, applicable to a person guilty of a misdemeanor under *s.* 75 of that Act, or to the provisions of any enactment for the time being substituted for that section [*i.e. now* 1 *Edw.* 7, *c.* 10, *s.* 1, *supra*].

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861). *Sect.* 77—*Persons under powers of attorney fraudulently selling property.*]—Whosoever, being intrusted, *either solely, or jointly with any other person*, with any power of attorney for the sale or transfer of any property, shall fraudulently sell or transfer or otherwise convert the same or any part thereof to his own use or benefit, *or the use or benefit of any person other than the person by whom he was so intrusted*, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the

punishments which the court may award as hereinbefore last mentioned [*i.e. now under* 1 *Edw.* 7, *c.* 10, *s.* 1 (1), *see s.* 2 (2) *of that Act* (*ante*, p. 576) *This section re-enacts* 20 *&* 21 *Vict. c.* 54, *s.* 3, *with the additions italicized*].

Sect. 78—*Factors unlawfully obtaining advances on property of their principals.*]—Whosoever, being a factor or agent intrusted, *either solely or jointly with any other person*, for the purpose of sale or otherwise, with the possession of any goods, or of any document of title to goods,

Shall, contrary to or without the authority of his principal in that behalf, for his own use or benefit, *or the use or benefit of any person other than the person by whom he was so intrusted*, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or document of title so intrusted to him as in this section before mentioned, as and by way of a pledge, lien, or security for any money or valuable security borrowed or received by such factor or agent at or before the time of making such consignment, deposit, transfer, or delivery, or intended to be thereafter borrowed or received, or,

Shall, contrary to or without such authority, for his own use or benefit, *or the use or benefit of any person other than the person by whom he was so intrusted*, and in violation of good faith, accept any advance of *any money or valuable security* on the faith of any contract or agreement to consign, deposit, transfer, or deliver any such goods or document of title:

Shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned [*i.e. now under* 1 *Edw.* 7, *c.* 10, *s.* 1 (1); *see s.* 2 (2) *of that Act, ante*, p. 576].

And every clerk or other person who shall knowingly and wilfully act and assist in making any such consignment, deposit, transfer, or delivery, or in accepting or procuring such advance as aforesaid, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the same punishments [*i.e. now under* 1 *Edw.* 7, *c.* 10, *s.* 1 (1); *see s.* 2 (2) *of that Act, ante*, p. 576]: Provided, that no such factor or agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal, and accepted by such factor or agent. [*This section is framed on* 7 *&* 8 *G.* 4, *c.* 29, *s.* 51, *&* 5 *&* 6 *Vict. c.* 39, *s.* 6, *with the alterations italicized. For indictment, see post*, p. 581.]

24 *&* 25 *Vict. c.* 96. *Sect.* 1—*Definition of terms—Document of Title to Goods—Valuable Security—Property.*]—*See ante*, pp. 426, 427.

Sect. 79—*Definition of terms—Factor—Pledge—Possessed—Advance—Contract.*]—Any *factor or* agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods or obtained by reason of such *factor or* agent having been intrusted with the possession of the goods or of any other document of title thereto, shall be deemed to have been intrusted with the possession of the goods represented by such document of title;

"*Pledge or lien.*"]—And every contract pledging or giving a lien upon such document of title as aforesaid shall be deemed to be a pledge of and lien upon the goods to which the same relates;

"*Possessed.*"]—And such factor or agent shall be deemed to be possessed of such goods or documents, whether the same shall be in his actual custody, or shall be held by any other person subject to his control, or for him, or on his behalf;

"*Loan or advance.*"]—And where any loan or advance shall be *bonâ fide* made to any factor or agent intrusted with and in possession of any such goods or document of title, on the faith of any contract or agreement in writing to consign, deposit, transfer or deliver such goods or document of title, and such goods or document of title shall actually be received by the person making such loan or advance, without notice that such factor or agent was not authorized to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or document of title within the meaning of the last preceding section, though such goods or document of title shall not actually be received by the person making such loan or advance till the period subsequent thereto;

"*Contract or agreement.*"]—And any contract or agreement, whether made direct with such factor or agent, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such factor or agent;

"*Advance.*"]—And any payment made, whether by money or bill of exchange or other negotiable security, shall be deemed to be an advance within the meaning of the last preceding section;

"*Intrusted.*"]—And a factor or agent in possession as aforesaid of such goods or document shall be taken for the purposes of the last preceding section to have been intrusted therewith by the owner thereof, unless the contrary be shown in evidence. [*This section re-enacts* 5 *&* 6 *Vict. c.* 39, *s.* 4, *with the addition of the words* "*factor or.*" *As to the meaning of the term* "*agent intrusted*" *see Hatfield* v. *Phillips*, 12 *Cl. & F.* 343: 8 *Eng. Rep.* 440.]

Sect. 85—*No person exempt from answering questions in any court.*]—Nothing in any of the last ten preceding sections of this Act contained shall enable or entitle any person to refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency; and no person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved [*or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency*]. [*This section is partly a re-enactment of* 20 *&* 21 *Vict. c.* 54, *s.* 11, *and partly new: see* 24 *&* 25 *Vict. c.* 96, *s.* 29 (*ante*, p. 495). · *By* 1 *Edw.* 7, *c.* 10, *s.* 2 (2) (*ante*, p. 576), *s.* 1 (1) *of that Act is substituted for ss.* 75, 76 *of* 24 *&* 25 *Vict. c.* 96, *and s.* 85 *applies to the substituted enactment. So much of this section as is in italics and square brackets was repealed by* 53 *&* 54 *Vict. c.* 71, *ss.* 27, 29, *and the schedule to that Act, post*, p. 579].

53 & 54 *Vict. c.* 71 (*Bankruptcy Act*, 1890), *s.* 27—*Partial repeal of* 24 & 25 *Vict. c.* 96, *s.* 85—*Compulsory statements in bankruptcy not evidence.*]—(1) There shall be repealed so much of section eighty-five of the *Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), as provides that no person shall be liable to be convicted of any of the misdemeanors mentioned in sections seventy-five to eighty-four of that Act (being frauds by agents, bankers, or factors), if he shall have first disclosed the same in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy or insolvency. [1 *Edw.* 7, *c.* 10, *s.* 1 *is substituted for ss.* 75, 76 *of the Larceny Act*, 1861, *see ante*, pp. 575, 576.]

(2) A statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding in respect of any of the misdemeanors referred to in the said section eighty-five. [*A bankrupt's statement of affairs is not within this sub-section, and is admissible as evidence against him. R.* v. *Pike* [1902] 1 *K. B.* 552 *in a prosecution under s.* 80 *of the Larceny Act.*]

S. 29 *& Sched.*]—*Specifically repeal the words of* 24 & 25 *Vict. c.* 96, *s.* 85, *which are italicized, ante*, p. 578.

24 & 25 *Vict. c.* 96, *s.* 86—*Not to deprive party grieved of remedy—Conviction not to be evidence in civil suits.*]—Nothing in any of the last eleven preceding sections of this Act contained, nor any proceeding, conviction, or judgment to be had or taken thereon against any person under any of the said sections, shall prevent, lessen, or impeach any remedy at law or in equity which any party aggrieved by any offence against any of the said sections might have had if this Act had not been passed; but no conviction of any such offender shall be received in evidence in any action at law or suit in equity against him: and nothing in the said sections contained shall affect or prejudice any agreement entered into or security given by any trustee, having for its object the restoration or repayment of any trust property misappropriated.

Sect. 87—*Offences not triable at quarter sessions.*]—No misdemeanor against any of the last twelve preceding sections of this Act shall be prosecuted or tried at any court of general or quarter sessions of the peace. [*This also applies to offences under* 1 *Edw.* 7, *c.* 10, *see s.* 2 (2) *of that Act* (*ante*, p. 576).]

Indictment for fraudulent conversion of Property intrusted to him for safe Custody. (1 *Edw.* 7, *c.* 10, *s.* 1 (*a*) *ante*, p. 575.)

Central Criminal Court, to wit: The jurors for our lord the King upon their oath present that A. B. on the —— day of ——, A.D. ——, was intrusted with certain property (*see definition of property, ante*, p. 427), to wit, with the sum of 5*l.* in money [of and belonging to C. D.] in order that he might retain the said money in safe custody [*retain in safe custody, or apply, pay or deliver, for any purpose, or to any person, the property, or any part thereof, or any proceeds thereof*], and the jurors aforesaid upon their oath aforesaid do further present that the said A. B. afterwards, to wit, on the —— day of ——, A.D. 1902, in the parish of ——, in the county of London, and within the jurisdiction of the said court, unlawfully and fraudulently did convert the said property [*the property, or any part*

thereof, or any proceeds thereof] to his own use and benefit [*his own use or benefit or the use or benefit of any other person*]: against the form (*as ante*, p. 465).

Misdemeanor.—Penal servitude for not more than seven or less than three years, or imprisonment with or without hard labour not exceeding two years, 1 *Edw.* 7, *c.* 10, *s.* 1 (1) (*ante*, p. 575); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

This offence is not triable at quarter sessions. 1 *Edw.* 7, *c.* 10, *s.* 2 (2) (*ante*, p. 576); 24 & 25 *Vict. c.* 96, *s.* 87 (*ante*, p. 579).

Evidence.

Prove that the defendant was intrusted, either solely or jointly with any other person with the property, as stated in the indictment, and that it was intrusted to him for safe custody (*a*), or for the purpose stated—and, lastly, that he converted it to his own use and benefit, or to the use and benefit of some other person.

H. received sums of money from S. and others who entered his employment as security for their honesty whilst in his employment, and promised to repay the said sums to the depositors on their leaving his employment. He did not do so, but used the money for his own purposes. On an indictment against H. under *s.* 1 (*a*) of 1 *Edw.* 7, *c.* 10, alleging that H. had been intrusted by S. with certain property, to wit, ten pounds in money of and belonging to S., in order that (in one set of counts) he, H., might retain the same in safe custody and thereafter pay it back to S., and (in another set of counts) in order that he, H., might thereafter pay ten pounds the proceeds thereof back to S. in three months' time or on S. leaving the service of H., it was held by *Bosanquet*, Common Serjeant, after consulting *Phillimore*, J., that there was no evidence against H. of the offence so charged against him. *R.* v. *Hotine*, 68 *J. P. Rep.*, 143.

(*a*) "*Safe custody.*"]—Trust money had been invested on mortgage, which was paid off, and the money left in the hands of the defendant, the solicitor to the trust, who wrote to the person beneficially interested:—"R.'s money was paid on the 6th of April. Let me know how you would like to have it invested, whether in the funds or on mortgage." The answer, dated 9th of April, was:—"Will consult G. at once about the money, and let you know. I do not wish it placed in the funds. I am very glad it is paid over, and hope it will be well secured this time." At or very near the date of these letters it was clear that the defendant had fraudulently appropriated the money to his own use. Held, that this was a fraudulent conversion to his own use of property intrusted to the defendant for safe custody within 24 & 25 *Vict. c.* 96, *s.* 76 (*rep.*). *R.* v. *Fullagar*, 14 *Cox*, 370 (*C. C. R.*); 41 *L. T.* (*N. S.*) 448. In the course of the argument in that case, *Hawkins*, J., said:—"If you say that the letters show that the defendant was intrusted with the money to invest on mortgage, then they amount to a direction in writing within section 75; and if they do not, then the money was intrusted to the defendant for safe custody within section 76 until the prosecutrix gave further directions how it was to be dealt with." But where a solicitor was intrusted by a client with money to invest on mortgage on the client's behalf, and he, instead of doing so, fraudulently appropriated the money to his own use, it was held that he was not intrusted with such money "*for safe custody*" within section 76. *R.* v. *Newman*, 8 *Q. B. D.* 706 (*C. C. R.*); 51 *L. J.* (*M. C.*) 87. The decision in this case turned upon the absence of any evidence that the money was to be treated as intrusted for safe custody until opportunity for investment should arise, and *Stephen*, J., expressly approved of the direction of *Bowen*, J., to the jury in the court below, viz., that "if they were satisfied that money was intrusted to the prisoner to be invested on mortgage, and to be kept safely in his own hands until such mortgage was effected by him, and if instead of investing the money so intrusted to him he converted it fraudulently to his own use, they should find the prisoner guilty." See also the observations of *Denman* and *Stephen*, JJ., upon *R.* v. *Cooper* (*ante*, p. 576).

1 *Edw.* 7, *c.* 10, *s.* 1 does not affect trustees under an express trust created by deed or will or mortgagees, in respect to any act done by them in relation to the property comprised in or affected by the trust or mortgagee (*see ante*, p. 576). As to the liability of such trustees, *see* 24 & 25 *Vict. c.* 96, *s.* 80 (*post*, p. 583).

No person shall be convicted of an offence against that statute by any evidence in respect of any act done by him, if at any time previously to his being charged with the offence he shall have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, 24 & 25 *Vict. c.* 96, *s.* 85 (*ante*, p. 578). *See R.* v. *Strahan*, 7 *Cox*, 85; and the cases discussed, *ante*, pp. 328, 497. The same protection was afforded to him by the same section if he should have first disclosed such act in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency. That part of *s.* 85 is, however, now repealed by 53 & 54 *Vict. c.* 71, *s.* 27 (*ante*, p. 579), but by *sub-s.* 2 of that section a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankrupty is not admissible as evidence against that person in any proceeding in respect of any of the misdemeanors referred to in 24 & 25 *Vict. c.* 96, *s.* 85.

Indictment for fraudulent conversion of Property received on account of another. (1 *Edw.* 7, *c.* 10, *s.* 1 (*b*), *ante*, p. 575.)

Commencement as ante, p. 579]—That J. S. on the —— day of ——, A.D. ——, received certain property, to wit, the sum of 100*l.* in money of and belonging to J. N., for and on the account of one M. M., and that the said J. S. afterwards, to wit, on the —— day of —— A.D. 1902 [in the parish, etc.], so having received the said property as aforesaid, unlawfully and fraudulently did convert the said property ("*the property or any part thereof or any proceeds thereof*") to his own use and benefit ("*to his own use or benefit or the use or benefit of any other person*"): against the form (*as ante*, p. 465).

Misdemeanor: For punishment and court of trial, see last precedent.

Evidence.

Prove that the defendant received the property for or on account of another person, as stated in the indictment, and that he converted to his own use, etc., all or part of the property or some of the proceeds thereof. As to what constitutes receipt for or on account of another *see ante*, p. 568.

Indictment against a Factor for unlawfully pledging Goods of the Principal. (24 & 25 *Vict. c.* 96, *s.* 78, *ante*, p. 577.)

Commencement as ante, p. 579.]—J. N. did intrust to J. S., the said J. N. then being a factor and agent of him the said J. N., ten bales of cotton ("*intrusted with the possession of goods or of any document of title to goods*"); and that the said J. S., factor and agent as aforesaid, on the day and year aforesaid, contrary to and without the authority of the said J. N., for his own use and benefit, and in violation of good faith, unlawfully did make a deposit of the said ten bales of cotton with one J. P., as and by

way of a pledge, lien and security for a certain sum of money, to wit, the sum of fifty pounds, then advanced by the said J. P. to him the said J. S.; against the form [*as ante*, p. 465].

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment with or without hard labour, not exceeding two years. —24 & 25 *Vict. c.* 96, *s.* 78; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235); 1 *Edw.* 7, *c.* 10, *ss.* 1 (1), 2 (*ante*, pp. 575, 576). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

This offence is not triable at quarter sessions. Id. s. 87 (*ante*, p. 479).

Evidence.

Prove that the goods, etc., described in the indictment were intrusted by J. N. to the defendant as his agent: that the defendant deposited the goods with J. P. as a security for an advance of money, etc.; and, lastly, circumstances must be shown from which the jury may infer that the defendant pledged the goods in violation of good faith, and contrary to and without the authority of the prosecutor. A factor who has a lien upon goods may pledge them to the extent of his lien. 24 & 25 *Vict. c.* 96, *s.* 78, *proviso* (*ante*, p. 577). A statement or admission by the defendant in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy is not admissible in evidence against him. 53 & 54 *Vict. c.* 71, *s.* 27, *sub-s.* 2 (*ante*, p. 579). And if he have, previously to the charge, first disclosed the act on oath under compulsory process of any court of law or equity, in any action, etc., *bonâ fide* instituted by any party grieved, he cannot be convicted by any evidence whatever. 24 & 25 *Vict. c.* 96, *s.* 85. (*See ante*, p. 578.)

The conviction will not be evidence against the defendant in any action at law or suit in equity against him. *Id. s.* 86. As to what is an *intrusting* within the statute, *see* 24 & 25 *Vict. c.* 96, *s.* 79 (*ante*, p. 578), and as to what are to be considered as documents of title to goods, *see s.* 1 (*ante*, p. 426). A person intrusted with goods, or the documents of title thereto, as agent, was held, after his authority as agent had been revoked, not to be "an agent intrusted" within the meaning of 5 & 6 *Vict. c.* 39, *s.* 1 (*rep.*), so as to protect a pledge by him to an innocent pledgee. *Fuentes* v. *Montes*, *L. R.* 4 *C. P.* 93; 38 *L. J. C. P.* 95 (*Ex. Ch.*). The *Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *s.* 2, *sub-s.* 2, and the *Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 25, appear to protect the innocent pledgee in such a state of circumstances, but the question perhaps still remains whether a person whose authority has been so revoked is "a factor or agent intrusted" within the meaning of 24 & 25 *Vict. c.* 96, *s.* 78. (*See ante*, p. 577.)

Agent.]—The words "or other agent" occurring after the words "banker, merchant, broker, attorney" in the repealed *s.* 75 of 24 & 25 *Vict. c.* 96 were held to apply only to persons whose occupation is *ejusdem generis* with that of a "banker, etc." *R.* v. *Portugal*, 16 *Q. B. D.* 487; followed in *R.* v. *Kane* [1901] 1 *K. B.* 472; 19 *Cox*, 658 (*C. C. R.*); and *semble* the meaning of "agent" in *s.* 78 is similarly limited to that "agent" *ejusdem generis* with "factor," though the word "other" does not occur in *s.* 78. *See R.* v. *Portugal*, *ubi supra.*

BY TRUSTEES.

Statute.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 1—*Definition of "Trustee."*]—The term "trustee" shall mean a trustee on some express trust created by some deed, will, or instrument in writing, and shall include the heir, or personal representative, of any such trustee, and any other person upon or to whom the duty of such trust shall have devolved or come, and also an executor and administrator, and an official manager, assignee, liquidator, or other like officer acting under any present or future Act relating to joint stock companies, bankruptcy or insolvency.

Id.—Definition of "property."]—*Ante*, p. 427.

Sect. 80—*Misappropriation by trustees under an express trust in writing.*]—Whosoever, being a trustee of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert or appropriate the same or any part thereof to or for his own use or benefit, *or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid*, or otherwise dispose of or destroy such property or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned [*i.e. now under* 1 *Edw.* 7, *c.* 10, *s.* 1 (1), *see s.* 2 (2), *see ante*, p. 576].

Provided, that no proceeding or prosecution for any offence included in this section shall be commenced without the sanction of [his] Majesty's attorney-general, or in case that office be vacant, of [his] Majesty's solicitor-general:

Provided also, that where any civil proceeding shall have been taken against any person to whom the provisions of this section may apply, no person who shall have taken such civil proceeding shall commence any prosecution under this section without the sanction of the court or judge before whom such civil proceeding shall have been had or shall be pending. [*This section re-enacts* 20 & 21 *Vict. c.* 54, *ss.* 1, 13, *with the additions in italics. An offence within this section cannot be dealt with as an offence within* 1 *Edw.* 7, *c.* 10, *s.* 1 (*ante*, p. 575) *if the trust is an express trust created by deed or will.*]

Sect. 85.]—*Ante*, p. 578.

53 & 54 *Vict. c.* 71 (*Bankruptcy Act*, 1890), *s.* 27.—*Ante*, p. 579.

1 *Edw.* 7, *c.* 10, *s.* 2 (2) *ante*, p. 576.

Indictment. (24 & 25 *Vict. c.* 96, *s.* 80.)

Surrey, to wit:—The jurors for our lord the King upon their oath present, that before and at the time of the committing of the offences hereinafter mentioned, to wit, on the first day of June, in the year of our Lord ——, J. S. was a trustee* to wit trustee under and by virtue of a certain deed* (*describe the deed, will or other instrument in writing*) of certain

property, to wit, five thousand pounds three per centum consolidated bank annuities, for the benefit of J. N. [*or* for a certain public (*or* charitable) purpose, that is to say (*stating the purpose*)]; and that the said J. S., so being such trustee as aforesaid, on the day and year aforesaid, unlawfully did convert and appropriate the said property to his own use ["*convert or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of or destroy such property or any part thereof*"] with intent thereby then to defraud; against the form [*as ante*, p. 465]. *Add count alleging that the defendant disposed of (showing the mode of disposition) or destroyed the property, if necessary.*

*The precedent of an indictment for this offence contained in former editions of this work did not contain the words between the **, and in R. v. Piper*, 65 *J. P.* 10, *Ridley*, J., *declined an application to quash an indictment under this section made on the ground of their omission; it would seem, however, to be safer to insert them.*

Definition of Property.]—*See ante*, p. 427.

Misdemeanor: penal servitude for not more than seven and not less than three years, or imprisonment, with or without hard labour, not exceeding two years.—24 *&* 25 *Vict. c.* 96, *s.* 80; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour, Id. s*, 117 (*ante*, p. 431). *See* 24 *&* 25 *Vict. c.* 96, *ss.* 85, 86, *ante*, pp. 478, 479).

This offence is not triable at quarter sessions. Id. s. 87 (*ante*, p. 479).

The prosecution must be commenced with the sanction of a judge or of the attorney-general. Id. s. 80 (*supra*). *It is not necessary to aver the obtaining of such sanction.*

Evidence.

Prove that the defendant was a trustee within 24 *&* 25 *Vict. c.* 96, *s.* 1 (*ante*, p. 583), as stated in the indictment, by producing and proving the deed, will, or other instrument in writing whereby the trust (which must be an express and not an implied trust) was created, and also, if the defendant be the heir or personal representative of the original trustee, by proving his heirship, or the will or letters of administration, as the case may be, of the original trustee (*see ante*, pp. 364, 380). Also prove the written *fiat* of the attorney-general authorizing the prosecution by calling his clerk or otherwise. But see *R. v. Dexter*, 19 *Cox*, 360 (*ante*, p. 8). A trustee of a savings bank is not a trustee of property "for a public or charitable purpose" within *s.* 80, *supra*. He is, however, a trustee for the benefit "of some other persons" within that section. *R. v. Fletcher*, *L. & C.* 180; 31 *L. J.* (*M. C.*) 206; 9 *Cox*, 189 (*C. C. R.*): *cf. R. v. Gibbs*, *Dears.* 445; 24 *L. J.* (*M. C.*) 62; 6 *Cox*, 455 (*C. C. R.*). The rules of a savings bank are an "instrument in writing" within *s.* 1 (*ante*, p. 583) *Id.* The defendant applied to his bankers for an advance as against goods consigned to him and then at sea. The advance was made on his signing a letter of hypothecation by which he undertook to hold the goods in trust for the bankers, and to hand over to them the proceeds to the amount of the advance. It was held that this letter contained a declaration of an express trust such as made the giver of it a trustee for the bankers within the meaning of 24 *&* 25 *Vict. c.* 96, *s.* 80. *R. v. Townshend*, 15 *Cox*, 466, *Day*, J. It was also held that a letter of hypothecation is a bill of sale within the definition of the *Bill of Sale Acts* as being a declaration of trust without transfer of possession, and is required to

comply with the provisions of those Acts as to form and registration; but that in this case, the goods being at sea at the time of the execution of the letter of hypothecation, it came within the exception as to "goods at sea" contained in the *Bill of Sale Acts*, and so was not affected by these provisions. *Id.* If the defendant is charged as a trustee in bankruptcy, the proceedings must be produced and proved (*see ante*, p. 367), in order to show his character as assignee. If as liquidator under the *Companies Act*, 1862 (25 & 26 *Vict. c.* 89), it must be shown that the company was one that had been duly registered by producing the certificate of registration; and if the appointment as liquidator was one by the court of Chancery, the order of the court appointing the defendant must be proved; if by the company in general meeting, the appointment by such general meeting must be proved. Then prove that the defendant appropriated the property of which he was such trustee, or some part thereof, to his own use, or disposed of or destroyed it, or some part of it, as the case may be, and that he did so with intent to defraud, which intent must in general be implied from the circumstances of the case (*see ante*, pp. 303, 308). The definition of "property" is very wide (*see ante*, p. 427).

A statement or admission by the defendant in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy is not admissible in evidence against him. 53 & 54 *Vict. c.* 71, *s.* 27, *sub-s.* 2 (*ante*, p. 579). *See R. v. Pike* [1902] 1 *K. B.* 552; 20 *Cox*, 164. And if he have previously to the charge, first disclosed the act on oath under compulsory process of any court of law or equity, in any action, etc., *bonâ fide* instituted by any party grieved, he cannot be convicted by any evidence whatever, 24 & 25 *Vict. c.* 96, *s.* 85 (*ante*, p. 578). As to what constitutes first disclosure, *see ante*, pp. 328, 496.

BY BANKRUPTS.

See "Offences against Bankruptcy Law," post, Book II. Part II. Chap. v., Sect. 1.

BY DIRECTORS, OFFICERS, AND MEMBERS OF PUBLIC COMPANIES.

Statutes.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 81.]—Whosoever, being a director, member, or public officer of any body corporate or public company, shall fraudulently take or apply for his own use or benefit, *or for any use or purposes other than the use or purposes of such body corporate or public company*, any of the property of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned [*i.e. penal servitude for not more than seven nor less than three years, or imprisonment with or without hard labour for not more than two years, see* 1 *Edw.* 7, *c.* 10, *ss.* 1 (1), 2 (2), *ante*, pp. 575, 576. *This section re-enacts* 20 & 21 *Vict. c.* 54, *s.* 5, *with the additions in italics. For indictment, see post*, p. 588].

Sect. 82—*Keeping fraudulent accounts.*]—Whosoever, being a director, public officer, or manager of any body corporate or public company, shall

as such receive or possess himself of any of the property of such body corporate or public company otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned [*i.e. now under* 1 *Edw.* 7, *c.* 10, *s.* 1 (1), *see s.* 2 (2), *ante*, p. 576. *This section re-enacts* 20 *&* 21 *Vict. c.* 54, *s.* 6].

Sect. 83—*Wilfully destroying or mutilating books, etc.*]—Whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular, in any book of account or other document, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned. [*Now under* 1 *Edw.* 7, *c.* 10, *s.* 1 (1), *see s.* 2 (2), *ante*, p. 576. *This section re-enacts* 20 *&* 21 *Vict. c.* 54, *s.* 7. *For indictment, see post*, p. 589. *As to the offences within this section, see Re Arton, No.* 2 [1896], 1 *Q. B.* 509, *per Russell*, L.C.J.]

Sect. 84—*Publishing fraudulent statements.*]—Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder or creditor, of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned; *i.e. now under* 1 *Edw.* 7, *c.* 10, *s.* 1 (1), *see s.* 2 (2), *ante*, p. 576. [*This section re-enacts* 20 *&* 21 *Vict. c.* 54, *s.* 8. *For indictment, see post*, p. 589.]

24 *&* 25 *Vict.* 96, *s.* 85—*Not to exempt from giving evidence, etc.*]—*Ante*, p. 578.

53 *&* 54 *Vict. c.* 71, *s.* 27—*Partial repeal of* 24 *&* 25 *Vict. c.* 96, *s.* 85.]—*Ante*, p. 579.

24 *&* 25 *Vict. c.* 96, *s.* 86—*Remedies not to be affected—Convictions not to be evidence in civil suits.*]—*Ante*, p. 579.

Sect. 87—*Offences not triable at quarter sessions.*]—*Ante*, p. 579.

25 *&* 26 *Vict. c.* 89 (*Companies Act*, 1862), *s.* 166—*Falsification of books.*] —If any director, officer, or contributory of any company wound up under this Act destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document

belonging to the company with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and upon being convicted shall be liable to imprisonment for any term not exceeding two years, with or without hard labour. [*It is submitted that this section refers only to falsification of books, etc., on or in connection with the winding-up of a company. In the case of the* London and Globe Finance Corporation [1903], 1 *Ch.* 728, *an order was made under s.* 167, *infra, by Buckley, J., directing the official receiver "to institute and conduct against* W. W. *a criminal prosecution for such offences under ss.* 83 *and* 84 *of the Larceny Act,* 1861, *and s.* 166 *of the Companies Act,* 1862, *as he may be advised." The falsifications charged against the accused having been committed upon dates prior to the winding-up of the company in question, and having no direct reference thereto, no count alleging an offence against s.* 166 *was included in the indictment eventually preferred against him.*]

Sect. 167—*Direction of prosecution by court in case of winding-up by court —Expenses of prosecution.*]—Where any order is made for winding-up a company by the court, or subject to the supervision of the court, if it appear in the course of such winding-up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company, for which he is criminally responsible, the court may, on the application of any person interested in such winding-up or of its own motion, direct the official liquidators, or the liquidators (as the case may be), to institute and conduct a prosecution or prosecutions for such offence, and may order the costs and expenses to be paid out of the assets of the company. [*See Re London & Globe Finance Corporation, ubi supra.*]

Sect. 168—*Prosecution by liquidators with sanction of court, in case of voluntary winding-up—Expenses of prosecution.*]—Where a company is being wound up altogether voluntarily, if it appear to the liquidators conducting such winding-up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company for which he is criminally responsible, it shall be lawful for the liquidators, with the previous sanction of the court, to prosecute such offender, and all expenses properly incurred by them in such prosecution shall be payable out of the assets of the company, in priority to all other liabilities.

26 *&* 27 *Vict. c.* 87 (*Savings Bank Act,* 1863), *s.* 9—*Officers of savings banks receiving deposits and not paying over same.*]—If any actuary, cashier, secretary, officer, or other person holding any situation or appointment in any savings bank shall receive any sum or sums of money from or on account of any depositor or person desirous of becoming such, or on account of such savings bank, and shall not forthwith, or in the case of local receivers acting on behalf of any savings bank within the time specified in the rules of the said savings bank, duly account for and pay over the same to the trustees or managers thereof, or to such person as may be directed by the rules of the said savings bank, such actuary, cashier, secretary, officer, or local receiver, or other person as aforesaid, on being convicted thereof, shall be guilty of a misdemeanor. *As to friendly societies, etc., see ante,* p. 561.]

63 *&* 64 *Vict. c.* 48 (*Companies Act,* 1900), *s.* 28. *Penalty for false statement.*]—If any person in any return, report, certificate, balance sheet, or other document, required by or for the purposes of this Act, wilfully make a statement false in any material particular, knowing it to be false,

be shall be guilty of a misdemeanor, and shall be liable on conviction or indictment to imprisonment for a term not exceeding two years, with or without hard labour, and on summary conviction to imprisonment for a term not exceeding four months, with or without hard labour, and in either case to a fine in lieu of or in addition to such imprisonment as aforesaid: Provided that the fine imposed on summary conviction shall not exceed £100.

Indictment against a Director of a Public Company for fraudulently appropriating the Company's Money. (24 & 25 *Vict. c.* 96, *s.* 81, *ante*, p. 585.)

Surrey, to wit:—The jurors for our lord the King upon their oath present, that J. S. on the —— day of ——, in the year of our Lord ——, then being a director ["*director, member, or public officer*"] of a certain public company ["*any body corporate or public company*"] called the —— Company (Limited), unlawfully and fraudulently did take and apply for his own use and benefit ["*for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company*"] certain money, to wit, one thousand pounds ["*any property*," *see* 24 & 25 *Vict. c.* 96, *s.* 1, *ante*, p. 427] of and belonging to the said company; against the form [*as ante*, p. 465].

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisoment, with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 96, *s.* 81; 1 *Edw.* 7, *c.* 10, *s.* 2 (2) (*ante*, p. 576); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour,* 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

"*Then being a director*" *is a sufficient averment of the fact that J. S. was a director: cf. R.* v. *Somerton*, 7 *B. & C.* 463 (*ante*, p. 560).

As to the effect of omitting the word "*limited*," *see R.* v. *Webb* [1893] 9 *T. L. R.* 199 (*C. C. R.*).

This offence is not triable at quarter sessions. 24 & 25 *Vict. c.* 96, *s.* 87 (*ante*, p. 579).

Evidence.

Prove that the defendant was, at the time of the commission of the offence, a director of the public company mentioned in the indictment. Proof of his acting in that capacity will be sufficient *primâ facie* evidence of his being director (*see post*, p. 590). The statute does not define what is to be deemed a "public company" within these sections; but there can be no doubt that any company constituted by Act of Parliament or by charter, or registered under the *Companies Acts*, 1862–1900, would be held within them. *See In Re Griffith*, 12 *Ch. D.* 665. Prove also that he took and applied to his own use the money of the company, as stated in the indictment, or some part thereof, and that he did so fraudulently (*see ante*, pp. 303, 308). *See Nelson* v. *R.* [1902] *App. Cas.* 250; 20 *Cox*, 150. The provisions of 24 & 25 *Vict. c.* 96, *s.* 85 (*ante*, p. 578), and 53 & 54 *Vict. c.* 71, *s.* 27 (*ante*, p. 579), apply to an indictment for this offence, where the defendant has been examined in bankruptcy: *sed quære* as to cases where the defendant has been examined in the winding-up of a company (*see ante*, p. 328).

Indictment against Directors and Members of a body corporate for making false entries in Books. (24 & 25 *Vict. c.* 96, *s.* 83, *ante*, p. 586.)

Commencement as in last precedent.]—That A. B., C. D., and E. F. then being directors of a certain body corporate ("*any body corporate or*

public company,") to wit, the —— Building Society; and G. H. then being a member of the said body corporate on the —— day of ——, in the year of our Lord ——, unlawfully, and with intent to defraud, did make and concur in the making of a false entry ("*make or concur in the making of any false entry, or omit or concur in omitting any material particular,*") in a book of account of the said body corporate ("*in any book of account, or other document,*") called the ledger, to wit, an entry of the sum of ——*l.*, under the name of premium, to the credit of an account in the said ledger called the "Premiums" account, against the form (*as ante*, p. 465).

The above was the form of many of the counts in the indictment in R. v. *Jabez Balfour and others, tried in the Queen's Bench Division in* 1895, *and has been often followed subsequently at the C. C. C. Semble: that the longer form* "whereas in truth and in fact," *etc., is unnecessary. Semble further: that it is unnecessary to describe the* "book or other document" *as being of the said body corporate, the word* "such" *not being in the statute.*

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 96, *s.* 83; 1 *Edw.* 7, *c.* 10, *ss.* 1 (1), 2 (2) (*ante*, p. 576); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour,* 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

This offence is not triable at quarter sessions. 24 & 25 *Vict. c.* 96, *s.* 87 (*ante*, p. 579).

Indictment against Directors, etc., for publishing Fraudulent Statements.
(24 & 25 *Vict. c.* 96, *s.* 84, *ante*, p. 586.)

Commencement as in the last precedent]—unlawfully did circulate and publish ["*make, circulate, or publish, or concur in making, circulating, or publishing*"] a certain written statement and account ["*any written statement or account*"], which said written statement was false in certain material particulars, that is to say, in this, to wit, that it was therein falsely stated that (*state the particulars*), he the said J. S. then well knowing the said written statement and account to be false in the several particulars aforesaid; with intent thereby then to deceive and defraud J. N., then being a shareholder of the said public company ["*with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof*"] against the form [*as ante*, p. 465]. *Add counts stating the intent to be deceived and defraud* "certain persons to the jurors aforesaid unknown (*or* A. B. and others), then being shareholders of the said public company;" *and also varying the allegation of the intent as above stated. It is safer to have a set of counts alleging an* "intent to defraud," *and another set alleging an* "intent to deceive." *See R.* v. *Birt*, 63 *J. P.* 328; *and Re London and Globe Finance Corporation* (*post*, p. 589) *and to add counts alleging an* "intent to induce," etc.; *and see last precedent above.*

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment with or without hard labour for not more than two years. 24 & 25 *Vict. c.* 96, *s.* 84; 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235); 1 *Edw.* 7, *c.* 10, *ss.* 1 (1), 2 (2) (*ante*, pp. 575, 576). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping*

the peace and being of good behaviour, see 24 & 25 *Vict. c.* 96, *s.* 117, (*ante*, p. 431). *See the last precedent.*

This offence is not triable at quarter sessions. 24 & 25 *Vict. c.* 96, *s.* 87 (*ante*, p. 479.)

Evidence.

Prove that the defendant was a director. If the indictment be against a manager, it is sufficient to prove that the defendant in fact managed the business of the company; and it is not necessary to prove that he was duly appointed to the office of manager. *R.* v. *Lawson, C. C. R.* 31 *Jan.* 1905: *Gibson* v. *Barton, L. R.* 10 *Q. B.* 329. It is submitted that *R.* v. *Lawson* is equally applicable to directors and other officers. Prove also that he circulated and published, or concurred in circulating and publishing a statement in writing, or in print, relating to the affairs of the company, false in some material particular or particulars, as stated in the indictment (the materiality will be a question for the judge to determine: that it was false in such particular or particulars to the defendant's knowledge, which may be shown either expressly, by his acts or declarations, or impliedly, from the situation he filled in the company, the part he took in its management, and his opportunities of knowing its condition; and that he did so with the fraudulent intent set forth in the indictment, which will in general be inferred from its tendency to produce the effect alleged to have been intended; and prove his knowledge of the falsehood of the statement. This last head of evidence of course includes the proof that J. N. was a shareholder, etc., as stated in the indictment. It is not necessary to prove that any person was actually prejudiced by the fraudulent statement. On the indictment against the manager and secretary of a joint-stock bank, charging them in one set of counts with this offence, and in another set of counts with conspiracy to commit this offence, the prosecution was put to elect upon which set of counts it would proceed. *R.* v. *Burch*, 4 *F. & F.* 407, *Montague Smith*, J. As to the evidence necessary to prove such conspiracy, *Id., and see R.* v. *Brown*, 7 *Cox*, 442: *S. C. sub. nom. R.* v. *Esdaile*, 1 *F. & F.* 213. The provisions of 24 & 25 *Vict. c.* 96, *s.* 85 (*ante*, p. 578), and of 53 & 54 *Vict. c.* 71, *s.* 27 (*ante*, p. 479), apply to an indictment for this offence; *but see ante*, pp. 328, 588. It would seem that if the statements are proved to be false to the knowledge of the accused, an intention to defraud may be presumed; *see R.* v. *Birt*, 63 *J. P.* 328, *Ridley*, J. (*ante*, p. 589).

Deceive or defraud.]—"To deceive is to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes it to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action:" *Re London and Globe Finance Corporation* [1903] 1 *Ch.* 728, 732, *Buckley*, J.

Sect. 8.

Falsification of Accounts by Clerks, etc.

Statutes.

24 & 25 *Vict. c.* 96, *s.* 82.]—*Officers of companies keeping fraudulent accounts* (*ante*, p. 585).

25 & 26 *Vict. c.* 89, *s.* 166.]—*Falsification of books on winding-up of company* (*ante, p.* 586).

38 & 39 *Vict. c.* 24 (*Falsification of Accounts Act*, 1875), *s.* 1.—If any clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant, shall wilfully and with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document, or account then in every such case the person so offending shall be guilty of a misdemeanor, and be liable to be kept in penal servitude for a term not exceeding seven years . . . [NOTE.—*Falsification of accounts is not in all cases forgery, but it may take such a form as to amount to forgery within* 24 & 25 *Vict. c.* 98: *see Re Arton, No.* 2 [1896] 1 *Q. B.* 509, 517, *per Russell*, L.C.J.]

Sect. 2—*Form of indictment.*]—It shall be sufficient in any indictment under this act to allege a general intent to defraud without naming any particular person intended to be defrauded. [*See ante*, p. 78.]

Sect. 3—*Act to be read with* 24 & 25 *Vict. c.* 96.]—This act shall be read as one with the *Larceny Act*, 1861 (24 & 25 *Vict. c.* 96).

Sect. 4—*Short Title.*]—This act may be cited as *The Falsification of Accounts Act*, 1875.

Indictment. (38 & 39 *Vict. c.* 24, *s.* 1.)

City of Leeds in the West Riding of the county of York, to wit: The jurors for our lord the King upon their oath present, that J. S. on the first day of June, in the year of our Lord ——, then being clerk and servant ["*clerk, officer, or servant, or any person employed or acting in the capacity of a clerk, officer, or servant*"] to J. N., unlawfully, wilfully, and with intent to defraud, did destroy, to wit, by burning the same ["*destroy, alter, mutilate, or falsify*"], a certain book ["*any book, paper, writing, valuable security, or account*"], to wit, a cash book, which said book then belonged to ["*which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer*"] the said J. N. his employer; against the form [*as ante*, p. 465].

Second count. And the jurors aforesaid upon their oath aforesaid do further present that the said J. S. on the day and in the year first aforesaid, then being clerk to the said J. N., unlawfully, wilfully, and with intent to defraud, did make and concur in making ["*make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular*"] a certain false entry in a certain book ["*from or in any such book, or any document or account*"] to wit, a cash book, which said book then belonged to the said J. N. his employer [*by falsely entering in such book, under the date of the first day of June*, 1877, *the sum of* 200*l. as having been paid on that day to one A. B., whereas in truth and in fact the said sum of* 200*l. was not paid on the said day to the said A. B., as he the said J. S. well knew at the time when he made such false entry as aforesaid, and which said entry was in words and figures following* (*setting*

it out)]; against the form [*as ante*, p. 465]. *Add or substitute other counts, following the words of the statute and setting forth the facts and circumstances constituting the offence, ante*, p. 68. *If such facts and circumstances are not set forth with sufficient certainty, the defendant may demur to the indictment or move to quash it; but after verdict, no objection can be taken that the indictment does not set forth the facts and circumstances with sufficient certainty if it describes the offence in the words of the statute* (*ante*, p. 591). *It is sufficient to allege a general intent to defraud, without naming any particular person intended to be defrauded*, 38 & 39 *Vict.* c. 24, s. 2. *It is to be observed that the* "document or account" *mentioned in the latter part of the section differ from the* "book" *which immediately precedes them in that it need not* "*belong to or be in the possession of the employer*," *etc. As to the words* "*make and concur in making*, *see R.* v. *Bradlaugh*, 15 *Cox*, 217, 223; *R.* v. *Bowen*, 1 *Den.* 21; *and ante*, p. 304. *Semble, this indictment can be safely drawn in a shorter form similar to the precedent given* (*ante*, p. 589), *of an indictment under* 24 & 25 *Vict.* c. 96, s. 83, *omitting the words* "whereas in truth, etc."

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment not exceeding two years, with or without hard labour, 38 & 39 *Vict.* c. 24, s. 1; 54 & 55 *Vict.* c. 69, s. 1 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour*, 38 & 39 *Vict.* c. 24, s. 3; 24 & 25 *Vict.* c. 96, s. 117 (*ante*, p. 431).

Evidence.

Prove that the defendant at the time he committed the alleged offence was clerk or servant to J. N. The proof under this head will be the same as in cases of embezzlement, as to which *see ante*, p. 561. Prove that the book belonged to J. N. Prove, as to the first count, the destruction of the book by the defendant; and, as to the second count, that the defendant made the entry and that it was false to the defendant's knowledge. The intent to defraud would probably be implied by the jury if they were satisfied of the wilful destruction in the one case, or of the wilful false entry in the other (*ante*, pp. 303, 308). The proof of other facts, however, might render such implication irresistible, as that shortly before the defendant destroyed the book as alleged in the first count he had been questioned by his master about his accounts, and that the book contained or ought to have contained entries of such accounts, or that before he made the false entry as alleged in the second count he had received 200*l.* from his master to pay over to A. B. and had not paid it over. The question of intent to defraud is essentially one for the jury; and where a chairman of quarter sessions summed up a case of falsification in such a way as to withdraw from the jury circumstances bearing upon that question and a conviction ensued, the conviction was quashed. *R.* v. *Drewett*, 69 *J. P. Rep.* 37. A person may be guilty of making a false entry under this Act, although he does not make such entry with his own hands, but fraudulently and wilfully procures it to be made by a third person acting innocently and without any knowledge that the entry is otherwise than true. *R.* v. *Butt*, 15 *Cox*, 564 (*C. C. R.*).

A poor-rate collector in the accounts kept by him for the overseers, *between them and the parish*, made the only balance in hand 131*l.* 10*s.* 5*d.* He did not account to the overseers for the sum. Held that the entry as between the overseers and the parish being true, he was not liable to be convicted. *R.* v. *Williams*, 19 *Cox*, 239; 68 *J. P.* 103 (*C. C. R.*).

SECT. 4.

FALSE PRETENCES AND CHEATING.

Statutes.

9 *G.* 2, *c.* 5 (*Witchcraft Act*, 1736), *s.* 4—*Undertaking to tell fortunes punishable on indictment.*]—*For precedent of indictment see R.* v. *Stephenson*, 68 *J. P. Rep.* 524.

8 *&* 9 *Vict. c.* 109 (*Gaming Act*, 1845), *s.* 17—*Cheating at play punishable as obtaining money by false pretences.*]—Every person who shall by any fraud or unlawful device or ill-practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person, to himself or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly. [*See R.* v. *Hudson*, *Bell*, 268; 29 *L. J.* (*M. C.*) 145; 8 *Cox*, 305 (*C. C. R.*); *and for indictment, see post*, p. 618.]

14 *&* 15 *Vict. c.* 100, *s.* 18—*Description of coin and bank notes.*]—*Ante*, pp. 54, 57.

22 *&* 23 *Vict. c.* 35, *ss.* 24, 25; 23 *&* 24 *Vict. c.* 38, *s.* 8—*Concealment of documents affecting title and falsifying pedigrees.*]—*See ante*, pp. 498, 499.

24 *&* 25 *Vict. c.* 96 (*Larceny Act*, 1861), *ss.* 82, 84—*False accounts and statements by directors, etc., of public companies.*]—*Ante*, pp. 585, 586.

Sect. 88—*Obtaining chattels, etc., by false pretences.*]—Whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude . . . or to be imprisoned . . .:

Provided, that if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts:

Provided also, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretences to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, *and without alleging any ownership of the chattel, money, or valuable security*; and on the trial of any such indictment it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud. [*This section was framed from* 7 *&* 8 *G.* 4, *c.* 29, *s.* 53, *and* 14 *&* 15 *Vict. c.* 100, *s.* 8, *with the omission of the word* "cheat" *as being equivalent to* "defraud;" *R.* v. *Ingham*, *Bell*, 181; *and with the addition of the words italicized, to*

get rid of Sill v. *R.*, *Dears.* 132; 1 *E. & B.* 553; 22 *L. J.* (*M. C.*) 41: *R.* v. *Norton*, 8 *C. & P.* 196: *R.* v. *Martin*, 8 *A. & E.* 481.]

Sect. 89—*Where the money, etc., is caused to be paid or delivered to any person other than the party charged.*]—Whosoever shall by any false pretence cause or procure any money to be paid, or any chattel, or valuable security, to be delivered to any other person, for the use or benefit or on account of the person making such false pretence, or of any other person, with intent to defraud, shall be deemed to have obtained such money, chattel, or valuable security within the meaning of the last preceding section. [*This section was new in* 1861, *and was framed to get rid of the decision in R.* v. *Garrett, Dears.* 232; 23 *L. J.* (*M. C.*) 20, *as to the meaning of* "*obtain.*"]

Sect. 90—*Inducing persons by fraud to execute deeds and other Instruments.*]—Whosoever, with intent to defraud or injure any other person, shall by any false pretence fraudulently cause or induce any other person to execute, make, accept, endorse, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or co-partnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterwards made or converted into or used or dealt with as a valuable security, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude . . . or to be imprisoned. . . . [*This section partially re-enacts* 21 *&* 22 *Vict. c.* 47, *but is wider in its scope, and was framed to get rid of R.* v. *Danger, Dears. & B.* 307; 26 *L. J.* (*M. C.*) 185; 7 *Cox*, 303; *in which it was decided that obtaining a signature to a bill of exchange was not an offence within* 7 *&* 8 *G.* 4, *c.* 29, *s.* 53.]

22 *&* 23 *Vict. c.* 17, *s.* 1—*False pretences within the Vexatious Indictments Act.*]—*See ante*, p. 7.

24 *&* 25 *Vict. c.* 98, *s.* 38—*Obtaining property on forged instruments.*]—*See post, tit.* "*Forgery.*"

32 *&* 33 *Vict. c.* 62 (*Debtors Act*, 1869), *s.* 11 (14)—*Fraudulent obtaining of goods by bankrupts.*]—*See post, Book II. Part II. ch. v., s.* 1.

Sect. 13 (1)—*Obtaining credit under false pretences, or by means of any other fraud.*]—*See post, Book II. Part II. ch. v., s.* 1.

62 *&* 63 *Vict. c.* 22—*Summary trial of adults by consent for obtaining property by false pretences.*]—*See post*, p. 597.

63 *&* 64 *Vict. c.* 51 (*Money Lenders Act*, 1900), *s.* 4—*False statements and representations by money lenders.*]—If any money lender, or any manager, agent, or clerk of a money lender, or if any person being a director, manager or officer of any corporation carrying on the business of a money lender, by any false, misleading, or deceptive statement, representation, or promise, or by any dishonest concealment of material facts, fraudulently induces or attempts to induce any person to borrow money or to agree to the terms on which money is or is to be borrowed, he shall be guilty of a misdemeanor, and shall be liable on indictment to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding £500, or to both.

Sect. 6.—Definition of money lender.]—*Includes persons whose business is that of money lending, or who advertise or announce themselves as carrying on that business, but excepts pawnbrokers, registered friendly societies, bonâ fide banks, and insurance offices, etc.*

Indictment for obtaining Goods, etc., by false Pretences (24 & 25 *Vict. c.* 96, *s.* 88, *ante*, p. 593).

Commencement as ante, p. 433]—unlawfully, knowingly, and designedly did falsely pretend to one J. N. [*that the said J. S. then was the servant of one K. O., of St. Paul's Churchyard, in the city of London, tailor, and that the said J. S. was then sent by the said K. O. to the said J. N. for five yards of superfine woollen cloth*]; by means of which said false pretences the said J. S. did then unlawfully obtain from the said J. N. five yards of superfine woollen cloth ["*any chattel, money, or valuable security*"] with intent to defraud; whereas in truth and in fact [*the said J. S. was not then the servant of the said K. O.; and whereas in truth and in fact the said J. S. was not then sent by the said K. O. to the said J. N. for the said cloth or for any cloth whatsoever*]; as he the said J. S. well knew at the time when he did so falsely pretend as aforesaid; against the form [*as ante*, p. 465].

Indictment for obtaining Goods or Money by means of a Cheque which the defendant knows will not be paid (24 & 25 *Vict. c.* 96, *s.* 88).

Commencement as ante, p. 433]—unlawfully, knowingly, and designedly did falsely pretend to C. D. that a certain paper writing which he the said A. B. then produced and delivered to the said C. D., then was a good and valid order for the payment of money, to wit, for the payment of the sum of 5*l.* in money, and that he the said A. B. then had authority to draw a cheque upon a certain bank known as the . . . Bank situate at . . . by means of which said false pretences the said A. B. did then, etc. (*as in last precedent*). Whereas in truth and in fact the said paper writing which the said A. B. then produced and delivered to the said C. D. was not then a good and valid order for the payment of the sum of 5*l.* in money. And whereas in truth and in fact the said A. B. had not then authority to draw a cheque upon the said bank known as the . . . Bank situate at . . . As he the said A. B., etc. (*as in last precedent*). [*See R.* v. *Hazelton, L. R.* 2 *C. C. R.* 134; 44 *L. J.* (*M. C.*) 11 (*post*, p. 605). *For another precedent as to false pretences by means of cheques, see* 11 *Cox, App. XI.*]

Indictment for Obtaining Goods by Means of Representations contained in a letter calculated to induce the prosecutor to believe that the writer was a dealer in a large way of business (24 & 25 *Vict. c.* 96, *s.* 88.)

Commencement as ante, p. 433]—unlawfully, knowingly, and designedly did [falsely] pretend to C. D. that he the said A. B. then was a dealer in potatoes, and that as such dealer in potatoes he then was in a large way of business, and that he then was in a position to do a good trade in potatoes, and that he then was able to pay for large quantities of potatoes as and when the same might be delivered to him: By means of which said false pretences, etc. (*as in preceding precedents*). *See R.* v. *Cooper*, 2 *Q. B. D.* 510; 46 *L. J.* (*M. C.*) 219 (*post*, p. 606); 13 *Cox*, 617:

R. v. *King* [1897] 1 *Q. B.* 214; 66 *L. J. Q. B.* 87 (*post*, p. 604); 18 *Cox*, 447: *R.* v. *Rhodes* [1899] 1 *Q. B.* 77; 19 *Cox*, 182 (*C. C. R.*), and *cf. R.* v. *Bates*, 3 *Cox*, 201. *The indictment must state to whom the pretences were made, and from whom the goods, etc., were obtained. R.* v. *Sowerby* [1894] 1 *Q. B.* 173; 63 *L. J.* (*M. C.*) 136; 17 *Cox*, 767, *where the form of indictment in R.* v. *Hunter*, 10 *Cox*, 642, *was held bad, and that in R.* v. *Douglass*, 1 *Camp*, 212, *was approved. But an indictment is good which states that the pretence was made to all the King's subjects by an advertisement in a newspaper. R.* v. *Silverlock* [1894] 2 *Q. B.* 766; 64 *L. J.* (*M. C.*) 233; 18 *Cox*, 104 (*C. C. R.*).

An indictment, which stated that the defendant "unlawfully, knowingly, and designedly did feloniously *pretend," etc., was held bad. R.* v. *Walker*, *C. & P.* 657. *The words "*knowingly and designedly*" are in* 30 *G.* 2, *c.* 24, *s.* 1 (*rep.*), *but not in* 7 *&* 8 *G.* 4, *c.* 29, *s.* 53 (*rep.*), *nor in the present statute; and their omission, if material, is cured by verdict. R.* v. *Bowen*, 13 *Q. B.* 790; 19 *L. J.* (*M. C.*) 65; *cf. R.* v. *Howarth*, 3 *Stark.* (*N. P.*) 26. *The pretences which form the main or sole inducement must be set out. R.* v. *Mason*, 2 *T. R.* 581; 1 *Leach*, 487; 2 *East, P. C.* 837; 1 *R. R.* 545, *and cf.* 15 *R. R.* 282 *n.*; *and their truth must be negatived. R.* v. *Perrott*, 2 *M. & Sel.* 379; 15 *R. R.* 280: *R.* v. *Kelleher*, 2 *L. R.* (*Ir.*) 11. *In Heymann* v. *R.*, *L. R.* 8 *Q. B.* 102, 12 *Cox*, 383, *and R.* v. *Goldsmith*, *L. R.* 2 *C. C. R.* 74; 42 *L. J.* (*M. C.*) 24; 12 *Cox*, 479, *it was held that although an indictment for obtaining money by false pretences, without specifying them, would be bad on demurrer, or might be quashed on motion, yet that the defect would be cured by verdict. See ante*, pp. 84, 165. *And in indictments for a conspiracy to obtain money by false pretences, or receiving property obtained by false pretences, it is unnecessary to specify the false pretences. R.* v. *Gill*, 2 *B. & Ald.* 204; 20 *R. R.* 407 (*ante*, p. 70): *Taylor* v. *R.* [1895] 1 *Q. B.* 25 (*ante*, p. 70). *Matters of evidence upon which this false pretence is founded need not be referred to in the indictment. R.* v. *Lee*, *L. & C.* 418; 332 *L. J.* (*M. C.*) 129; 9 *Cox*, 304 (*C. C. R.*). *It is not necessary to state in what manner the false pretence was calculated to effect, or did effect, the obtaining of the money. Hamilton* v. *R.*, 9 *Q. B.* 271; 16 *L. J.* (*M. C.*) 9; 2 *Cox*, 11.

And the pretences must be set forth with sufficient certainty. But where the pretence alleged was a wager made "with a colonel in the army, then at Bath," without naming him—the court held it to be sufficient; for probably the defendant at the time did not mention the name of the colonel. Young v. *R.*, 3 *T. R.* 98; 2 *East, P. C.* 828, 837, 838; 1 *Leach*, 505; 1 *R. R.* 660.

*The words "*well knew*" are essential. R.* v. *Henderson*, 2 *Mood. C. C.* 192; *C. & Mar.* 328; *but see R.* v. *Bowen* (*ubi supra*); *Hamilton* v. *R.* (*ubi supra*). *So are the words "*with intent to defraud.*" R.* v. *James*, 12 *Cox*, 127. *And it must be alleged that the goods, etc., were obtained by the pretences. R.* v. *Kelleher* (*ubi supra*). *Ownership of the goods need not be alleged, nor intent to defraud any particular person.* 24 *&* 25 *Vict. c.* 96, *s.* 88 (*ante*, p. 593). *Where the false pretence charged was that the defendant pretended that a certain paper purporting to be a bank-note for the payment to the bearer of the sum of* 5*l. was then a good, genuine, and available* order *for the payment of the sum of* 5*l., and was then of the value of* 5*l., it was held that the indictment, although inartificially framed, sufficiently alleged that the defendant represented the paper therein mentioned to be a good and genuine note of an existing bank and of the value of* 5*l. R.* v. *Jarman*, 14 *Cox*, 111 (*C. C. R.*). *All persons who have concurred and assisted in the fraud may be indicted and convicted as principals, though not present at the time of making the pretence and obtaining the money or goods. R.* v. *Moland*, 2 *Mood. C. C.* 276; 24 *&* 25 *Vict. c.* 96, *s.* 98. *If the goods, etc.,*

are not obtained, or are not obtained through the false pretence, the accused can be convicted of the attempt. 14 & 15 *Vict.* c. 100, s. 9 (*ante*, p. 219). *See R.* v. *Hensler*, 11 *Cox*, 570 (*C. C. R.*).

Venue.]—*One who obtains goods by false pretences in one county, and afterwards brings them into another county, where he is apprehended with them, cannot be indicted for the offence in the latter county, but must be indicted in the county where the goods were obtained. R.* v. *Stanbury, L. & C.* 128; 31 *L. J.* (*M. C.*) 88; *see post*, p. 609.

Misdemeanor: penal servitude for not less than three years and not exceeding five years, or imprisonment, with or without hard labour, not exceeding two years, 24 & 25 *Vict.* c. 96, s. 88; 54 & 55 *Vict.* c. 69, s. 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour,* 24 & 25 *Vict.* c. 96, s. 117 (*ante*, p. 431).

No indictment can be preferred for obtaining money or other property by false pretences unless one or other of the preliminary steps required by 22 & 23 *Vict.* c. 17, s. 1 (*ante*, p. 7), *has been taken: but additional counts can be inserted in an indictment for this offence if the provisions of* 30 & 31 *Vict.* c. 35, s. 1 (*ante*, p. 9), *have been complied with. See R.* v. *Clarke*, 59 *J. P.* 218, *and ante*, p. 10. *But an indictment for* attempting *to obtain money or other property by false pretences may be preferred without taking any of such steps, as such an indictment is not within* 22 & 23 *Vict.* c. 17. *R.* v. *Burton*, 13 *Cox*, 71 (*C. C. R.*).

For other frauds punishable by particular statutes, see Official Index to Statutes (ed. 1904) *tit.* "*Fraud:*" 2 *Russ. Cr.* (6th ed.) 552.

False pretences within the Act.]—The first statute on this subject, 33 *H.* 8, c. 1, extended only to cases where the money, etc., was obtained by means of a *false token* or counterfeit letter in the name of another; but this provision not being deemed sufficiently extensive, 30 *G.* 2, c. 24, was passed for the purpose of including all false pretences whatsoever. *See* 3 *Chitty, Cr. L.* 1000. These two statutes, the former entirely, and the latter so far "as relates to obtaining by false pretence or pretences any property therein mentioned:" and also the whole of 52 *G.* 3, c. 64, which extended the provisions of 30 *G.* 2, c. 24; and also so much of 3 *G.* 4, c. 114, as relates to the punishment for obtaining any property as therein mentioned by false pretences—were repealed by 7 & 8 *G.* 4, c. 27, and consolidated and amended by 7 & 8 *G.* 4, c. 29, s. 53, which substituted the words "by any false pretence" for the words "by false pretence or pretences," which were in 30 *G.* 2, c. 14, s. 1. The same words are repeated in 24 & 25 *Vict.* c. 96, s. 88 (*ante*, p. 593). The phrases in all these Acts are in substance the same, and consequently most of the decisions upon the repealed statutes are applicable to cases arising under the enactments of 1861.

As to existing fact.]—It may be laid down as a general rule for the interpretation of the statute, that wherever a person fraudulently represents as an *existing fact* that which is not an existing fact, and so gets money, etc., that is an offence within the Act. *See R.* v. *Woolley*, 1 *Den.* 559; 3 *C. & K.* 98; 19 *L. J.* (*M. C.*) 165; 4 *Cox*, 193. This rule has been recognized by the legislature in 62 & 63 *Vict.* c. 22 (*The Summary Jurisdiction Act*, 1899), which enacts (*s.* 3) that "Where a court of summary jurisdiction proposes to deal summarily in pursuance of this Act with a charge of obtaining by false pretences from any person any chattel, money, or valuable security, with intent to defraud the court shall, after

the charge has been reduced to writing and read to the person charged, state in effect that a *false pretence means a false representation by words, writing, or conduct, that some fact or facts existed, and that a promise as to future conduct not intended to be kept is not by itself a false pretence. . . .*" Where a carrier falsely pretending that he had carried certain goods to A. B., demanded, and thereupon obtained from the consignor sixteen shillings for the carriage of them, it was held to be within the statute. *R.* v. *Coleman*, 2 *East, P. C.* 672: *R.* v. *Airey*, *Id.* 831; 2 *East*, 30. The defendant, on entering the service of a railway company, signed a book of rules, a copy of which was given to him. One of the rules was, "No servant of the company shall be entitled to claim payment of any wages due to him on leaving the company's service until he shall have delivered up his uniform clothing." On leaving the service, the defendant knowingly and fraudulently delivered up to an officer of the company, as part of his own uniform, a great-coat belonging to a fellow-servant, and so obtained the wages due to him. It was held that he was properly convicted of obtaining by false pretences the money so paid to him as wages. *R.* v. *Bull*, 13 *Cox*, 608 (*C. C. R.*) Where the defendant falsely pretended to J. N. that he was intrusted by the Duke de Lauzun to take some horses from Ireland to London for him, and that he had been detained so long by contrary winds that his money was all spent, by means of which representation he induced J. N. to advance him money; this was held to be within the Act. *R.* v. *Villeneuve*, 2 *East, P. C.* 830; 3 *T. R.* 104. So, where the defendant, who had actually taken premises and was doing a small business in coal, obtained forty coal bags on credit from the prosecutor by falsely pretending that he had a lot of trucks of coal at a railway station on demurrage and that he required forty coal bags, this was held to be a false pretence within the statute. *R.* v. *Willot*, 12 *Cox*, 68 (*C. C. R.*). So, where the defendants, falsely pretending that they had made a bet with A. B. that one of them should run ten miles within an hour, prevailed upon J. N. to join them in the bet, and obtained from him twenty guineas as his share in it; the judges held this to be within the statute, notwithstanding the pretence was probably one against which common prudence might have guarded. *Young* v. *R.*, 3 *T. R.* 98; 1 *Leach*, 505; 1 *R. R.* 660. *Cf. R.* v. *Asterley*, 7 *C. & P.* 191. Where a servant, who had authority to buy goods, and was to be repaid on producing a ticket containing a statement of the purchase, produced such a ticket and obtained the amount stated therein, no purchase having in fact being made, this was held to be not larceny, but obtaining money by false pretences. *R.* v. *Barnes*, 2 *Den.* 59; 20 *L. J.* (*M. C.*) 34 (*C. C. R.*). *And see R.* v. *Green*, *Dears.* 323; 6 *Cox*, 296 (*C. C. R.*); *R.* v. *Prince* (*post*, p. 606). Where the foreman of a manufacturer, who was in the habit of receiving from his master money to pay the workmen, obtained from him by means of false written accounts of the wages earned by the men, more than the men had earned or he had paid them, the judges held it to be within the Act; they said that all cases where the false pretence creates the credit are within the statute; and here the defendant would not have obtained the excess above what was really due to the workmen, were it not for the false account he had delivered to his master. *R.* v. *Witchell*, 2 *East, P. C.* 830. It was the prisoner's duty to ascertain daily the amount of dock dues payable by his master, and, having ascertained it, to apply to his master's cashier for the amount, and then to pay it in discharge of the dues. On one occasion, by representing falsely to the cashier that the amount was larger than it really was, as he knew, the prisoner obtained from the cashier the sum he stated it to be, and then paid the real amount due, and appropriated the difference to his own use. This was held to

be not larceny, but obtaining money by false pretences. *R.* v. *Thompson*, *L. & C.* 233; 32 *L. J.* (*M. C.*) 57; 9 *Cox*, 222 (*C. C. R.*). It is difficult to distinguish the essential facts of this case from those in *R.* v. *Cooke*, *L. R.* 1 *C. C. R.* 295; 40 *L. J.* (*M. C.*) 68 (*ante*, p. 461), where the prisoner was held to be guilty of larceny. *R.* v. *Thompson* was cited and observed upon in *R.* v. *Cooke*, although not overruled, *Bovill*, C.J., saying that the decision in *R.* v. *Thompson* went entirely on the question whether there was a larceny in the obtaining of the money in the first instance, and that the point was not considered whether the subsequent misappropriation was larceny. So, where the defendant obtained goods by falsely stating that he wanted them for J. S., who lived at N., and was a person whom he would trust with 1000*l.*, and who went out to New Orleans twice a year to take goods to his sons, this was held to be a sufficient false pretence within the statute. *R.* v. *Archer*, *Dears.* 449; 6 *Cox*, 515 (*C. C. R.*). So, where the false pretence alleged was, that a person who lived in a large house down the street, and had had a daughter married some time back, had been to him (the defendant) about some carpet, and had asked him to procure a piece of carpet, whereby the defendant obtained from the prosecutor twenty yards of carpet: this was held sufficient. *R.* v. *Burnsides*, *Bell*, 282; 30 *L. J.* (*M. C.*) 42; 8 *Cox*, 370 (*C. C. R.*). Receipt of a cheque by a clerk to a savings bank from the manager on a false representation that a depositor had given notice of withdrawal, and for the purpose of handing the cheque to the depositor, was held to be obtaining by false pretences and not larceny. *R.* v. *Essex*, *Dears. & B.* 371; 27 *L. J.* (*M. C.*) 20; 7 *Cox*, 384 (*C. C. R.*).

Where the secretary of an Odd Fellows' Lodge told a member that he owed the lodge 13*s.* 6*d.*, and thereby obtained that sum from him fraudulently, whereas the member owed 2*s.* 2*d.* only, he was held to be rightly convicted of obtaining money by false pretences. *R.* v. *Woolley*, 1 *Den.* 559; 3 *C. & K.* 98; 19 *L. J.* (*M. C.*) 165; 4 *Cox*, 193 (*C. C. R.*). A creditor who wilfully and fraudulently represents to a third person who holds money of his debtor that a larger sum is due to him from the debtor than is really the case, and thus obtains from such third person payment of the larger sum, is guilty of a false pretence within the statute, and that too although he may have obtained a judgment by default, not set aside, against his debtor for the larger sum. *R.* v. *Taylor*, 15 *Cox*, 265, 268 (*Q. B. D.*). Obtaining a gift of money by means of false statements of the name and circumstances of the defendant or any other person, in a *begging letter*, is within the statute. *R.* v. *Jones*, 1 *Den.* 551; 19 *L. J.* (*M. C.*) 162; 4 *Cox*, 198 (*C. C. R.*).

An indictment charging the prisoner with obtaining money from a wife, whose husband had run away, by falsely pretending to her that she, the prisoner, had power to bring him back, is good, and sufficiently states an indictable offence. *R.* v. *Giles*, *L. & C.* 502; 34 *L. J.* (*M. C.*) 50; 10 *Cox*, 44 (*C. C. R.*).

Mere promise of future conduct insufficient.]—A pretence that the party *would do* an act which he did not mean to do (*e.g.* a promise), to pay for goods on delivery, is not a false pretence within the Act, but merely a promise for future conduct. *R.* v. *Goodhall*, *R. & R.* 461; *R.* v. *Burrows*, 11 *Cox*, 258 (*C. C. R.*); 62 & 63 *Vict. c.* 22, *s.* 3, *ante*, p. 597). So, where the defendant obtained money from the prosecutor by the false pretence that he *was going* to pay his rent, whereas he had no intention of paying his rent, this was held to be no false pretence within the statute. *R.* v. *Lee*, *L. & C.* 309; 9 *Cox*, 304 (*C. C. R.*) So, also, a false pretence that the defendant wanted a loan of 30*l.* to enable him to take a public-house is

not within the statute. *R.* v. *Woodman*, 14 *Cox*, 179, *Mellor*, J. And a pretence to a parish officer, as an excuse for not working, that the party had not clothes, when he really has, though it induced the officer to give him clothes, is not a pretence within the statute, the statement being rather a false excuse for not working than a false pretence to obtain goods. *R.* v. *Wakeling*, *R.* & *R.* 504. An indictment for obtaining money from A., under the false pretence that the defendant intended to marry A., and wanted the money to pay for a wedding suit he had bought, was held not sufficient to sustain a conviction. *R.* v. *Johnston*, 2 *Mood. C. C.* 254. And where the false pretence averred in the indictment was that there was a certain sum due and owing to the defendant on account of certain work executed by him, whereas only a smaller sum was due to him; this was held bad, as not sufficiently averring a false pretence of an existing fact, and being provable by evidence of a mere wrongful overcharge. *R.* v. *Oates*, *Dears.* 459; 24 *L. J.* (*M. C.*) 123; 6 *Cox*, 540 (*C. C. R.*). Where an indictment alleged that the defendant falsely pretended to P., who lived at one T.'s, that the said P. was to give the defendant 10*s.*, and that T. was going to allow him 10*s.* a week, it was held (*Blackburn*, J., and *Piggot*, B., *dub.*) that the indictment did not allege with sufficient certainty any false pretence respecting any existing fact. *R.* v. *Henshaw*, *L.* & *C.* 444; 33 *L. J.* (*M. C.*) 132 (*C. C. R.*)

False pretence as to existing fact, coupled with promise, sufficient.]—But where the statement consists partly of a fraudulent misrepresentation of an existing fact, and partly of a promise to do something *in futuro*—as, that the defendant kept a shop, and that the prosecutrix might go and live with her at the said shop until she obtained a situation; whereas the defendant kept no shop; and the jury find that the prosecutrix parts with her money or goods, relying wholly or in part upon the misrepresentation of fact; this is a sufficient false pretence within the act. *R.* v. *Fry*, *Dears.* & *B.* 449; 27 *L. J.* (*M. C.*) 68; 7 *Cox*, 394 (*C. C. R.*). *R.* v. *Bates*, 3 *Cox*, 201. So, where the false representation was that the defendant *had* bought certain skins, and *would* sell them to the prosecutor. *R.* v. *West*, *Dears.* & *B.* 575; 24 *L. J.* (*M. C.*) 227; 8 *Cox*, 12 (*C. C. R.*). And where a married man induced a woman to give him money by representing himself to be unmarried, and by promising that with the money he would furnish a house and return and marry her, he was held indictable for obtaining money by false pretences. *R.* v. *Jennison*, *L.* & *C.* 157; 31 *L. J.* (*M. C.*) 146; 9 *Cox*, 158 (*C. C. R.*): *cf. Anon.*, *Lofft*, 146: *R.* v. *Johnston*, 2 *Mood. C. C.* 254; *R.* v. *Williams*, 62 *J. P.* 311. Where the defendant obtained money from a woman under the threat of an action for breach of promise of marriage, he being in fact a married man already, an indictment, laying as the false pretence that he was entitled to maintain an action against her for the breach of promise, was held to be good, for that this was a false pretence within the statute. *R.* v. *Copeland*, *C.* & *Mar.* 516. A promise to do a thing *in futuro* may involve a false pretence that the promissor has the power to do that thing, for which false pretence the promissor may be indictable. *R.* v. *Giles*, *L.* & *C.* 502; 34 *L. J.* (*M. C.*) 50; 10 *Cox*, 44 (*C. C. R.*). And where the false pretence charged was that the defendant said he had got a carriage and pair and expected it down, either that day or the next, this was held to be proved by evidence of his having said that he expected his carriage and pair down. *R.* v. *Howarth*, 11 *Cox*, 588 (*C. C. R.*). Where money was obtained by the defendant by the false representation that W. was about to publish a new directory, and that the defendant was collecting information for it, this was held to be a false pretence of an existing fact.

R. v. *Speed*, 15 *Cox*, 24 (*C. C. R.*). A false pretence by a prisoner of power to communicate with the spirits of deceased and other persons not present where he then was, and that he had power to cause such spirits to be present, was held a false pretence of an existing fact. *R.* v. *Lawrence*, 36 *L. T.* (*N. S.*) 404 : *cf. Penny* v. *Hanson*, 18 *Q. B. D.* 478; 56 *L. J.* (*Q. B.*) 41; 16 *Cox*, 173: *R.* v. *Entwistle* [1899] 1 *Q. B.* 846; 68 *L. J. Q. B.* 580; 19 *Cox*, 317: *R.* v. *Giles* (*ante*, p. 600): *R.* v. *Stephenson*, 68 *J. P. Rep.* 524.

As to business.]—Where the defendant pretended that he was carrying on an extensive business as a surveyor and house agent, and thereby induced the prosecutor to deposit with him 25*l.*, as a security for his (the prosecutor's) fidelity as a clerk, whereas the defendant was not carrying on *any* business as a surveyor or house agent, this was held to be a false pretence within the statute. *R.* v. *Crab*, 11 *Cox*, 85 (*C. C. R.*). But where the defendant pretended (1) that he was doing a good business, and (2) that he had recently sold a good business, and thereby induced the prosecutor to deposit with him 50*l.*, as a security for the prosecutor's fidelity as an assistant, whereas in truth defendant's business was worthless and the defendant was a bankrupt, it was held that neither of the false pretences alleged came within the statute, because the first pretence was a mere exaggerated representation of value (*see post*, p. 602) upon which, though fraudulent, an indictment would not lie, and because the second was too remote. *R.* v. *Williamson*, 11 *Cox*, 328, *Byles*, J. In the former of these two cases there was no existing business at all, whereas in the latter there appears to have been an existing, although a worthless, business. *See also R.* v. *Watson*, *Dears. & B.* 348; 27 *L. J.* (*M. C.*) 18 (*C. C. R.*), in which, although it was not necessary to decide the point, *Erle*, J., said :—"I wish not to be supposed to assent to the proposition that an indictment [for false pretences] can be sustained by proof of *mere* exaggeration of the prosperity of a business, where there is an original business. It is difficult to draw a decided line; but I think it has been decided that exaggerated praise does not render a person liable within the statute." As to the general doctrine that exaggerated praise does not render a prisoner liable within the statute, and the limitations of that doctrine, *see R.* v. *Bryan*, and other cases, *post*, p. 603. For instances of indictments for obtaining money by false pretences where the business carried on by the defendant was a "bogus" business, *see R.* v. *Cooper*, 2 *Q. B. D.* 510; 18 *Cox*, 617 (*C. C. R.*); *R.* v. *King* [1897] 1 *Q. B.* 214; 18 *Cox*, 447 (*C. C. R.*): *R.* v. *Rhodes* [1899] 1 *Q. B.* 77; 19 *Cox*, 182 (*C. C. R.*): and indictments charging defendants with obtaining money by falsely pretending that they "were then carrying on a genuine and *bonâ fide* business as —— at ——" are constantly preferred at the Central Criminal Court and County of London Sessions against persons publishing fraudulent advertisements and the like.

In *R.* v. *Codrington*, 1 *C. & P.* 661, where the prisoner sold to the prosecutor a reversionary interest which he had previously sold to another, and the prosecutor took a regular assignment of it, with the usual covenants for title, *Littledale*, J., ruled that he could not be convicted for obtaining money by false pretences; for if this were within the statute, every breach of warranty or false assertion at the time of a bargain might be treated as a false pretence. In *R.* v. *Kenrick*, 5 *Q. B.* 49; 1 *Dav. & M.* 208, that decision was much questioned; and it was strongly intimated that the execution of a *contract* between the same parties does not secure from punishment the obtaining of money under false pretences, in conformity with that contract. And in *R.* v. *Abbott*,

1 *Den.* 273; 2 *C. & K.* 630; 2 *Cox*, 430, it was decided unanimously by the judges, upon a case reserved, that the law was so. *And see also R.* v. *Burgon*, *Dears. & B.* 11; 25 *L. J.* (*M. C.*) 105; 7 *Cox*, 131 (*C. C. R.*): *R.* v. *Dark*, 1 *Den.* 276 (*C. C. R.*); and *R.* v. *Goss*, *Bell*, 208; 29 *L. J.* (*M. C.*) 86, in which, upon the authority of *R.* v. *Abbott*, the same law was laid down. In *R.* v. *Meakin*, 17 *W. R.* 683; 11 *Cox*, 270 (*C. C. R.*), where the defendant induced the prosecutor to lend him money on a bill of sale of furniture, and the joint and several promissory note of the defendant and another person, by representing that the furniture was unincumbered, whereas the defendant had previously given a bill of sale of the same furniture to another person, although not to its full value, this was held to be an indictable false pretence.

Quantity or weight.]—Where the indictment charged that the defendant, having in his possession a certain weight of twenty-eight pounds, falsely pretended to C. that a quantity of coals which he delivered to C. weighed 16 cwt. (meaning 1792 pounds weight), and were worth 1*l.*, and that the weight was fifty-six pounds, by means of which he obtained a sovereign from C. with intent to defraud him of part thereof, to wit, 10*s.*; whereas the coal did not weigh 1792 pounds, and were not worth 1*l.*, and whereas the weight was not fifty-six pounds, and whereas the coals were of the weight of 896 pounds only, and were not worth more than 10*s.*, and whereas the weight was twenty-eight pounds only: the judges (according to the report) held a conviction on the indictment wrong, on the ground that all the pretences, except that relating to the weight, were mere false affirmations, and that as to the weight, there was no allegation to connect the sale of the coals with the use of the weight. *R.* v. *Reed*, 7 *C. & P.* 848. Lord *Denman*, C.J., in *Hamilton* v. *R.*, 9 *Q. B.* 271, 274, said that *R.* v. *Reed* was misreported, and that no such decision was given. This seems to have been a mistake; *see Dears. & B.* 35, *note* (*e*); but *R.* v. *Reed* can no longer be considered to be law since *R.* v. *Sherwood*, *Dears. & B.* 251; 26 *L. J.* (*M. C.*) 81; 7 *Cox*, 270 (*C. C. R.*). There the defendant, having contracted to sell and deliver to the prosecutrix a load of coal at 7*d.* per cwt., delivered to her a load of coals which he knew weighed only 14 cwt., but which he stated to her contained 18 cwt., and produced a ticket, showing 18 cwt. to be the weight, which he said he had himself made out when the coals were weighed; and she thereupon paid him the price as for 18 cwt., which was 2*s.* 4*d.* more than was really due; and it was held that the defendant was indictable for obtaining the 2*s.* 4*d.* by false pretences. This decision was approved and followed in *R.* v. *Lee*, *L. & C.* 418; 33 *L. J.* (*M. C.*) 129; 9 *Cox*, 460 (*C. C. R.*); and *cf. R.* v. *Ridgway*, 8 *F. & F.* 838, *Bramwell*, B. So, where the prosecutor bought of the defendant and paid him for a quantity of coal on a false representation by him that there were 15 cwt., whereas in fact there were only 8 cwt., but so packed in the cart as to have the appearance of a larger quantity, this was held to be an indictable false pretence. *R.* v. *Ragg*, *Bell*, 214; 29 *L. J.* (*M. C.*) 86; 8 *Cox*, 262 (*C. C. R.*). *See also R.* v. *Eagleton* (*post*, p. 617).

Quality or value.]—A person who obtains from a pawnbroker, upon an article which he falsely represents to be silver, a greater advance than would otherwise have been made, is guilty of a false pretence within the statute; although the pawnbroker have the opportunity of testing the article at the time. *R.* v. *Ball*, *C. & Mar.* 249: *see R.* v. *Roebuck*, *Dears. & B.* 24; 25 *L. J.* (*M. C.*) 101; 7 *Cox*, 126 (*C. C. R.*): *R.* v. *Goss*, *Bell*, 208 (*infra*). And a false representation that a stamp on a watch is

the hall-mark of the Goldsmiths' Company, and that the number 18, part thereof, indicates that it is made of eighteen carat gold, is a false pretence, and is not the less so because accompanied by the representation that the watch is a gold one, and some gold is proved to have been contained in its composition. *R.* v. *Suter*, 10 *Cox*, 577 (*C. C. R.*). But a false representation of what is mere matter of opinion, falling within the category of untrue praise in the course of a contract for sale, is not indictable. The defendant was convicted on an indictment for obtaining money by false pretences, the pretences charged being that certain spoons were of the best quality, that they were equal to Elkington's A (meaning spoons made by Messrs. Elkington, and stamped by them with the letter A); that the foundations were of the best material, and that they had as much silver on them as Elkington's A. The representations were made to a pawnbroker for the purpose of obtaining, and the defendant did thereby obtain, advances of money on the spoons, which were in fact of inferior quality, and were of less value than the money advanced on them, and the pawnbroker stated that he was induced by the defendant's misrepresentations alone to advance the money, and that if he had known the real quality of the spoons he would have advanced no money on them. The jury found the defendant guilty of fraudulently and falsely representing that the spoons had as much silver on them as Elkington's A, and that the foundations were of the best material, etc., and that he thereby obtained the money. It was nevertheless held by a large majority of the judges, that the conviction could not be sustained. *R.* v. *Bryan*, *Dears. & B.* 265; 26 *L. J.* (*M. C.*) 84; 7 *Cox*, 312 (*C. C. R.*). *See also R.* v. *Levine*, 10 *Cox*, 374. The decision in *R.* v. *Bryan* is said by *Erle*, C.J., to have gone "upon the sound principle, that indefinite praise upon a matter of indefinite opinion cannot be made the ground of an indictment for false pretences;" *R.* v. *Goss*, 29 *L. J.* (*M. C.*) 86, 90 (*infra*); and by *Byles*, J., to have been governed by the maxim, *simplex commendatio non obligat*. *R.* v. *Ardley*, *L. R.* 1 *C. C. R.* 301, 306; 40 *L. J.* (*M. C.*) 88; 12 *Cox*, 23: *cf. R.* v. *Lee*, 8 *Cox*, 233: *R.* v. *Williamson*, 11 *Cox*, 328, (*ante*, p. 601). But a false representation respecting an alleged matter of definite fact knowingly made, is a false pretence within the statute, and that, too, although the representation is merely as to the *quality* of goods sold or pledged. Therefore, where the defendant induced the prosecutor to purchase a chain from him by fraudulently representing that it was fifteen carat gold, when, in fact, it was only of a quality a trifle better than six carats, knowing at the time that he was falsely representing the quality of the chain as fifteen carat gold, it was held that the statement that the chain was fifteen carat gold, not being mere exaggerated praise, nor relating to a mere matter of opinion, but a statement as to a specific fact within the defendant's knowledge, was a sufficient false pretence to sustain an indictment for obtaining money by false pretences. *R.* v. *Ardley*, *ubi supra*. And where the defendant induced a purchaser to buy and pay for a cheese of a very inferior description by the wilfully false statement that a taster of a different and superior cheese produced as a sample had formed part of and been taken out of the cheese sold, it was held that he might be convicted of obtaining money by false pretences. *R.* v. *Goss*, *Bell*, 208; 29 *L. J.* (*M. C.*) 86; 8 *Cox*, 262 (*C. C. R.*). So, where the defendant sold spurious blacking as "Everett's Blacking," he was held to be indictable for the false pretences. *R.* v. *Dundas*, 6 *Cox*, 380, *Erle*, J. Where the defendant falsely represented to the prosecutrix that certain packages which he sold to her contained good tea, whereas, in fact, each package contained a mixture of which only one-fourth part was tea, the remaining three-fourths consisting of sand and other articles unfit for food or drink,

and the jury found that the defendant knew the real nature of the contents of the packages, that it was not tea, but a mixture of articles unfit for drink, and that he designedly falsely pretended that it was good tea with intent to defraud, and the defendant was convicted, it was held that the conviction was right. *R.* v. *Foster*, 2 *Q. B. D.* 301; 46 *L. J.* (*M. C.*) 128; 13 *Cox*, 393 (*C. C. R.*). In *R.* v. *Spiro*, 64 *J. P.* 794, *Darling*, J., the prisoner was convicted of obtaining money by false pretences where he had held an auction and had induced persons to hand up sovereigns to him by a representation that they would get them back and also watches offered by him for sale.

Selling goods in wrappers which are a colourable imitation of those of another firm would, it seems, be a false pretence (*R.* v. *Smith, Dears. & B.* 566; 27 *L. J.* (*M. C.*) 225; 8 *Cox*, 32 *C. C. R.*); but certainly falls within the *Merchandize Marks Act*, 1887 (50 & 51 *Vict.* c. 28), *post*, *Book II. Part II. ch. v., s.* 2.

As to false representations of the soundness of a horse, *see R.* v. *Keighley*, *Dears. & B.* 145; 7 *Cox*, 217 (*C. C. R.*).

The defendant and two other persons entered into articles of partnership, by the terms of which the profits were to be divided equally among them. By a subsequent verbal arrangement the defendant was to act as agent for the sale of the partnership goods, and was to receive a commission on all orders obtained by him, which commission was to be paid out of the partnership funds before any division of profits was made. The defendant, by falsely pretending that he had obtained some orders, got his partner to pay him a sum for commission. It was held that he was not indictable for false pretences, as his charges were payable out of the partnership funds, and his false statement was a misrepresentation concerning a partnership matter, and would have to be investigated, and the sum paid duly considered, in taking the partnership accounts, in order to ascertain the profits. *R.* v. *Evans*, *L. & C.* 252; 32 *L. J.* (*M. C.*) 38; 9 *Cox*, 238 (*C. C. R.*).

Form of pretence.]—When the false pretences are by letter the prosecutor may be asked his opinion as to its meaning, and as to his belief when he received it with respect to the truth of the statements contained in it: but the proper inferences to be drawn from the letter are for the jury. *R.* v. *King* [1897] 1 *Q. B.* 214; 66 *L. J.* (*Q. B.*) 87; 18 *Cox*, 447. It is not necessary that the pretence should be by words; the conduct and acts of the party will be sufficient, without any verbal or written representation: *R.* v. *Barnard*, 7 *C. & P.* 784; 62 & 63 *Vict.* c. 22, *s.* 3 (*ante*, p. 597): *R.* v. *Hunter*, *R.* v. *Carter*, 10 *Cox*, 642 (*C. C. R.*): *R.* v. *Giles*, *L. & C.* 502; 34 *L. J.* (*M. C.*) 50; 10 *Cox*, 44: *R.* v. *Cooper*, 2 *Q. B. D.* 510 (*post*, p. 606). Thus, if a person obtain goods from another upon giving him in payment his cheque upon a banker, with whom in fact he has no account, this (although not indictable as a fraud at common law, *R.* v. *Lara*, 6 *T. R.* 565 (*post*, p. 619): *see R.* v. *Flint*, *R. & R.* 460) is a false pretence within the meaning of the *Larceny Act*. *R.* v. *Jackson*, 3 *Camp.* 370; 14 *R. R.* 756; *cf. R.* v. *Martin*, 5 *Q. B. D.* 34; 49 *L. J.* (*M. C.*) 11; 14 *Cox*, 375 (*C. C. R.*): *R.* v. *Garratt*, 10 *Times L. R.* 167 (*C. C. R.*). But if the defendant, at the time he gives the cheque, believes, although he has no account at the bankers, that the cheque will be paid on presentation, he cannot be convicted of a false pretence. *R.* v. *Walne*, 11 *Cox*, 647 (*C. C. R.*). Thus, where the defendant bought a mare, and paid for her on Thursday by a cheque drawn on a banker with whom he had no account, but told the prosecutor not to present the cheque until Saturday, to which the prosecutor assented, but

nevertheless did present it on Thursday, when it was dishonoured, and it appeared from the evidence that the defendant was on Thursday in daily expectation of having money paid to him which would have enabled him to place the banker in funds to meet the cheque on Saturday, this was held not to be criminal because the accused had no intent to defraud. *Id.* But a man who makes and gives a cheque for the amount of goods purchased in a ready-money transaction, makes a representation that the cheque is a good and valid order for the amount inserted in it; and if such person has only a colourable account at the bank on which the cheque is drawn without available assets to meet it, and has no authority to overdraw, and knows that the cheque will be dishonoured on presentation, and intends to defraud, he may be convicted of obtaining such goods by such false pretence. *R.* v. *Hazleton*, *L. R.* 2 *C. C. R.* 134; 44 *L. J.* (*M. C.*) 11; 13 *Cox*, 1. Where the prisoner was charged with falsely pretending that a post-dated cheque, drawn by himself, was a good and genuine order for 25*l.*, and of the value of 25*l.*, whereby he obtained a watch and chain; and the jury found that, before the completion of the sale and delivery of the watch by the prosecutor to the prisoner he represented to the prosecutor that he had an account with the bankers on whom the cheque was drawn, and that he had a right to draw the cheque, though he postponed the date for his own convenience, all which was false; and that he represented that the cheque would be paid on or after the day of the date, but that he had no reasonable ground to believe that it would be paid, and that he had no funds to pay it; he was held to be properly convicted. *R.* v. *Parker*, 2 *Mood. C. C.* 1; 7 *C. & P.* 825. Where the defendant obtained goods in exchange for a cheque on a bank at which he falsely represented that he had an account, though he knew that the account was closed, and the cheque would not be honoured, it was held that he obtained the goods and not merely credit by false pretences. *R.* v. *Cosnett*, 20 *Cox*, 6; 65 *J. P.* 472 (*C. C. R.*). But where the indictment stated that the defendant falsely pretended to A. B. that he was a captain in the East India Company's service, and that a certain promissory note, which he then delivered to A. B., was a valuable security for 21*l.*, by means of which false pretences he fraudulently obtained from A. B. 8*l.* 15*s.*; whereas the defendant was not a captain, etc., and the note was not a valuable security, etc., it was held, in error, that as it did not appear but that the note was the defendant's own promissory note, or that he *knew* it to be worthless, there was no sufficient false pretence in that respect; and, as the two pretences were to be taken together, that the indictment was bad. *R.* v. *Wickham*, 10 *A. & E.* 34; 2 *Per. & D.* 333; 8 *L. J.* (*M. C.*) 87. *See also R.* v. *Philpotts*, 1 *C. & K.* 112. Where the prisoner passed the note of a country bank, which he knew had stopped payment, it appearing that one of the partners was solvent, *Gaselee*, J., held that he could not be convicted for obtaining money under false pretences. *R.* v. *Spencer*, 3 *C. & P.* 420. It would seem, however, that an indictment which charged that the defendant obtained money by falsely pretending that a certain piece of paper was a bank note then current, and of the value for which it purported to be made, would be supported by evidence that it was the note of a bank which had stopped payment, and was no longer in existence, and that it had paid only a small dividend, and that these facts were known to the defendant. *R.* v. *Evans*, *Bell*, 187; 29 *L. J.* (*M. C.*) 20; 8 *Cox*, 257 (*C. C. R.*). But in that case an allegation that the note was *of no value whatever* was held not to be supported by the above evidence. *Cf. R.* v. *Williams*, 7 *Cox*, 351, *Martin*, B., where the indictment was for passing in 1857 as good a note of a bank which as the prisoner knew

had in 1857 stopped payment; and *R.* v. *Flint*, *R. & R.* 460. Where an indictment charged the defendant with obtaining money, by falsely pretending that a piece of paper was a bank note then current and of the full value of 5*l.*, and the evidence was that the piece of paper was the note of a bank which had stopped payment forty years before, and had not been reopened, and that the defendant knew it, this evidence was held sufficient to justify a conviction, although it appeared from the cross-examination of a witness for the prosecution, that the bank had been made bankrupt, and the bankruptcy proceedings were not produced, and there was no evidence as to what dividend, if any, had been paid. *R.* v. *Dowey*, 37 *L. J.* (*M. C.*) 52; 11 *Cox*, 115 (*C. C. R.*): *cf. R.* v. *Smith*, 6 *Cox*, 314. Under 14 & 15 *Vict. c.* 100, *s.* 12 (*ante*, p. 218), the prisoner can now be convicted of misdemeanor in cases where the facts given in evidence amount in law to a felony: *e.g.* to forgery, as in *R.* v. *Evans*, 5 *C. & P.* 553: *cf. R.* v. *Anderson*, 2 *M. & Rob.* 469. And where the cashier of a bank, who had a general authority to conduct the business of the bank, and to part with its property on the presentation of a genuine order from a customer, was deceived by a forged order, and parted with the property of the bank to the person who presented the order, and who knew the order to be forged, it was held that the latter was guilty of obtaining by false pretences the money so paid on the order. *R.* v. *Prince*, 38 *L. J.* (*M. C.*) 8; *L. R.* 1 *C. C. R.* 150. Fraudulently offering a "flash note" in payment under the pretence that it is a bank note, is a false pretence within the statute. *R.* v. *Coulson*, 1 *Den.* 592; 19 *L. J.* (*M. C.* 182; 4 *Cox*, 227 (*C. C. R.*). A person who fraudulently obtains goods by forwarding to the vendor the half of a bank note, having previously parted with the corresponding half to a third person, is guilty of obtaining goods by false pretences, as by forwarding the half-note he represents that he has the corresponding half ready for the vendor's satisfaction. *R.* v. *Murphy*, *Ir. Rep.*, 10 *C. L.* 508; 13 *Cox*, 298 (*C. C. R. Ir.*): *cf. R.* v. *Freeth*, *R. & R.* 127. So, where a person at Oxford, who was not a member of the university, went, for the purpose of fraud, wearing a commoner's gown and cap, and obtained goods, this was held a sufficient false pretence to satisfy the statute, though nothing passed in words. *R.* v. *Barnard*, 7 *C. & P.* 784. So, where the prisoner, who had previously pledged ingots of silver with the prosecutor, brought bars of worthless metal similar in appearance, and laid them down, saying eight ounces each at 4*s.* an ounce, the same as before. *R.* v. *Stevens*, 1 *Cox*, 83.

Ordering a meal at a restaurant without the means to pay is not a false pretence within 24 & 25 *Vict. c.* 96, *s.* 88 (*ante*, p. 593), but is a fraud within *s.* 13 (1), of the *Debtors Act*, 1869 (32 & 33 *Vict. c.* 62). *R.* v. *Jones* [1898] 1 *Q. B.* 119; 67 *L. J.* (*Q. B.*) 41; 19 *Cox*, 87; *post*, *Book II. Part II. ch. v.*, *s.* 1.

Indeed, it may be laid down generally that, as it is not necessary that the statement of the existing facts should be in *words*, but it may be conveyed by the *conduct and acts* of the party (*ante*, p. 598), so also if made by words or writing it is not necessary that such statement should be made expressly, if the statement may be naturally and reasonably, although not necessarily, inferred from such words or writing, and the defendant intended the prosecutor to put upon them a construction supporting the pretences charged in the indictment. *R.* v. *Cooper*, 2 *Q. B. D.* 510; 46 *L. J.* (*M. C.*) 219; 13 *Cox*, 617 (*C. C. R.*): *R.* v. *King* [1897] 1 *Q. B.* 214; 18 *Cox*, 447 (*C. C. R.*). Thus, where C. was convicted of obtaining potatoes from the prosecutor by falsely pretending that he was then in a large way of business, that he was in a position to do a good trade in potatoes, and that he was able to pay for large

quantities of potatoes as and when the same might be delivered to him, and the evidence that C. had so pretended was the following letter written by him to the prosecutor:—"Send me one truck of regents and one truck of rocks, as samples, at your prices named in your letter; let them be good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. I may say if you use me well I shall be a good customer." It was held, affirming the conviction, that the words of the letter were fairly and reasonably capable of a construction supporting the pretences charged, and that it was a question for the jury whether the writer intended the prosecutor to put that construction upon them. *R.* v. *Cooper* (*ubi supra*). So, where the defendant was convicted of obtaining money from the prosecutor by falsely pretending that there was a person named A. Brient, living at Holt, Trowbridge, in the county of Wilts, who was a minister of religion, and that the said A. Brient had instituted a "*bonâ fide* competition for the production of the greatest number of words from the word 'Barnardo,' and that the said A. Brient had made arrangements to present prizes to the successful competitors, of the respective values of two pounds, one pound, and ten shillings, and had further arranged to give the proceeds derived from the entrance fees of competitors, after deducting the said prizes, to a charitable institution known as Dr. Barnardo's Home for Destitute Children,—and the evidence that the defendant had so pretended was that he had inserted the following advertisement in a newspaper:—'Barnardo. 2*l.*, 1*l.*, 10*s.* for most words from Barnardo. Proceeds to go to Dr. Barnardo's Home for Destitute Children. Alphabetical lists, with 1*s.* 3*d.* to Revd. A. Brient, Holt, Trowbridge, Wilts.'" It was held, affirming the conviction, that the words in the advertisement were reasonably capable of the construction put upon them in the indictment and that it was a question for the jury whether the defendant intended the prosecutor to put that construction upon them. *R.* v. *Randell*, 16 *Cox*, 335 (*C. C. R.*).

Obtaining as a loan (*see post*, p. 608), from the drawer of a bill accepted by the prisoner and negotiated by the drawer, part of the amount, for the purpose of paying the bill, under the false pretence that the prisoner was prepared with the residue of the amount, was held to be an offence within the statute, the prisoner being shown not to be prepared, and not intending so to apply the money. *R.* v. *Crossley*, 2 *M. & Rob.* 17, *Patteson*, J. In like manner, where the defendant obtained goods by a false statement that a bill, drawn on and accepted by himself, and purporting to be payable at the London and Westminster Bank, which he gave the prosecutor for the price of the goods, would be paid at the bank the next day, and that he had made arrangements for it, this was held a false pretence within the Act. *R.* v. *Hughes*, 1 *F. & F.* 355.

"*Prepared to pay*"—*Intention.*]—"A promise as to future conduct not intended to be kept is not by itself a false pretence." (62 & 63 *Vict. c.* 22, *s.* 3, *ante*, p. 597.) On the special facts of *R.* v. *Gordon*, 23 *Q. B. D.* 354 (*post*, p. 618), an averment that the prisoner falsely pretended that he was "prepared to pay" money to the prosecutor was held to be a sufficient statement of an existing fact: *cf. R.* v. *Bates*, 3 *Cox*, 201, where the pretences that the prisoner "then had the means of paying," and "was able and willing to pay" were held sufficient by *Platt*, B. "There must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion." *Edyington* v. *Fitzmaurice*, 29 *Ch. D.* 459, 483, *Bowen*, L.J. The court in *R.* v. *Gordon* (*ubi supra*), however, specially refrained from deciding the question there raised by

Wills, J., whether a statement of present intention is a sufficient representation of an existing fact, and *semble*, that it would certainly be unsafe to base an indictment under 24 & 25 *Vict. c.* 96, *s.* 88, upon such a statement alone. *Cf. R.* v. *Johnston*, 2 *Mood. C. C.* 254.

A false pretence actually made to A. in B.'s hearing, whereby money is obtained from B., may be laid as made to B. *R.* v. *Dent*, 1 *C. & K.* 249, *Rolfe*, B. And where the indictment alleged the false pretence to have been made to B. and others, and it was proved that B. was one of a firm, and that the false pretence was made to him alone, but with intent to defraud the firm, it was held sufficient, the words "and others" being rejected as surplusage. *R.* v. *Kealey*, 2 *Den.* 68; 20 *L. J.* (*M. C.*) 57; 5 *Cox*, 193 (*C. C. R.*). The jury may connect together representations made in several distinct conversations (if from their nature they can be connected), and convict the defendant for obtaining money, etc., by means of false pretences made in those several conversations. *R.* v. *Welman*, *Dears.* 188; 22 *L. J.* (*M. C.*) 118; 6 *Cox*, 153 (*C. C. R.*). A false pretence made through an innocent agent is the same as if made by the defendant himself, and may be so charged. *R.* v. *Butcher*, *Bell*, 6; 28 *L. J.* (*M. C.*) 14; 8 *Cox*, 77 (*C. C. R.*). K. represented to B. that he had a quantity of good tobacco, and induced B. to agree to buy some. P. was with K. at the time, and it was arranged that P. was to deliver the tobacco to B., and that B. was to pay P. for K. P. afterwards delivered to B. two bales purporting to be tobacco, as in pursuance of the contract, and received payment from B. The bales contained little else but rubbish; K. and P. were parties to the fraud. It was held on these facts that K. was liable to be convicted on an indictment charging him with obtaining money from B. by falsely pretending that he was possessed of a quantity of good tobacco. *R.* v. *Kerrigan*, *L. & C.* 383; 33 *L. J.* (*M. C.*) 71; 9 *Cox*, 441 (*C. C. R.*).

It is not necessary to allege that the money, etc., obtained was the property of the person whom it was intended to defraud (*see* 24 & 25 *Vict. c.* 96, *s.* 88, *ante*, p. 593), nor to allege that the pretence was made with intent of obtaining the money, etc.; it is sufficient to show that the pretence was made, that the money, etc., was obtained thereby, with intent to defraud, and that the pretence was false to the knowledge of the defendant. *Hamilton* v. *R.*, 9 *Q. B.* 271. It is still, however, necessary to allege in the indictment and to prove that the defendant obtained the money, etc., "with intent to defraud," and if those words be omitted the indictment is bad, and cannot be amended under 14 & 15 *Vict. c.* 100, *s.* 1 (*ante*, p. 52), by inserting them. *R.* v. *James*, 12 *Cox*, 127, *Lush*, J. If it be a valuable security that was obtained, the indictment need not, it seems, show it to be still unsatisfied; at all events, it is good after verdict without such averment. *Id.*

Loans.]—The offence is completed by the *obtaining* of the money, etc., and it is no defence, where the indictment charges the obtaining of *money*, that the money had been obtained only by way of a loan, and that the defendant intends to repay it; *R.* v. *Crossley*, 2 *M. & Rob.* 17; because the property in money that is lent passes as much in a case of loan as on a sale, there being no expectation that the same money which is lent will be returned. *See R.* v. *Burgon*, *Dears. & B.* 11, 20, *Crompton*, J. Where, however, a *chattel* is obtained by way of loan, the property in the chattel does not pass (*see per Crompton*, J., *supra*), and since to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property, if it appears that the defendant had no such intention, but merely

intended to obtain the use of the chattel for a limited time, he cannot be convicted of obtaining the chattel by false pretences. *R.* v. *Kilham*, *L. R.* 1 *C. C. R.* 261; 39 *L. J.* (*M. C.*) 109: 11 *Cox*, 561. And therefore where the defendant, by false pretences, obtained from a livery stable keeper a horse on hire, rode it himself during the time of hiring, and afterwards returned it to the stables, it was held that he could not be convicted of obtaining the horse by false pretences. *Id.* *See R.* v. *Boulton* (*post*, p. 611). As to obtaining credit under false pretences, *see* 32 & 33 *Vict. c.* 62, *s.* 13 (1), *post*, *Book II. Part II. ch. v. s.* 1, *tit.* "*Frauds upon Creditors.*"

Venue.]—The offence is completed by the *obtaining* of the money; and therefore where it was transmitted in a letter, posted by the defendant's request in county A., but which reached him in county B., it was held that this was an obtaining of the money in county A., and that the venue was rightly laid there. *R.* v. *Jones*, 1 *Den.* 551; 19 *L. J.* (*M. C.*) 162; 4 *Cox*, 198 (*C. C. R.*). *See R.* v. *Buttery*, 4 *B. & Ald.* 179 *cit.*: *R.* v. *Ellis* [1899] 1 *Q. B.* 230; 68 *L. J.* (*Q. B.*) 103; 19 *Cox*, 210 (*C. C. R.*), where it was held that a bankrupt who, by means of false representations made verbally in Scotland, obtained goods and credit for goods delivered in the county of Durham, was guilty of an offence in Durham, and was rightly tried in that county. Again, where the defendant, by means of a false pretence contained in a letter written by him in the county of C., received there the money obtained thereby, which money was sent to him by the prosecutor in a registered letter; the letter containing the false pretence being received by the prosecutor in the county of the borough of C., and the registered letter being posted by him in the county of the borough of C., the venue was held to be well laid in the county of the borough. *R.* v. *Leech*, *Dears.* 642; 25 *L. J.* (*M. C.*) 77; 7 *Cox*, 100 (*C. C. R.*): *R.* v. *Allington*, 9 *Times L. R.* 199 (*C. C. R.*). *See R.* v. *Cooke*, 1 *F. & F.* 64, in which case *Coleridge*, J., held that the defendant could be tried at Northampton, where he wrote the letter containing the false pretence, although the money was paid over in Westminster. And where the defendant wrote and posted at Nottingham a letter, addressed to G. at a town in France, containing a false pretence, by means of which he induced G. to send from France to Nottingham a draft for 150*l.*, which defendant there cashed, it was held that there was jurisdiction to try the defendant at Nottingham, the pretence having been made at Nottingham, where also the money obtained by means of it was received. *R.* v. *Holmes*, 12 *Q. B. D.* 23; 53 *L. J.* (*M. C.*) 37 (*C. C. R.*); *and see ante*, p. 43.

Evidence.

The prosecutor must prove the making of the pretence, as stated in the indictment: and any variance in substance between the pretence laid and that proved will be fatal. On the trial of an indictment, charging that the defendant obtained a horse of the prosecutor by falsely pretending that he was the servant of Hardman of S., the evidence was that the defendant at first represented himself as a servant of Hardman of S., but that afterwards learning that the prosecutor had supposed that he had said that he was the servant of Harding of B., he adopted that view, and virtually said that he was the servant of Harding, late of B., and now of S. It was proved that the prosecutor parted with his horse in the belief that the defendant was the servant of Harding. On these facts it was held that the defendant could not be convicted on the indictment, as the real

pretence that operated on the prosecutor's mind was not alleged therein. *R.* v. *Bulmer*, *L. & C.* 476; 33 *L. J.* (*M. C.*) 171; 9 *Cox*, 492 (*C. C. R.*). Where the pretence laid was, that the defendant said "*that he had paid* a sum of money into the Bank of England," and the proof was, that he said that the money had been paid into the Bank, without saying by whom, the defendant was acquitted for the variance; Lord *Ellenborough* holding that the assertions were different in substance. *R.* v. *Plestow*, 1 *Camp.* 494. *See R.* v. *Douglass*, *Id.* 212. But it is not necessary to prove the whole of the pretence charged; proof of part of the pretence and that the money was obtained by such part, is sufficient. *R.* v. *Hill*, *R. & R.* 190; *R.* v. *Lince*, 12 *Cox*, 451 (*C. C. R.*). It is sufficient if the actual substantial pretence which was the main inducement to part with the money, etc., is alleged in the indictment and proved, although it may be shown by the evidence that other matters not laid in the indictment in some measure operated as an inducement upon the prosecutor's mind. *R.* v. *Hewgill*, *Dears.* 315 (*C. C. R.*): *R.* v. *English*, 12 *Cox*, 171, *Cockburn*, J.: *R.* v. *Lince*, 12 *Cox*, 451 (*C. C. R.*). If, however, two false pretences are laid as together conducing to the fraud, and the jury find a general verdict of guilty, and it afterwards appear that one of them is not a sufficient false pretence within the statute, that will invalidate the indictment altogether on a writ of error. *R.* v. *Wickham* (*ante*, p. 605). If the false pretence be in writing, it may be proved by secondary evidence, if the paper be lost before the trial. *R.* v. *Chadwick*, 6 *C. & P.* 181. The opinion formed by the prosecutor as to the position or occupation of the prisoner upon the receipt of a letter from the prisoner respecting the goods the subject of the indictment (such letter being put into the prosecutor's hands at the trial) is admissible in evidence. *R.* v. *King* [1897] 1 *Q. B.* 214 (*C. C. R.*), (*ante*, p. 604).

He must next prove that the goods, etc., stated in the indictment, or some part of them (for the rule in this respect is the same as in larceny) (*see ante*, p. 434, *et seq.*), were obtained from him by means of the pretences alleged. Proof that money was actually paid to the defendant by the wife of A. B. in her husband's absence, but by his authority, in consequence of false pretences made by the defendant to A. B., is sufficient to support an indictment charging the defendant with obtaining money by false pretences from A. B. *R.* v. *Moseley*, *L. & C.* 92; 31 *L. J.* (*M. C.*) 24; 9 *Cox*, 16 (*C. C. R.*). Where a false pretence was made to the secretary of a friendly society, and the secretary accompanied the prisoner to the treasurer, who paid over the money, it was held that the treasurer was merely a mechanical medium, and that the false pretence to and obtaining from the secretary was proved. *R.* v. *Rouse*, 4 *Cox*, 7, *Erle*, J.: *cf. R.* v. *Taylor*, 65 *J. P.* 547 (*C. C. R.*). The words in the statute are "any money, chattel, or valuable security."

Intent to defraud.]—This may be implied sufficiently from the facts of the case. Where A. owed B. a debt, of which he could not get payment, and C., B.'s servant, went to A.'s wife, and obtained from her two sacks of malt, saying that B. had bought them of A., and C. knew this to be false, but took the malt to B., his master, to enable him to pay himself the debt, it was ruled that C. could not be convicted of obtaining the malt by false pretences. *R.* v. *Williams*, 7 *C. & P.* 354, *Coleridge*, J. The fact that the defendant at the time he obtained goods by false pretences intended to pay for them when it should be in his power to do so affords no defence to an indictment for obtaining such goods by false pretences. *R.* v. *Naylor*, *L. R.* 1 *C. C. R.* 4; 35 *L. J.* (*M. C.*) 61; 10 *Cox*, 149. As to the effect of a verdict of guilty, to which the jury add that there is not

sufficient evidence of an intent to defraud, and therefore recommend the prisoner to mercy, *see R.* v. *Gray*, 17 *Cox*, 299 (*C. C. R.*) (*ante*, p. 221).

As to where evidence of other obtainings is admissible in order to prove guilty knowledge, *see post*, p. 615.

It is sufficient to show that the pretence was made, that the money, etc., was obtained thereby, with intent to defraud, and that the pretence was false to the knowledge of the defendant. *Hamilton* v. *R.*, 9 *Q. B.* 271.

Falsity.]—Lastly, it must be proved that the pretences made use of were false in fact: or, in other words, the averments negativing the pretences must be proved. But it does not seem to be essential that they should all be proved; if so many of them as show the falsity of the substance of the pretence be proved, it would seem to be sufficient. Thus, under the precedent (*ante*, p. 595), if it were to appear in evidence that the defendant was really the servant of K. O., yet if it were also to appear that he had no directions from him to get the cloth in question, and that, after he had obtained it, he converted it to his own use, it would be sufficient. Nor is it necessary that the falsity of the pretences should be shown by direct evidence. Thus, where the pretences charged were, that the defendant had a carriage and pair, and expected it down in a few days, and that he had large property abroad, and there was no direct evidence to show that he had no carriage or no property abroad, but it was proved that three days before he made the pretence he was in another place assuming to be a man of position and wealth, but was in a destitute condition and unable to pay his hotel and other bills, this was held to be evidence from which the jury might well infer that the pretences were false. *R.* v. *Howarth*, 11 *Cox*, 588 (*C. C. R.*). Where the defendant, the agent of a life assurance company, had received from the prosecutor a premium for the renewal of a life policy for the year 1883, but had not paid over such premium to the company, and had represented to them that it had not been paid by the prosecutor, in consequence of which the company had treated the policy as lapsed, and the defendant afterwards represented to the prosecutor that the policy was still in existence, and so induced him to pay to him the premium for its renewal for the year 1884, it was held that he was guilty of obtaining such last-mentioned premium by false pretences. *R.* v. *Powell*, 54 *L. J.* (*M. C.*) 26; 15 *Cox*, 568. Where the defendants were charged with obtaining money by colour and pretence of their being collectors of the property-tax, and it appeared in evidence that they had in fact been appointed collectors by the commissioners, though in an informal manner; the pretence was held not to be false within the meaning of the Act. *R.* v. *Dobson*, 7 *East*, 218. Upon an indictment for obtaining money by a false pretence made by the defendant that he was an attorney, it is not necessary to prove the negative in any other way than by the production of the Law List in which the defendant's name does not appear. *R.* v. *Wenham*, 10 *Cox*, 222 (*ante*, p. 355).

Chattel.]—A railway ticket which enabled the defendant to travel free by the railway from B. to H., and was to be given back to the railway company at H., was held to be a "chattel" within this section. *R.* v. *Boulton*, 1 *Den.* 508; 2 *C. & K.* 917; 19 *L. J.* (*M. C.*) 67 (*C. C. R.*) This case seems to conflict with *R.* v. *Kilham*, *ante*, p. 609), as the defendant did not intend, nor was it necessary for his purpose to intend, wholly to deprive the railway company of their property in the ticket; but it is distinguishable from *R.* v. *Kilham*, in this respect, that the defendant by using the ticket for the purpose of travelling on the railway entirely

converted it to his own use, for the only purpose for which it was capable of being applied. See the judgment in *R.* v. *Kilham* (*ubi supra*). A dog, not being the subject of larceny at common law, is not a chattel within this Act. *R.* v. *Robinson, Bell*, 34 (*ante*, p. 473).

Valuable security.]—The defendant, who was the secretary to a burial society, had, by the false pretence of a death, obtained from the president of the society an order on the treasurer in the following form:—"B. United Burial Society, No. 23. Bolton, Sept. 1, 1853. Mr. A. E., treasurer:—Please to pay the bearer 2*l.* 10*s.*, Greenhalgh, and charge the same to the above society, R. L., president:" this was held to be a "valuable security" within 7 & 8 *G.* 4, *c.* 29, *s.* 53 (*rep.*), as explained by *s.* 5 of that Act (*see now* 24 & 25 *Vict. c.* 96, *s.* 1, *ante*, p. 427). *R.* v. *Greenhalgh, Dears.* 267; 6 *Cox*, 257 (*C. C. R.*) Where, in order to induce his bankers to pay his cheques, a defendant drew a bill on a person on whom he had no right to draw, and which had no chance of being paid, in consequence of which the bankers paid money for him, it was held not to be within the Act, because he only obtained credit, not any specific sum on the bill. *R.* v. *Wavell*, 1 *Mood. C. C.* 224. *See R.* v. *Crosby*, 1 *Cox*, 10: *R.* v. *Garrett, Dears.* 232; 23 *L. J.* (*M. C.*) 20; 6 *Cox*, 260 (*C. C. R.*). This, however, would seem to come under *s.* 13, *sub-s.* 1 of the *Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), which is expressly aimed at the obtaining of credit under false pretences, or other fraud. (*See post*, p. 613.) Where the prisoner was charged with obtaining a filly by the false pretence that he was a gentleman's servant, and had lived at Bream, and had bought twenty horses at Bream fair; and it appeared that he bought the filly of the prosecutor for 11*l.*, making him this statement, which was false, and telling him also that he would come down to the Cross Keys and pay him: and the prosecutor stated that he parted with the filly because he expected the prisoner would come to the Cross Keys and pay him, and not because he believed that the prisoner was a gentleman's servant, etc.; the prisoner was held to be entitled to an acquittal. *R.* v. *Dale*, 7 *C. & P.* 352. Where the prisoner had fraudulently obtained goods on approval, and had falsely represented to the prosecutor that she was the daughter of a Mrs. Jones of C., but there was no evidence to show that the prosecutor knew Mrs. Jones of C., or that the goods had not been delivered to the prisoner before she made the false representation, or that the goods were parted with by the prosecutor on the faith of the false representation, it was held that the conviction of the prisoner for obtaining goods by false pretences could not be sustained. *R.* v. *Jones*, 15 *Cox*, 475 (*C. C. R.*); *cf. R.* v. *Hazzlewood*, 48 *J. P.* 151 (*C. C. R.*). But where the grantor of a bill of sale sold the goods subject to the bill, without disclosing its existence, it was held that the onus of proof that he had authority from the grantee to sell the goods was upon him, and that the act of selling constituted a false pretence that he was absolute owner of the goods sold. *R.* v. *Sampson*, 52 *L. T.* 772; 49 *J. P.* 807 (*C. C. R.*), in which *R.* v. *Hazzlewood* was not followed.

Conviction for attempt where prosecutor not deceived.]—Where the defendant offered a chain in pledge to a pawnbroker, which he falsely stated to be silver, but the pawnbroker stated that he advanced money on it, not in consequence of the defendant's statement, but in reliance on its withstanding a test which he himself applied to it, it was held that the defendant could not be convicted of obtaining the money by means of the false pretence, but that he was properly convicted of *attempting* to obtain money by false pretences. *R.* v. *Roebuck, Dears. & B.* 24; 25 *L. J.* (*M. C.*) 101; 7 *Cox*, 126 (*C. C. R.*). So, also, wherever the prosecutor himself

knows the falsehood of the pretence, but parts with his money or goods notwithstanding, the defendant cannot be convicted of *obtaining* by false pretences. *R.* v. *Mills, Dears. & B.* 205; 26 *L. J.* (*M. C.*) 79; 7 *Cox*, 263 (*C. C. R.*). In *R.* v. *Ady*, 7 *C. & P.* 140, the head note is to the effect that "if the defendant obtained the money by a false presence, knowing it to be false, it is no answer to show that the party from whom he obtained it laid a plan to entrap him into the commission of the offence." In *R.* v. *Mills*, *R.* v. *Ady* was cited, and it was pointed out that *Patteson*, J., left to the jury the question whether the prosecutor parted with his money in belief in the pretence. And a defendant in such a case as *R.* v. *Ady* may be convicted of *attempting* to obtain by false pretences, even where the indictment charges him with *obtaining*; 14 & 15 *Vict. c.* 100, *s.* 9 (*ante*, p. 219: *R.* v. *Roebuck*, *ubi supra*; or he may, under such a state of facts, be indicted for the *attempt* simply. *R.* v. *Hensler*, 11 *Cox*, 570 (*C. C. R.*). But the fact of the prosecutor having the *means* of such knowledge will not of itself excuse the defendant from being convicted of obtaining by false pretences; for example, where the defendant falsely represented a 1*l.* Irish bank note to be a 5*l.* note, and thereby obtained the full value of a 5*l.* note; though the prosecutor could read, and the note on the face of it furnished obvious means of detecting the fraud, the defendant was held to be properly convicted. *R.* v. *Jessop, Dears. and B.* 442; 27 *L. J.* (*M. C.*) 70; 7 *Cox*, 399 (*C. C. R.*). Where the defendant was indicted for conspiring with others to obtain money by false pretences, it was held to be no bar to his conviction that the prosecutor had the intention of cheating the defendant if he could. *R.* v. *Hudson, Bell*, 263; 29 *L. J.* (*M. C.*) 145; 8 *Cox*, 305 (*C. C. R.*).

Obtaining board and lodging.]—Where the prisoner was received as a lodger into a house without making any false pretence, but afterwards falsely stated to his landlady that he had come directly from the house of a person whom she knew, and that he had left clothes there, and at the time of making this statement requested to be provided with board as well as lodging, and the landlady knowing the person to whom the prisoner referred, and believing his statement that he had come from that person's house and had clothes there, supplied him with meat and drink as a boarder, it was held that on these facts he was rightly convicted of obtaining goods—the meat and drink supplied to him as board—by false pretences. *R.* v. *Burton*, 16 *Cox*, 62 (*C. C. R.*). The defendant, by falsely pretending that he was a naval officer, induced the prosecutrix to enter into a contract with him to board and lodge him at a guinea a week, under which contract he was lodged and supplied with various articles of food. It was held that a conviction for obtaining the articles of food by false pretences could not be supported, for that the obtaining of the food was too remotely the result of the false pretence. *R.* v. *Gardner*, *Dears. & B.* 40; 25 *L. J.* (*M. C.*) 100; 7 *Cox*, 136 (*C. C. R.*): *R.* v. *Bryan*, 2 *F. & F.* 567. See, however, the comments on *R.* v. *Gardner* and *R.* v. *Bryan*, in *R.* v. *Martin*, *L. R.* 1 *C. C. R.* 56; 36 *L. J.* (*M. C.*) 20. These cases can now be dealt with as obtaining credit by means of fraud within *s.* 13 of the *Debtors Act*, 1869 (32 & 33 *Vict. c.* 62, *post*, *Book II. Part II. ch. v. s.* 1). *See R.* v. *Jones* [1898] 1 *Q. B.* 119; 67 *L. J.* (*Q. B.*) 41; 19 *Cox*, 87 (*C. C. R.*), where the defendant went to a restaurant and ordered and ate a meal knowing that he could not pay for it. See also *R.* v. *Wyatt* [1904] 1 *K. B.* 188 (*C. C. R.*)

Continuing false pretence.]—In *R.* v. *Martin*, *ubi supra*, it was held, that in order to support an indictment for obtaining a chattel by false

pretences, it is not necessary that the chattel should have been in existence when the false pretence was made, but that the obtaining is within the statute, if the pretence is a continuing one, so that the chattel is made and delivered in pursuance of the pretence, and that the question whether the pretence is or is not a continuing one, is one of fact for the jury. Another instance of a continuing false pretence is where the defendant by a false pretence obtained a cheque from the prosecutor, which the banker upon whom it was drawn refused to pay, owing to there being a material omission in the body of it. The defendant thereupon returned the cheque to the prosecutor, who immediately tore it up, drew another for the same amount, and gave it to the defendant, who got it cashed and appropriated the money to his own use. It was held that the false pretence which induced the prosecutor to give the first cheque continued in force, and induced him to give the second cheque, and that therefore the money which the defendant obtained by getting it cashed, was obtained by him by false pretences. *R.* v. *Greathead*, 14 *Cox*, 108 (*C. C. R.*).

On an indictment for attempting to obtain property by false pretences, it was proved that entries for two handicap races in athletic sports were sent to the secretary of the sports in the name of S., containing statements as to the last four races in which S. had run. The prisoner personated S. at the sports and came first in both races. The entries sent in were not in the writing either of S. or the prisoner. After the first race the prisoner was asked whether he was S., and whether the performances specified in the entry were really prisoner's. He answered both questions falsely in the affirmative. Held that the attempt to obtain the prizes was not too remote from the pretence, and that the prisoner was rightly convicted. *R.* v. *Button* [1900] 2 *Q. B.* 597; 69 *L. J.* (*Q. B.*) 901; 19 *Cox*, 568 (*C. C. R.*), disapproving *R.* v. *Larner*, 14 *Cox*, 497; and following *R.* v. *Dickenson*, 2 *Russ. Cr.* (6th ed.) 511: *Roscoe Cr. Ev.* (12th ed.) 432. Where the defendant, by false and fraudulent representations as to the value and profits of his business, induced the prosecutor to enter into partnership with him, and to advance 500*l.* as part of the capital of the concern, and the prosecutor, after such advance, recognized and acted in the partnership; it was held that this was not obtaining money by false pretences within the meaning of the statute, for the prosecutor, as partner, continued to be interested in the money. *R.* v. *Watson*, *Dears. & B.* 348; 27 *L. J.* (*M. C.*) 18; 7 *Cox*, 364 (*C. C. R.*) Parol evidence may be given of the false pretences laid in the indictment, though a deed between the parties, stating a different consideration for parting with the money, be put in evidence for the prosecution; such deed having been made for the purpose of the fraud. *R.* v. *Adamson*, 2 *Mood. C. C.* 286; 1 *C. & K.* 192.

Distinction between larceny and obtaining by false pretences.]—Formerly, if the evidence proved not only an intent to cheat or defraud, but also established a pre-existing *animus furandi*, and a constructive taking, such as to constitute larceny, the misdemeanor being merged in the felony, the defendant was entitled to his acquittal. *R.* v. *Pear*, 2 *East, P. C.* 685; 1 *Leach*, 212; 4 *R. R.*, 703. But now, under 24 & 25 *Vict. c.* 96, *s.* 88 (*ante*, p. 593), the defendant may be convicted, although it appear at the trial that the offence amounts to larceny, and not merely to obtaining money, etc., by false pretences. The safer course, therefore, to adopt, where it is doubtful whether the offence is larceny or obtaining goods under a false pretence, is to indict for the misdemeanor: in which case, if the offence should turn out to be larceny, the prisoner may nevertheless be convicted by force of the statute. These two offences are sometimes difficult to be

distinguished, in cases where there has been a constructive taking. *R.* v. *Essex, Dears. & B.* 371; 27 *L. J.* (*M. C.*) 20; 7 *Cox*, 384 (*C. C. R.*). *R.* v. *Solomons*, 17 *Cox*, 93 (*ante*, p. 451); but the difficulties arising from this circumstance appear to be obviated by this provision of the statute. It is not, however, sufficient under this provision to prove *any* larceny. The true meaning of the provision is, that if the misdemeanor is proved as it is laid in the indictment, the defendant is not to be acquitted of the misdemeanor simply because the case amounts to larceny. *R.* v. *Bulmer*, *L. & C.* 476; 33 *L. J.* (*M. C.*) 171; 9 *Cox*, 492 (*C. C. R.*). Where the indictment averred an obtaining of a particular sum of money, with intent to defraud the prosecutor of *the same*, and it appeared that the intent was to defraud him of a part only of that sum, the rest being really due, it was held that the prisoner might nevertheless be convicted. *R.* v. *Leonard*, 1 *Den.* 304; 2 *C. & K.* 514; 3 *Cox*, 284. Where goods obtained on a contract induced by the false pretences of the prisoner that he is another person, it would seem that the contract is null (*Cundy* v. *Lindsay*, 3 *App. Cas.* 459; 47 *L. J.* (*Q. B.*) 581, and that the offence might be treated as larceny by a trick, *see R.* v. *George*, 65 *J. P.* 729. It is only necessary to allege in the indictment, and to prove, an intent to defraud generally, without alleging or proving an intent to defraud any particular person. 24 & 25 *Vict. c.* 96, *s.* 88 (*ante*, p. 593).

Guilty knowledge—Evidence of other obtainings.]—On an indictment for attempting to obtain money by falsely pretending that a ring was composed of diamonds, which in fact was composed of crystals, evidence is admissible of a false pretence by the defendant on a *prior occasion* to another person that a chain was gold, whereas it was plated, and on another distinct occasion, that a ring was of diamonds, which it was not, on the ground that these previous transactions are evidence of the guilty knowledge of the prisoner at the time he made the false pretence charged in the indictment. *R.* v *Francis*, *L. R.* 2 *C. C. R.* 128; 43 *L. J.* (*M. C.*) 97; 12 *Cox*, 612. And where the prisoner was indicted for obtaining eggs by false pretences, he having falsely represented by advertisements in newspapers that he was carrying on a *bonâ fide* dairyman's business, whereas in truth and in fact the business was a "bogus" one, evidence that on occasions *subsequent to the transactions the subject of the charge* he had obtained eggs from other persons by means of similar advertisements was held admissible. *R.* v. *Rhodes* [1899] 1 *Q. B.* 77; 19 *Cox*, 182 (*C. C. R.*) where *R.* v. *Holt, Bell*, 280; 30 *L. J.* (*M. C.*) 11; 8 *Cox* 411 (*C. C. R.*) is distinguished. And see the remarks on *R.* v. *Holt*, made by *Blackburn*, J., in *R.* v. *Francis*, and the general rules as to admission of such evidence (*ante*, pp. 310, 311).

The prisoner, having been acquitted on an indictment charging him with obtaining from A. a cheque by falsely pretending that another cheque which he then gave to A. was a good and valid order for the payment of money, was tried on a second indictment charging him with obtaining money from B. and C. by similar false pretences as to three other cheques: it was held that the evidence of A. which had been given on the first indictment, upon which the prisoner had been tried and acquitted, was admissible upon the trial of the second indictment. *R.* v. *Ollis* [1900] 1 *Q. B.* 758; 19 *Cox* 555 (*C. C. R.*). "The evidence was relevant *as showing a course of conduct on the part of the accused*, and a belief on his part that the cheques would not be met," *Id. per Lord Russell of Killowen*, L.C.J. It "tended to show that the conduct of the prisoner was not inadvertent or accidental, but was *part of a systematic fraud*:" *Id. per Wright*, J. On the same principle, where the prisoner was charged with

obtaining credit by fraud under *s.* 13 (1) of the *Debtors Act*, 1869, in respect of food and lodging obtained by him from A., evidence of similar obtainings from B., C., and D. immediately preceding the commission of the alleged offence were held admissible. *R.* v. *Wyatt* [1904] 1 *K. B.* 188; 68 *J. P.* 34. *And see R.* v. *Smith*, *28th Jan.* 1905, *C. C. R.*

The prisoner was indicted in four counts for obtaining money by false pretences from four persons named, the four statements alleged being the same in all these counts; in a fifth count, for inserting, with intent to defraud the Queen's subjects, an advertisement in a newspaper containing the false statements mentioned in the previous counts, and obtaining money thereby. It was shown at the trial that the prisoner had inserted in a newspaper an advertisement containing statements found to be false, offering permanent employment in the preparation of carte-de-visite papers, and adding, "Trial paper and instructions, 1*s.*," and giving an address. Six envelopes were found in the possession of the prisoner on his being apprehended, each directed to the address given, and containing an answer to the advertisement, and twelve postage stamps. Two hundred and eighty-one other letters were produced by a post-office clerk. These letters had been addressed to the prisoner under the address given in the advertisement, and had been received at the post office like the other letters; but, having been stopped by the post-office authorities, none of them had ever been in the prisoner's possession or custody; nor was any proof adduced that they were written by the persons from whom they purported to come. Each letter had been opened at the post-offie before production at the trial, and each contained twelve stamps. The two hundred and eighty-one letters were admitted in evidence. It was held that, under the circumstances, the letters were rightly received in evidence. *R.* v. *Cooper*, 1 *Q. B. D.* 19; 45 *L. J.* (*M. C.*) 15; 13 *Cox*, 123 (*C. C. R.*). In *Re Pinter*, 17 *Cox*, 497, an extradition case, it was held that dealing in 1890 under a false name with bonds stolen in 1883 and stopped, was some evidence to support a charge of falsely representing that they were current bonds, and honestly held. For other decisions on this subject, *see ante*, pp. 308–312.

Attempt.]—As every attempt to commit a crime is itself an indictable misdemeanor at common law (*see ante*, p. 2), wherever the intention to obtain money or goods by false pretences is manifested by any overt act, the party may be indicted for the attempt to commit the statutable misdemeanor. *R.* v. *Hensler*, 11 *Cox*, 570 (*C. C. R.*). And he may be convicted of the *attempt* to obtain, although the indictment charges an actual obtaining. *See R* v. *Roebuck*, *Dears. & B.* 24 (*ante*, p. 612). 14 *& 15 Vict. c.* 100, *s.* 9 (*ante*, p. 219). But where the indictment charges an attempt only, the nature of the attempt must be set forth in the indictment with reasonable certainty. And where the indictment stated that the defendant "did unlawfully attempt and endeavour fraudulently, falsely, and unlawfully to obtain from an insurance company a large sum of money, to wit, the sum of 22*l.* 10*s.*, with intent thereby then and there to cheat and defraud the said company," etc.; this was held insufficient. *R.* v. *Marsh*, 1 *Den.* 505; 19 *L. J.* (*M. C.*) 12. The defendant had contracted with the guardians of a poor-law union to deliver loaves of a specified weight to any poor person bringing a ticket from the relieving officer. The tickets were to be returned by the defendant at the end of each week, together with a statement of the number of tickets sent back, whereupon he would be credited for the amount, and the money would be paid at the time stipulated in the contract. The defendant delivered to certain poor people who brought tickets loaves of less than the certified weight, returned the

tickets with a note of the number sent, and obtained credit in account for the loaves so delivered, but before the time for payment had arrived the fraud was discovered. It was held that the mere delivery of a less quantity of bread than that contracted for was a mere private fraud, no false weights or tokens having been used, and therefore not an indictable offence; but that the defendant was properly convicted of attempting to obtain money by false pretences; for although he had only obtained credit in account, and could not, therefore, have been convicted of the offence of actually obtaining money by false pretences, yet he had done all that was depending on himself towards the payment of the money, and was therefore guilty of the attempt; and that this was a case within 7 & 8 *G.* 4, *c.* 29, *s.* 53 (*rep.*), because it was an attempt to obtain money by a false and fraudulent representation of an antecedent fact; it was not a mere sale of goods by a false pretence of their weight. *R.* v. *Eagleton*, *Dears.* 376, 515; 24 *L. J.* (*M. C.*) 158; 6 *Cox*, 559 (*C. C. R.*); and *semble*, that he could now be convicted of obtaining credit under false pretences under *s.* 13 (1) of the *Debtors Act*, 1869 (32 & 33 *Vict. c.* 62).

Indictment for obtaining the Acceptance to a Bill of Exchange by False Pretences. (24 & 25 *Vict. c.* 96, *s.* 90, *ante* p. 594.)

Commencement as ante, p. 433]—unlawfully, knowingly, and designedly did falsely pretend to one J. N., that [*state the false pretence used, as in the precedents, ante*, p. 595], by means of which said false pretence the said J. S. did then unlawfully and fraudulently induce the said J. N. to accept a certain valuable security, that is to say, a bill of exchange for one hundred pounds, purporting to be [*describe the bill*], with intent thereby then to defraud and injure the said J. N.; whereas in truth and in fact [*here negative the false pretences, as ante*, pp. 595, 596]; against the form [*as ante*, p. 465].

In this indictment it is necessary to name the person intended to be injured or defrauded, as 24 & 25 *Vict. c.* 96, *s.* 88 (*ante*, p. 593) *does not apply to the offence.*

Misdemeanor: penal servitude for not less than three years and not exceeding five years, or imprisonment, with or without hard labour, not exceeding two years—24 & 25 *Vict. c.* 96, *s.* 90 (*ante*, p. 594); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

Evidence.

The evidence will be governed by the like rules as would apply to an indictment under 24 & 25 *Vict. c.* 96, *s.* 88 (*see ante*, p. 597, *et seq.*). The prosecutor must prove the pretences as stated in the indictment: that by means of them or some of them he was induced to accept the bill of exchange; their falsehood; and the intent to defraud, which of course will generally be implied from the circumstances of the case.

Where the prisoner was convicted on an indictment charging that by the false pretence to the prosecutor that he "was prepared to pay him" 100*l.*, he did then unlawfully and fraudulently induce the prosecutor to "make a certain valuable security," to wit, a promissory note for 100*l.*, with intent thereby to defraud the prosecutor, it was held that the indictment was good, as it must be taken by necessary inference to allege a

false pretence by the prisoner of an existing fact, viz. that he was prepared to pay the prosecutor 100*l.*, and had the money ready for him on his signing the promissory note; and that the indictment showed an offence within 24 & 25 *Vict. c.* 96, *s.* 90, of fraudulently causing a person to "make a valuable security," although the promissory note in question might not be of value until it had been delivered into the prisoner's hands. *R.* v. *Gordon*, 23 *Q. B. D.* 354; 58 *L. J.* (*M. C.*) 117; 16 *Cox*, 622 (*C. C. R.*). The facts of this case would bring it within the *Money Lenders Act*, 1900 (63 & 64 *Vict. c.* 51), *s.* 4, *ante*, p. 594.

Indictment for winning Money at Cards, etc., by Fraud. (8 & 9 *Vict. c.* 109, *s.* 17, *ante*, p. 593.)

Berks, to wit:—The jurors for our lord the King upon their oath present, that W. M., on the 9th day of June, in the year of our Lord, 1904, by fraud, unlawful device and ill-practice in playing at and with cards ("*cards, dice, tables or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise*") unlawfully did win from one H. F. B., to a certain person, whose name is to the jurors unknown ("*to himself or any other or others*") a sum of money (to wit), fifty pounds ("*any sum of money or valuable thing*") of the monies of the said H. F. B. And so the jurors aforesaid, upon their oath aforesaid, do say that the said W. M., then in manner and form aforesaid, unlawfully did obtain the said sum of money (to wit), fifty pounds, so being of the monies of the said H. F. B. as aforesaid, from the said H. F. B. by a false pretence with intent to cheat and defraud the said H. F. B. of the said sum of money (to wit), fifty pounds, against the form [*as ante*, p. 465]. (*Second Count.*)—And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. M. afterwards (to wit), on the day and year aforesaid, by fraud, unlawful device, and ill-practice in playing at and with cards, unlawfully did win from the said H. F. B., to a certain person, whose name is to the jurors unknown, a certain sum of money with intent to cheat him, the said H. F. B., to the evil example of all others in the like case offending, against the form [*as ante*, p. 465]. [*An indictment in the form contained in the second count was held good after verdict, although it was objected that it should have alleged that the money won was the property of the person defrauded. R.* v. *Moss, Dears. & B.* 104; 26 *L. J.* (*M. C.*) 9; 7 *Cox*, 200 (*C. C. R.*). *Where the offence was committed by two or more, and there is any doubt whether the game or fraud comes within* 8 & 9 *Vict. c.* 109, *s.* 17, *a count should be added as in R.* v. *Hudson, Bell*, 263; 29 *L. J.* (*M. C.*) 145; 8 *Cox*, 305 (*C. C. R.*), *charging a conspiracy to cheat.*]

Misdemeanor: punishable as obtaining money by false pretences. 8 & 9 *Vict. c.* 109, *s.* 17 (*ante*, p. 593).

Evidence.

To maintain the indictment, it is necessary not only to prove that W. M. won of H. F. B. the money, etc., laid in the indictment, or some part of it, *see R.* v. *Darley*, 1 *Stark.* (*N. P.*) 359, but also to prove that it was won by "fraud or unlawful device or ill-practice." *See R.* v. *Rogier*, 1 *B. & C.* 272; 2 *D. & R.* 431; 25 *R. R.* 393. A variance between the indictment and evidence as to the game played (if stated) would be fatal, unless amended. *See Cooke* v. *Stratford*, 13 *M. & W.* 379. It does not

seem, however, to be necessary to state the name of the game. As to what frauds and games come within 8 & 9 *Vict. c.* 109, *s.* 17, *see R.* v. *Bailey*, 4 *Cox*, 390: *R.* v. *Hudson*, *ubi supra*: *R.* v. *O'Connor*, 15 *Cox*, 3, *Lush*, J., where a watch was obtained by tossing coins for a wager.

Common Law Cheats.

It is a cheat punishable on indictment at common law to obtain money from another by a false message or token; 1 *Hale*, 506, *and see* 3 *Chit. Cr. L.* 994, *et seq.* For other cheats indictable at common law, *see* 2 *Russ. Cr.* (6th ed.) 454; *Tremaine*, P.C. 85 to 110. They include wilful sale of unwholesome food. *R.* v. *Dixon*, 4 *Camp.* 12; 3 *M. & Sel.* 11; 15 *R. R.* 381; selling a forged picture, *R.* v. *Closs*, *Dears. & B.* 460; 27 *L. J.* (*M. C.*) 54; and the fraudulent use of devices or tokens to support a false and fraudulent statement. *R.* v. *Lara*, 6 *T. R.* 565; 2 *Leach*, 647, 652; 2 *East*, *P. C.* 819: *R.* v. *Ward*, 2 *Str.* 747; *and cf. R.* v. *Vreones* [1891] 1 *Q. B.* 360; 60 *L. J.* (*M. C.*) 62; 17 *Cox*, 267; *and post*, *tit.* "*Perjury*;" *and see also* 1 *Hawk. c.* 71; *Fabian's case* [1664] *Kel.* (*J.*) 89; 1 *East*, *P. C.* 194; *and see* 2 *East*, *P. C.* 816. But it is not an offence at common law to make short delivery under a contract, unless false weights, measures or tokens are used as the general course of dealing or to all or many customers, or there is a conspiracy to cheat. *R.* v. *Wheatly*, 2 *Burr.* 1125, 1127, *Ld. Mansfield*, L.C.J.

Indictment for Selling by False Scales (*common law*).

Middlesex, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of August, in the year of our Lord ——, and from thence until the taking of this inquisition, did use and exercise the trade and business of a [*grocer*], and during that time did deal in the buying and selling by weight of [*teas*, *sugars*, *spices*], and of divers other goods, wares, and merchandise; and that the said J. S., being a person of a wicked and depraved mind, and contriving and fraudulently intending to cheat and defraud the subjects of our said lord the King, whilst he was and continued to be a [*grocer*] as aforesaid, to wit, on the said first day of August, in the year aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, knowingly, wilfully, falsely, fraudulently, and deceitfully did keep in a certain shop wherein he, the said J. S., did so as aforesaid carry on his said trade, a certain false pair of scales for the weighing of goods, wares, and merchandises by him sold in the way of his said trade, and which said scales were then, by artful and deceitful means and contrivance, so made and constructed as to cause the goods, wares, and merchandises weighed and sold thereby to appear of greater weight, to wit, of a greater weight by two ounces in every quantity of goods weighed thereby, than the real and true weight thereof: and that the said J. S., well knowing the said scales to be false as aforesaid, did then, to wit, on the several days and times aforesaid, wilfully, falsely, fraudulently and deceitfully sell and utter to divers subjects of our lord the King, divers goods, wares and merchandises in the way of his said trade, weighed in and sold by the said false scales, and which goods, wares and merchandises were very much deficient and short of the weight at and for which the same were so sold by the said J. S., as aforesaid, to wit, by the weight of two ounces: to the great damage and deceit of his Majesty's said subjects, to the evil example of all others in the like case offending, and against

the peace of our lord the King, his crown and dignity. *If you can prove any particular instance of a sale by those scales to a particular person you may add a count upon it; or, if you think your evidence not sufficiently specific to maintain the count above given, you may add a count or counts in a more general form. See* 6 *Went.* 389. *Stating the sale to have been "to divers subjects of our said lord the King to the jurors unknown" has been held sufficient. R.* v. *Gibbs*, 1 *Str.* 497. *An indictment for selling by false weights or measures may readily be framed from the above precedent. For other precedents, Trem. P. C.* 85–110; 3 *Chit. Cr. L.* 1000.

Misdemeanor at common law, punishable by fine or imprisonment (with or without hard labour for the whole or any part of such imprisonment, 14 *&* 15 *Vict. c.* 100, *s.* 29, *ante*, p. 238), *or both. It is also summarily punishable under the Weights and Measures Act,* 1878 (41 *&* 42 *Vict. c.* 49).

Evidence.

Prove that the defendant carried on the business mentioned in the indictment; that the false scales described in the indictment were found in his shop or warehouse, etc., and that he has used them in weighing goods sold by him to his customers. If you have proof that the scales were used by his shopman or servants, it will be sufficient, as it will be presumed that they were used by his orders (*see ante*, p. 35).

Where a cheat or fraud at common law against a private individual is charged, there are two conditions precedent to the offence: (1) that the Act has been completed; (2) that there has been injury to the individual. *R.* v. *Vreones* [1891] 1 *Q. B.* 360; 60 *L. J.* (*M. C.*) 62, *per Pollock*, B.

If a man in the course of his trade or business publicly carried on, puts a false mark or token upon a spurious article, so as to pass it off as a genuine one, and the article is sold and money obtained by means of the false mark or token, he is indictable for a cheat at common law. *R.* v. *Closs*, *Dears. & B.* 460; 27 *L. J.* (*M. C.*) 54. *See R.* v. *Worrell*, *Trem.* 106; *R.* v. *Farmer*, *Id.* 197. The forgery of a trade-mark is also punishable as a misdemeanor under the *Merchandise Marks Act*, 1887 (50 *&* 51 *Vict. c.* 28), *post*, *Book II. Part II. chap. v. s.* 2. And the forgery of initials and frauds in the sale of paintings, etc., are punishable in a summary way under 25 *&* 26 *Vict. c.* 68. As to frauds in the stamping and sale of chain cables and anchors, *see* 62 *&* 63 *Vict. c.* 28, *ss.* 13, 14, 15, 16, which supersede previous enactments on the same subject.

Sect. 5.

BURGLARY, HOUSEBREAKING, SACRILEGE, ETC.

Statutes.

24 *&* 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 1—*Definition of night.*]—For the purposes of this Act, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day. [*This re-enacts* 7 *W.* 4 *&* 1 *Vict. c.* 86, *s.* 4.]

43 *&* 44 *Vict. c.* 9 (*Statutes* (*Definition of Time*) *Act*, 1880), *s.* 1.]—Whenever any expression of time occurs in any Act of Parliament, deed, or other legal instrument, the time referred to shall, unless it is otherwise

specifically stated, be held in the case of Great Britain to be *Greenwich* mean time, and in the case of Ireland, Dublin mean time. [*This enactment overrides the decision in Curtis* v. *Marsh*, 28 *L. J. Ex.* 36.]

24 *& 25 Vict. c.* 96, *sect.* 50—*Sacrilege.*]—Whosoever shall break and enter any church, chapel, meeting-house, or other place of divine worship, and commit *any felony* therein, or being in any church, chapel, meeting-house, or other place of divine worship, shall commit *any felony* therein and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . [*This section re-enacts in extended terms* 7 *&* 8 *G.* 4, *c.* 29, *s.* 10, *which was confined to breaking into churches with intent to steal chattels. R.* v. *Baker*, 3 *Cox*, 581. *Alderson*, B. *For indictments, see post*, pp. 638, 639.]

Sect. 51—*Entering dwelling-house with intent to commit felony.*]—Whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary. [*This section re-enacts* 7 *&* 8 *G.* 4. *c.* 29, *s.* 11, *and adds to the common law definition of burglary. For indictment, see post, p.* 635].

Sect. 52—*Punishment of burglary.*]—Whosoever shall be convicted of the crime of burglary shall be liable . . . to be kept in penal servitude for life . . . *For indictment, see post*, p. 623.]

Sect. 53—*What buildings part of dwelling-house.*]—No building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this Act, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other. [*This section re-enacts* 7 *&* 8 *G.* 4, *c.* 29, *s.* 8.]

Sect. 54—*Entering dwelling-house in the night with intent to commit felony.*]—Whosoever shall enter any dwelling-house in the night, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years, . . . [*This section was new law in* 1861.]

Sect. 55—*Entering building within curtilage of dwelling-house.*]—Whosoever shall break and enter any building, and commit *any felony* therein, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof according to the provision hereinbefore mentioned (*s.* 53, *supra*), *or being in any such building shall commit any felony therein, and break out of the same*, shall be guilty of felony, and being convicted thereof shall be liable, . . . to be kept in penal servitude for any term not exceeding fourteen years, . . . [*This section re-enacts* 7 *&* 8 *G.* 4, *c.* 29, *s.* 14, *with the additions italicized. For indictment, see post*, p. 644.]

Sect. 56—*Housebreaking.*]—Whosoever shall break and enter any dwelling-house, *school-house*, shop, warehouse, or counting-house, and commit *any felony* therein, *or being in any dwelling-house, school-house, shop, warehouse, or counting-house, shall commit any felony therein, and*

break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, . . . to be kept in penal servitude for any term not exceeding fourteen years, . . . [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 15, *with the additions italicized. For indictments, see post*, pp. 639, 640.]

Sect. 57—*Entering house, etc., with intent to commit felony.*]—Whosoever shall break and enter any dwelling-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage, school-house, shop, warehouse, or counting-house, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable, . . . to be kept in penal servitude for any term not exceeding seven years, . . . [*This section was new law in* 1861. *For indictment, see post*, p. 644.]

Sect. 58—*Being found by night armed with intent to break and enter, etc.*]—Whosoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building whatsoever, and to commit any felony therein, or

shall be found by night having in his possession without lawful excuse (the proof of which excuse shall lie on such person) any picklock key, crow, jack, bit, or other implement of house-breaking, or shall be found by night having his face blackened or otherwise disguised with intent to commit any felony, or

shall be found by night in any dwelling-house or other building whatsoever with intent to commit any felony therein,

shall be guilty of a misdemeanor, and being convicted thereof shall be liable, . . . to be kept in penal servitude. . . . [*This section re-enacts* 14 & 15 *Vict. c.* 19, *s.* 1. *For indictments, see post*, pp. 636, 637.]

Sect. 59—*The like, after previous conviction of felony.*]—Whosoever shall be convicted of any such misdemeanor as in the last preceding section mentioned, committed after a previous conviction, either for felony or such misdemeanor, shall, on such subsequent conviction, be liable, . . . to be kept in penal servitude for any term not exceeding ten years . . . [*This section re-enacts* 14 & 15 *Vict. c.* 19, *s.* 2.]

Sect. 60—*Stealing in a dwelling-house.*]—Whosoever shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of five pounds or more, shall be guilty of felony, and being convicted thereof shall be liable, . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 12, *on which see R.* v. *Wenmouth*, 8 *Cox*, 348. *For indictment, see post*, p. 642.]

Sect. 61—*Stealing in a dwelling-house with threats.*]—Whosoever shall steal any chattel, money, or valuable security in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear, shall be guilty of felony, and being convicted thereof shall be liable, . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . [*This section re-enacts* 7 *W.* 4 & 1 *Vict. c.* 86, *s.* 5. *For indictment, see post*, p. 641.]

Sect. 104—*Persons loitering at night and suspected of felony against this Act may be apprehended.*]—*See ante*, p. 430.

14 & 15 *Vict. c.* 19 (*Prevention of Offences Act*, 1851), *s.* 11—*Apprehension of offenders.*]—It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence in the

night, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law.

Sect. 12—*Assaults in course of apprehension.*]—If any person liable to be apprehended under the provision of this Act shall assault or offer any violence to any person by law authorized to apprehend or detain him, or to any person acting in his aid and assistance, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, for any term not exceeding three years. [*See ante*, pp. 235, 236.]

Sect. 13—*Definition of* "night."]—The time at which the night shall commence and conclude in any offence against the provisions of this Act shall be the same as in cases of burglary (*ante*, p. 620).

59 & 60 *Vict. c.* 57 (*Burglary Act*, 1896), *s.* 1—*Jurisdiction of quarter sessions to try burglary.*]—(1) A court of quarter sessions shall, notwithstanding anything in the *Quarter Sessions Act*, 1842 (5 & 6 *Vict. c.* 38, *ante*, p. 126), have jurisdiction to try a person charged with burglary. (2) A justice of the peace when committing for trial a person charged with burglary, shall nevertheless commit him for trial before a court of assize, unless, owing to the absence of any circumstances which make the case a grave or difficult one, he thinks it expedient in the interests of justice to commit him for trial before a court of quarter sessions; and the *Assizes Relief Act*, 1889 (52 & 53 *Vict. c.* 12, *ante*, p. 126), shall apply.

Indictment for Burglary, and Larceny to the value of 5*l.* (24 & 25 *Vict. c.* 96, *s.* 52, *ante*, p. 621.)

Surrey, to wit: The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, about the hour of eleven of the clock in the night of the same day, the dwelling-house of J. N., situate at the parish of B., in the county of S., feloniously and burglariously did break and enter, with intent the goods and chattels of one K. O., in the said dwelling-house then being, feloniously and burglariously to steal, take, and carry away; and then in the said dwelling-house, one silver sugar-basin of the value of three pounds, six silver table-spoons of the value of three pounds, and twelve silver tea-spoons of the value of two pounds, of the goods and chattels of the said K. O., in the said dwelling-house then being found, feloniously and burglariously did steal, take, and carry away; against the form [*as ante*, p. 465].

This form of count charges two offences. *R.* v. *Hungerford*, 2 *East, P. C.* 518: *R.* v. *Withal*, 1 *Leach*, 88; *but has always been held good, notwithstanding the rules against duplicity* (*vide ante*, p. 82). *The second felony should be specifically stated.* *R.* v. *Bailey*, 23 *L. J.* (*M. C.*) 13; *Dears.* 224. *As to indictments for burglary with intent to commit* "rape," *see R.* v. *Watkins*, *C. & Mar.* 264, 2 *Mood. C. C.* 217. *The name of the owner or occupier of the house must be stated.* *R.* v. *White*, 1 *Leach*, 252; 2 *East, P. C.* 513, 780. *The word* "burglariously" *has been held sufficient to describe the offence without stating nocturnal entry.* *R.* v. *Thompson*, 2 *Cox*, 377, 445, *Patteson, J.*: *sed cont. cf. R.* v. *Waddington*, 2 *East, P. C.* 513.

If there be any doubt as to the ownership of the house or goods, you may

add other counts accordingly. It seems, however, that no ownership of the goods need be stated. R. v. *Clarke*, 1 *C. & K.* 421. *Also, as burglary is a breaking and entering of a dwelling-house, with intent to commit any felony (and whether a felony at common law or by statute is immaterial*, 1 *Hawk. c.* 38, *s.* 38), *if there be any doubt of the intent with which the offence was committed, it may be varied in different counts accordingly. The intent to steal, as well as the stealing, ought to be charged*; 1 *Hale*, 559; *but where an indictment for burglariously breaking and entering a dwelling-house, and then and there stealing goods therein, omitted to state the intent, it was held that the defendant might be convicted of the burglary if the larceny were proved, but not otherwise. R.* v. *Furnival, R. & R.* 445. *Further, if it be doubted whether the building is in strictness a dwelling-house a count should be added under s.* 55 (*post*, p. 644). *An indictment under section* 54 *will be in the same form, omitting the words* "break and," *and the words* "and burglariously." *Venue:* 7 *G.* 4, *c.* 64, *s.* 12 (*ante*, p. 43), *applies to burglary: R.* v. *Ruck*, 2 *Russ. Cr.* (6th ed.) 45, 46, *n.*

Felony (24 *& 25 Vict. c.* 96, *s.* 52): *penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour.*—24 *& 25 Vict. c.* 96, *s.* 52; 54 *& 55 Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 *& 25 Vict. c.* 96, *s.* 117 (*ante*, p. 431). *As to the punishment for the larceny, see s.* 60 (*ante*, p. 622).

This offence is now triable at quarter sessions, but the justices may commit for trial at assizes if to do so appears to be in the interests of justice. 59 *& 60 Vict. c.* 57, *s.* 1 (*ante*, p. 623): *and see ante*, p. 126.

Evidence.

Burglary, at common law, is the *breaking* and *entering* of the dwelling-house of another *in the night-time*, with intent to commit a felony therein: 1 *Hale*, 549, 556; 1 *Hawk. c.* 38, *ss.* 1, 2; 4 *Bl. Com.* 224; 3 *Co. Inst.* 63; 2 *Stephen Hist. Cr. L.* 56, 3 *Id.* 150; *R.* v. *Polly*, 1 *C. & K.* 77. A man cannot be indicted for burglary in his own house. *Kel.* (J.), 84: 2 *East, P. C.* 502, 506. At common law it would seem that a church may be the subject of burglary: 3 *Co. Inst.* 64; 1 *Hale*, 559: *R.* v. *Baker*, 3 *Cox*, 581; but church breaking is now dealt with under 24 *& 25 Vict. c.* 96, *s.* 50 (*ante*, p. 621). By 24 *& 25 Vict. c.* 96, *s.* 51 (*ante*, p. 621), the breaking out of the dwelling-house of another in the night-time, having entered it with intent to commit felony, or having committed a felony while in it, is also declared to be a burglary. In order to maintain the above indictment, the prosecutor must prove that the defendant broke and entered the dwelling-house of J. N., in the night-time, with an intent to steal the goods of K. O.: and whether he succeed or fail in this, he may proceed to prove a larceny of the goods of K. O. in the dwelling-house of J. N. to the value of 5*l.*, in the manner directed *post*, p. 642, and if he succeed in proving the larceny, but fail in proving it to have been committed in the dwelling-house of J. N., or the goods to have been of the requisite value, the defendant may be convicted of the simple larceny.

Having made these few general observations, we shall now proceed to state the evidence in burglary more particularly.

About the hour of eleven in the night.]—Until 7 *W.* 4 *& 1 Vict. c.* 86, *s.* 4 (*rep.*), which first declared that, for the purpose of burglary, the night should be considered to commence at 9 p.m., and to conclude at 6 a.m. of the next day, many nice questions arose as to what fell within

the meaning of "the night-time." By the old authorities with reference to this subject, the day was divided into three parts: daylight, twilight, and night. If the breaking and entering were in the night, it was burglary, if in daylight it was not. If it were committed during twilight, then, if there were not daylight, or *crepusculum*, enough, begun, or left, to discern a man's face withal, it was a burglary; otherwise not. 3 *Co. Inst.* 63; 1 *Hale*, 550; 1 *Hawk. c.* 38, *s.* 2; 4 *Bl. Com.* 224. But this not to extend to moonlight; for then many midnight burglaries would go unpunished. 4 *Bl. Com.* 224; 1 *Hale*, 551. The time appears now to be ascertained by reference to Greenwich mean time (*see ante*, p. 620).

The breaking and entering must both be committed in the night-time: if the breaking be in the day, and the entering in the night, or the breaking in the night, and entering in the day, it is no burglary. 1 *Hale*, 551. But the breaking may be on one night, and the entry on another, *Id.*, provided the breaking be with intent to enter, and the entry with intent to commit a felony. *Id.*: *R.* v. *Smith*, *R. & R.* 417: *R.* v. *Jordan*, 7 *C. & P.* 432.

The dwelling-house of J. N.]—To prove this allegation, the prosecutor must prove that the defendant broke and entered the dwelling-house of J. N., in which he was in the habit of residing; 4 *Co. Inst.* 64; or some building between which and the dwelling-house there was a communication, either immediate, or by means of a covered and enclosed passage leading from the one to the other. 24 & 25 *Vict. c.* 96, *s.* 53 (*ante*, p. 621). And evidence of a breaking and entering of such a building will sustain an indictment charging a breaking and entry of the dwelling-house. *R.* v. *Garland*, 1 *Leach*, 144; 2 *East, P. C.* 493, 512.

Every permanent building in which the tenant or owner and his family dwell and lie, is deemed a dwelling-house, and burglary may be committed in it. Even a set of chambers in an inn of court or college is deemed a distinct dwelling-house for this purpose. 1 *Hale*, 556; 3 *Co. Inst.* 65; 1 *Hawk. c.* 38, *s.* 18: *see Monks* v. *Dykes*, 4 *M. & W.* 567: *Fenn* v. *Grafton*, 2 *Bing.* (*N. C.*) 617; 3 *Scott*, 56. And it will be sufficient if any part of the family reside in the house. Thus, where a servant boy of the prosecutor always slept over his brewhouse, which was separated from his dwelling-house by a public passage, but occupied therewith, it was held, upon an indictment for burglary, that the brewhouse was a distinct dwelling-house of the prosecutor, although, being separated by the passage it could not be deemed to be part of the house in which he himself actually dwelt. *R.* v. *Westwood*, *R. & R.* 495. So, where upon an indictment for burglary in a shop, it appeared that the prosecutor had left his house without an intention of returning, and had let some of the rooms to lodgers, but continued his business there, and his apprentice and foreman and the foreman's wife, who was also his servant, employed in keeping the apartments clean, dwelt there, but received weekly wages, it was held to be the dwelling-house of the prosecutor. *R.* v. *Gibbons*, *R. & R.* 442. And where a counting-house, over which there were two rooms communicating by a trap door, which was never used, was broken open, and it appeared that the prosecutor's cooper and his family lived in the two rooms, upon a contract that they should have the rooms to live in and firing, and weekly wages, it was held that the counting-house was the dwelling-house of the prosecutor. *R.* v. *Stock*, *R. & R.* 185; 11 *R. R.* 605. The mere temporary absence of the owner and his family will not deprive the house of this protection the law gives it; as, for instance, if a man have a town and a country house, in which he resides alternately, and whilst he and his family are residing for the season in

the country house, the town-house is broken and entered; 1 *Hale*, 556; or if a man lock up his house and go a journey, and, during his absence, it is broken and entered: *R.* v. *Murray*, 2 *East, P. C.* 496; or if a barrister have a set of chambers, in which he resides during the term only, and during the vacation they may be broken and entered: 1 *Hale*, 556; in these and the like cases the houses and set of chambers respectively, even although no person actually resided in them at the time, must be deemed dwelling-houses, and the breaking and entering of them, burglary; provided it appear that the owners, when they left them, had an intention to return to them. 1 *Hale*, 556; *Fost.* 77: *R.* v. *Nutbrown*, *Fost.* 76. But burglary cannot be committed in a tent or booth in a market or fair, even although the owner lodge in it; 1 *Hawk. c.* 38, *s.* 35; 1 *Hale*, 557; because it is a temporary, not a permanent edifice. But if it be a permanent building, though used only for the purposes of a fair, it is a dwelling-house. *R.* v. *Smith*, 1 *M. & Rob.* 256. Breaking open a house in which no man resides, or is in the habit of residing, is no burglary, even though the owner use it for his meals and the purposes of his businesses; for it is not a dwelling-house. *R.* v. *Martin*, *R. & R.* 108. If a porter lie in a warehouse for the purpose of protecting goods, *R.* v. *Smith*, 2 *East, P. C.* 497; 2 *Leach*, 1019, *n.*; or a servant lie in a barn in order to watch thieves, *R.* v. *Brown*, 2 *East, P. C.* 501; 2 *Leach* 1018, *n.*; this does not make the warehouse or barn a dwelling-house, in which burglary can be committed. So, where the landlord of a dwelling-house, after the tenant had quitted it, put a servant into it, to sleep there at night, until he should re-let it to another tenant, but had no intention to reside in it himself: the judges held that it could not be deemed the dwelling-house of the landlord. *R.* v. *Davies*, 2 *Leach*, 876; 2 *East, P. C.* 499. And where the prosecutor left his house without an intention of returning to live in it, but retained it as a workshop and warehouse, and two women employed in his business, not as domestic servants, slept in the house merely for the purpose of taking care of it; but did not take their meals there, or use the house for any other purpose, it was held not to be the dwelling-house of the prosecutor. *R.* v. *Flannagan*, *R. & R.* 187. So, where the tenant had put all his goods and furniture into the house, preparatory to his removing to it with his family, but neither he nor any of his family had as yet slept in it: it was held not to be a dwelling-house in which burglary could be committed. *R.* v. *Hallard*, 2 *East, P. C.* 498: *R.* v. *Thompson*, *Id.*; 2 *Leach*, 771. And the same has been ruled, where, under such circumstances, the tenant had put a person (not being one of the family) into the house, for the protection of the goods and furniture in it, until it should be ready for his residence. *R.* v. *Harris*, 2 *Leach*, 701; 2 *East, P. C.* 498: *R.* v. *Fuller*, 2 *East, P.C.* 498; 1 *Leach*, 186, *n.* *See R.* v. *Jones*, 2 *East, P. C.* 499: *R.* v. *Flannagan*, *R. & R.* 187: and where a house was under repair and was not inhabited though containing property of the owner. *R.* v. *Lyons*, 1 *Leach*, 185; 2 *East, P. C.* 497.

A dwelling-house may be divided so as to form two or more dwelling-houses (within the meaning of the word in the definition of burglary), by letting a part of it to a tenant: provided there be no internal communication between the part so let and the remainder of the dwelling-house. Upon an indictment for burglary it appeared that the house in which the burglary was alleged to have been committed formed the centre of a building, having two wings; in one of which A. lived, and the other consisted of the dwelling-houses of B. and C. respectively; the centre consisted of three manufactories, in one of which A., B., D. and other persons were jointly concerned, and of the remaining two D. was the sole proprietor,

C. was merely in the employment of D. There was no internal communication between the centre building and the houses of A. and B., nor between it and the house of C., except a window in the house of C., which looked into a passage that ran the whole length of the centre building. One of the counts in the indictment alleged the centre building to be the dwelling-house of C.; but the judges held that the window merely was not such an internal communication as could make the centre building be deemed parcel of C.'s house. *R.* v. *Egginton*, 2 *B. & P.* 508; 5 *R. R.* 689. Whether a part of a dwelling-house let separately from the rest can be considered a distinct dwelling-house and the subject of burglary depends on the mode of its user. Thus if a man hire a shop, parcel of another man's house, and unconnected with it by internal communication, and the tenant work or trade in it, but never lie there, it is no dwelling-house, and burglary cannot be committed in it. 1 *Hale*, 557, 558. If, on the contrary, he or any part of his family lie there it is deemed his dwelling-house, and may be laid to be so in an indictment for burglary. *Id.*; *and see R.* v. *Rogers*, 1 *Leach*, 89, 428; 2 *East, P. C.* 506. So, if he let off part, and do not by himself or any of his family dwell in the other part, the part let off is the dwelling-house of the tenant, whether it communicate with the other part or not, but the part not let off is not the subject of burglary. But if the owner of the dwelling-house let the shop, which is unconnected by internal communication with the house, and also let some rooms in the house, which are connected with the other parts of it, to the same person; and the tenant or some of his family sleep in the rooms; a breaking and entering of the shop, in that case, will be burglary, and it may be laid to be committed in the dwelling-house of the landlord. *R.* v. *Gibson*, 1 *Leach*, 357; 2 *East, P. C.* 508. *See Lee* v. *Gansel*, 1 *Cowp.* 1, 8: *R.* v. *Stock*, *R. & R.* 185; 11 *R. R.* 605; 2 *Leach*, 1015: *R.* v. *North Collingham*, 1 *B. & C.* 578: *R.* v. *Great Bolton*, 8 *B. & C.* 71: *R.* v. *Ditcheat*, 9 *B. & C.* 176: *R.* v. *Macclesfield*, 2 *B. & Ad.* 870: *Fenn* v. *Grafton*, 2 *Bing.* (*N. C.*) 617; 3 *Scott*, 56.

The term "dwelling-house" includes in its legal signification all outhouses occupied with and immediately communicating with the dwelling-house. But by 24 *&* 25 *Vict. c.* 96, *s.* 53 (*ante*, p. 621), no building, although within the same curtilage (*see post*, p. 645) with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of that Act, unless there be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other.

Where the prosecutor's house consisted of two living-rooms, another room used as a cellar, and a washhouse on the ground-floor, and of three bedrooms upstairs, one of them over the washhouse, and the bedroom over the house-place communicated with that over the washhouse, but there was no internal communication between the washhouse and any of the rooms of the house, but the whole was under the same roof, and the defendant broke into the washhouse, and was breaking through the partition wall between the washhouse and the house-place, it was held that the defendant was properly convicted of burglary in breaking the house. *R.* v. *Burrowes*, 1 *Mood. C. C.* 274. But where adjoining to the house was a kiln, one end of which was supported by the wall of the house, and adjoining to the kiln a dairy, one end of which was supported by the wall of the kiln, the roofs of all three being of different heights, and there being no internal communication from the house to the dairy, it was held that burglary was not committed by breaking into the dairy. *R.* v. *Higgs*, 2 *C. & K.* 322, *Wilde*, C.J. To be within the meaning of this

section, the building must be occupied with the house in the same right; and therefore where a house let to and occupied by A. adjoined and communicated with a warehouse let to and occupied by A. and B., it was held that the warehouse could not be considered a part of the dwelling-house of A. *R.* v. *Jenkins*, *R. & R.* 244. If the building be not proved to be a dwelling-house the defendant must be acquitted of burglary. If there be any doubt as to the nature of the building broken and entered, a count may be inserted for breaking and entering a building within the curtilage. 24 & 25 *Vict. c.* 96, *s.* 55, *ante*, p. 621; *and see post*, p. 645.

Ownership of the dwelling-house.]—It has been already stated that the house must be occupied; and occupation rather than legal ownership must be proved. Occupation by a tenant at will is enough to make him owner for the purpose of this indictment. *R.* v. *Collett*, *R. & R.* 498. The person described as owner must be proved to occupy in his own right, however precarious his tenure. Thus, an insolvent has been held to be rightly described as owner of a house in which he lived, although it was rented by his daughter, and she carried on business but did not live there. *R.* v. *Bridges*, 1 *Cox*, 261, *Erle*, J.

Where it is laid to be the dwelling-house of J. N., proof that it was occupied by his wife and her establishment alone will support the indictment. In such a case it was at common law necessary to allege it to be the dwelling-house of the husband, even although the wife lived separate from him, and the house had been taken by her, and she paid the rent, taxes, etc. *R.* v. *Farre*, *Kel.* (*J.*) 43; 1 *Leach*, 1064, *n.*: *and see Boggett* v. *Frier*, 11 *East*, 301: *R.* v. *Smyth*, 5 *C. & P.* 201; 1 *M. & Rob.* 155, *Tenterden*, C.J.: *R.* v. *French*, *R. & R.* 491: *R.* v. *Wilford*, *R. & R.* 517. This rule does not apply where the wife has obtained a judicial separation under 20 & 21 *Vict. c.* 85, *s.* 25, or a protection order under *s.* 21 of that Act, or a justice's separation order under 58 & 59 *Vict.*, *c.* 39, *ss.* 4, 5. And since the *Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), a wife can hold her separate property without the intervention of trustees (*s.* 1), and has the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *femme sole*. (*See s.* 12, *ante*, p. 60.) If, therefore, the house in which a burglary is committed is the separate property of a married woman and in her occupation, it should be described in the indictment as hers.

If a man occupy a dwelling-house by his servants, and do not reside in it himself, the indictment must allege it to be the dwelling-house of the master; and evidence of an occupation by his servants will maintain the indictment. But a difficulty very frequently arises in such cases, to ascertain whether the occupation by the servant is in his own right or in that of his master. Where three persons were in partnership in a bank and brewhouse, the business of which was transacted in the lower rooms of the house in question, and a cooper in the service of the partnership, at weekly wages, lived with his family in the upper rooms, which communicated with the lower rooms by means of a trap-door and a ladder but there was also a separate entrance to these rooms from without; the lower rooms were broken and entered, and property stolen from them; and the judges held that the house was well laid in the indictment to be the dwelling-house of the partners. *R.* v. *Stock*, *R. & R.* 185; 2 *Leach*, 1015; 2 *Taunt*, 339; 11 *R. R.* 605. Where a warehouseman, with his family, lived in a dwelling-house upon his master's premises, for which and for coals he paid his master a rent of 11*l.* a year, and the master let the house, which was worth 20*l. per annum* to an ordinary tenant, to the

warehouseman at the lower rent, that he might reside upon the premises as a security, it was held that the warehouseman stood in the character of tenant, for the master might have distrained upon him for rent, and could not arbitrarily have removed him. *R.* v. *Jarvis*, 1 *Mood. C. C.* 7. *See R.* v. *Smyth* (*ante*, p. 628.) So where, with certain wages, a workman had a cottage rent-free to live in, it was held that, as the workman occupied this cottage for his own benefit, and not for the benefit of his master, it was well described as the dwelling-house of the workman. *R.* v. *Jobling*, *R. & R.* 525. Where a toll-gate house, occupied by a person employed by the lessee of the tolls to collect the tolls, at weekly wages, with the privilege of living in the toll-gate house erected by the trustees of the road for that purpose, was broken and entered in the night-time, it was held that the house was well described as the dwelling-house of the toll-gate keeper, because he had the exclusive possession, and it was unconnected with the premises of the lessee, who did not appear to have any interest in it. *R.* v. *Camfield*, 1 *Mood. C. C.* 42. So, where a gardener lived in the house of his master, quite separate from the dwelling-house of his master, and had the entire control of the house he lived in, and kept the key, it was held that it might be laid either as his or his master's house. *R.* v. *Rees*, 7 *C. & P.* 568, *Denman*, C.J. And where a servant lived rent-free in a house belonging to his master, and his master paid the taxes, and his master's business was carried on in the house, but the servant and his family were the only persons who slept in the house, and that part of the house in which his master's business was carried on was at all times open to those parts in which the servant lived; upon an indictment for breaking and entering that part of the house in which the master's business was carried on, it was held that it might be described as the servant's house; but it was not decided that it might not also be described as the house of the master. *R.* v. *Witt*, 1 *Mood. C. C.* 248; *and see R.* v. *Courtenay*, 5 *Cox*, 218 (*Ir.*). Where the house was described as the house of J. B., and it appeared that J. B. worked for one W., who did carpenter's work for a public company, and put J. B. into the house in question, which belonged to the company, to take care of it, and some mills adjoining, J. B. receiving no more wages than before he went to live in the house, it was held not rightly laid. *R.* v. *Rawlins*, 7 *C. & P.* 150. Where apartments in the house of a corporation are appropriated as lodgings for servants of the corporation, a burglary committed in them must be laid to have been committed in the dwelling-house of the corporation. *R.* v. *Picket*, 2 *East, P. C.* 501: *R.* v. *Hawkins*, *Fost.* 38; 2 *East, P. C.* 485: *and see R.* v. *Maynard*, 2 *East, P. C.* 501. So, a club-house cannot be laid as being a dwelling-house of the house-steward, who sleeps in it, and had charge of the property stolen. *R.* v. *Ashley*, 1 *C. & K.* 198. So, where apartments are assigned to any person in a royal palace, a burglary committed in them must be laid to have been committed in the mansion of the King. *R.* v. *Williams*, 1 *Hale*, 522; *and see R.* v. *Burgess* [1663], *Kel.* (*J.*) 27. But where a company in the country rented a house in London for their agent, in the upper part of which he resided with his family, and in the lower part transacted his business, it is reported to have been held by *Graham*, B., and *Grose*, J., that a burglary in the house was well laid to have been committed in the dwelling-house of the agent. *R.* v. *Margetts*, 2 *Leach*, 930. Where a house rented by A. and B., partners, was divided into two houses for the convenience of their respective families, the family of A. residing in one, the family of B. in the other, and there was no internal communication between them; a burglary in the part occupied by A. was held to be well laid to have been committed in the dwelling-house of

A., and not of the partners, although the rent of both houses was paid jointly out of the partnership funds. *R.* v. *Jones*, 1 *Leach*, 537; 2 *East*, *P. C.* 504. But a house, the joint property of partners in trade, in which their business is carried on, may be described as the dwelling-house of all the partners, though only one of the partners reside in it. *R.* v. *Athea*, 1 *Mood. C. C.* 329.

Where the room occupied by a guest in an inn is broken and entered in the night-time, an indictment for the burglary must lay it to have been committed in the dwelling-house of the innkeeper; 1 *Hale*, 557: *R.* v. *Prosser*, 2 *East*, *P. C.* 502; and the same in all other cases where the occupier has the use merely, and no interest in the apartment he occupies. *See* 1 *Hawk. c.* 38, *s.* 26. Apartments let to lodgers, however, admit of a different consideration. If part of a house be let to a lodger, who sleeps there, and no other person resides in the remainder of the house, a burglary in the lodgings must be laid to have been committed in the dwelling-house of the lodger. Where a coachman rented the loft over a coach-house and stables, and he and his family resided in it, a burglary committed in it was held to be well laid to have been committed in the dwelling-house of the coachman. *R.* v. *Turner*, 1 *Leach*, 305; 2 *East*, *P. C.* 492. So, if the house be let out to several lodgers, and the owner do not reside in it, a burglary in it must be alleged to have been committed in the dwelling-house of that person whose lodgings were broken and entered. *R.* v. *Rogers*, 1 *Leach*, 89; 2 *East*, *P. C.* 506: *and see* *R.* v. *Trapshaw*, 1 *Leach*, 427; 2 *East*, *P. C.* 506, 780. So, where the shop of a dwelling-house is divided into two shops, with a door in each opening towards the street, and another into a common passage leading to the common staircase, and the whole of the house is occupied by the two occupiers of the shops, the separate shop of each may be described as the dwelling-house of each. *R.* v. *Bailey*, 1 *Mood. C. C.* 23. And where a lodger occupied a sleeping-room on the first-floor, and the workshop in the attic, and the rest of the house was occupied by other lodgers, a burglary in the workshop was held by the judges to be well laid to have been committed in the dwelling-house of the lodger who rented it. *R.* v. *Carroll*, 1 *Leach*, 237; 2 *East*, *P. C.* 506. But if the owner of the house reside in a part of it, and let the rest out in lodgings —then, if the part occupied by the lodger be severed from that occupied by the owner, that is, if there be no internal communication between them, and the lodger and owner enter the house by different outer doors, a burglary in the part occupied by each respectively must be laid to have been committed in the dwelling-house of the person so occupying it; but if they be not severed, and the lodger and the owner enter by the same outer door, then the burglary must be laid to have been committed in the dwelling-house of the owner. 1 *Leach*, 90, *n.*; *Kel.* (*J.*) 83, 84; 2 *East*, *P. C.* 503. Where, therefore, the servant of the prosecutor dwelt in part of the house, and the rest, excepting the shop, was let off to lodgers; it was held that the shop in the prosecutor's occupation was properly described as the dwelling-house of the prosecutor. *R.* v. *Gibbons*, *R. & R.* 442. And where the prosecutor let to his son a shop, which had a separate entrance from the street, but communicated with the dwelling-house of the prosecutor by a back door, and the son used the shop as a place of business only, and did not reside there, it was held that the shop was properly described as the dwelling-house of the prosecutor. *R.* v. *Sefton*, *R. & R.* 202. If a person let off part of his house, but do not dwell in the part reserved, the part let is the dwelling-house of the tenant, but the part reserved is not the subject of burglary; it is not the dwelling-house of the tenant, because it forms no part of his holding, and

it is not that of the owner, because he does not dwell in it. *R.* v. *Wilson*, *R. & R.* 115. The governor of a workhouse, under a contract for seven years with the guardians and overseers of the poor, occupied and dwelt in the governor's house, with the exception of one room reserved to the guardians and overseers, as their office, of which the governor had one key, and the clerk of the guardians and overseers the other, but the governor's servant cleaned the room; upon an indictment for breaking and entering this room, it was held that it could not be described as the dwelling-house of the governor. *Id.: and see R.* v. *Frowen* (*infra*).

If there be any doubt whether the house broken and entered should be described as the dwelling-house of A., B., or C. the pleader should obviate the difficulty by inserting counts alleging it to be the dwelling-house of A., B., and C. respectively; although there can be little doubt that a variance in this respect would be amended at the trial (*see ante*, pp. 52, 296, 300).

Situation of dwelling-house.]—The *local description* of the house must be proved as laid; if there be a variance between the indictment and evidence, in the parish, etc., where the house is alleged to be situate, the defendant, unless the variance is amended (*ante*, pp. 52, 300), must be acquitted of the burglary (although he may, if the indictment charge a burglary and stealing, be convicted of the simple larceny); *R.* v. *Brookes*, *C. & Mar.* 543, *Patteson*, J.: *R.* v. *Jackson*, 2 *Russ. Cr.* (6th ed.) 45. If it be not stated in the indictment where the house is situate, it shall be taken to be situate at the place laid as special venue. *R.* v. *Napper*, 1 *Mood. C. C.* 44. And if, two parishes having been named, the house is stated to be "at the parish aforesaid," the last parish shall be intended. *R.* v. *Richards*, 1 *M. & Rob.* 177. Where a parish and a union were named it was held that the words "there situate" referred to the parish. *R.* v. *Frowen*, 4 *Cox*, 266. It is sufficient to allege that the burglary was committed at a *place* named (as "at N., in the county aforesaid"), without stating it to be a parish, vill, chapelry, or the like. *R.* v. *Brookes*, *C. & Mar.* 543. In *R.* v. *Bennett*, *R. & R.* 289, upon an indictment for breaking and entering a dwelling-house in the parish of A., it appeared that the outhouse broken and entered was in the parish of B., but the dwelling-house with which it was connected and occupied was in the parish of A., and the point was raised, but not decided, whether under such circumstances the indictment was satisfied. In *R.* v. *Howell*, 1 *Cox*, 190, where a house was situate in two parishes, it was held sufficient to describe it as in the parish in which lay the part broken into.

To avoid difficulty, different counts should be inserted, varying the local description.

Break.]—There must be a *breaking* of the house, either actual or constructive, to constitute burglary. If a man leave his doors or window open, and another enter therein with intent to commit a felony, it is no burglary. 1 *Hale*, 551; 3 *Co. Inst.* 64. So if there be an aperture in a cellar window to admit light, through which a thief enters in the night, this is not burglary. *R.* v. *Lewis*, 2 *C. & P.* 628: *R.* v. *Spriggs*, 1 *M. & Rob.* 357.

An actual breaking is, where the offender for the purpose of getting admission for any part of his body, or for a weapon or other instrument, in order to effect his felonious intention, breaks a hole in the wall of a house, breaks a door or window, picks the lock of a door, or opens it with a key, or even by lifting a latch, or unlooses any other fastening to doors or windows which the owner has provided. 3 *Co. Inst.* 64; 1 *Hale*,

552. *Pugh* v. *Griffith*, 7 *A. & E.* 827, 836, *Coleridge*, J. Thus, an entry effected by taking out the glass from a door, was held to be burglary. *R.* v. *Smith*, *R. & R.* 417. So also where a pane of glass was broken, *R.* v. *Perkes*, 1 *C. & P.* 300; 15 *R. R.* 280; *R.* v. *Tucker*, 1 *Cox*, 73: or a cut pane of glass was pushed out. *R.* v. *Bird*, 9 *C. & P.* 44. And where the defendant pulled down the sash of a window which had no fastening, and was only kept in its place by the pulley-weight, it was held to be burglary, although there was an outer shutter which was not put to. *R.* v. *Haines*, *R. & R.* 451. So, where he raised a sash-window which was shut down close, but not fastened, though it had a hasp which might have been fastened. *R.* v. *Hyams*, 7 *C. & P.* 441. And where a window opening upon hinges, and fastened with wedges, but so that by pushing against it, it could be opened, was opened; it was held to be burglary. *R.* v. *Hall*, *R. & R.* 355. So, where a party thrust his arm through the broken pane of a window, and in so doing broke some more of the pane, and thus got at and removed the fastening of the window and opened it, it was held to be a sufficient breaking. *R.* v. *Robinson*, 1 *Mood. C. C.* 327: *and see Ryan* v. *Shilcock*, 7 *Ex.* 72. In *R.* v. *Callan*, *R. & R.* 157, the prisoner after committing larceny in a dwelling-house by night broke out of the premises by lifting up a heavy flap of a cellar, which was not bolted, and upon a question reserved whether this was a sufficient breaking out to constitute a burglary, the judges were equally divided. *Cf. R.* v. *Lawrence*, 4 *C. & P.* 231. But in *R.* v. *Russell*, 1 *Mood. C. C.* 377, it was decided that lifting up the flap of a cellar usually kept down by its own weight is a sufficient breaking for the purpose of burglary. *See R.* v. *Brown*, 2 *East*, *P. C.* 487; 2 *Leach*, 1016, *n.* If a window be partly open, but not sufficiently to admit a person, the raising of it so as to admit a person, is not a breaking of the house. *R.* v. *Smith*, 1 *Mood. C. C.* 178. Obtaining admission to a house by getting down the chimney is burglary; for the chimney is as much closed as the nature of things will admit. *R.* v. *Brice*, *R. & R.* 450; *and see* 1 *Hawk*, *c.* 38, *s.* 6; 1 *Hale*, 552.

A constructive breaking is where the offender, with intent to commit a felony, obtains admission by some artifice, trick, or threat, for the purpose of effecting it. As, for instance, if a man knocks at a door, and upon its being opened, rushes in with a felonious intent: or upon pretence of taking lodgings, falls upon the landlord and robs him: or procures a constable to gain admittance in order to search for traitors, and then binds the constable and robs the house; all these entries have been adjudged burglaries, although there were no actual breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process. 1 *Hawk. c.* 38, *ss.* 9, 10; *Bl. Com.* 226. So, where the defendants frightened the inmates of the house into admitting them. *R.* v. *Swallow*, 2 *Russ. Cr.* (6th ed.), 8. So, where the defendant obtained admission by promising a boy, who was in care of the house, some ale; and whilst the boy was gone for the ale, robbed the house: this was held to be burglary. *R.* v. *Hawkins*, 2 *East*, *P. C.* 485; *Fost*, 38. Nay, if a servant conspires with a robber, and let him into the house by night, this is burglary in both; 1 *Hale*, 553; 1 *Hawk. c.* 38, *s.* 14: *R.* v. *Cornwall*, 2 *Str.* 881. But if a servant pretending to agree with a robber, opens the door and let him in for the purpose of detecting and apprehending him, this is no burglary, for the door is lawfully open. *R.* v. *Johnson*, *C. & Mar.* 218, *Maule*, J., and *Rolfe*, B.

And the breaking necessary to constitute burglary is not restricted to the breaking of the outer wall, or doors, or windows of a house; if the thief gets admission into the house by the outer door or window being open, and afterwards breaks or unlocks, etc., an inner door, for the

purpose of entering one of the rooms, etc., in the house, it is burglary. 1 *Hale*, 553; *R.* v. *Johnson*, 2 *East*, *P. C.* 488. So, if a servant opens his master's chamber-door, or the door of any other chamber not immediately within his trust, with a felonious design; or if any other person lodging in the same house, or in a public inn, open and enter another door with such evil intent, it is burglary. 1 *Hale*, 553, 554. It is doubted, whether breaking open cupboards, etc., in the inside of a house, affixed to the freehold, is burglary: *see* 1 *Hale*, 527; *Fost.* 108; and Mr. Justice *Foster*, *in favorem vitæ*, recommended that it should not be so considered. *Fost.* 109. And clearly, the breaking open chests, etc., in a dwelling-house is not burglary. 1 *Hale*, 553, 554. The breaking must be of some part of the house; and, therefore, when the defendant opened an area gate with a skeleton key, and thence passed through an open door into the kitchen, it was held not to be a breaking, there being no free passage from the area to the house in the hours of sleep. *R.* v. *Davis*, *R. & R.* 322. And upon the same principle it was held that the breaking of a door which was in the outward fence of the curtilage of a dwelling-house, and opened, not into any building, but into the yard only, was not a breaking of the dwelling-house. *R.* v. *Bennett*, *R. & R.* 289. Where a shutter-box partly projected from a house, and adjoined the side of the shop-window, which side was protected by wooden panelling, lined with iron; it was held that the breaking and entering the shutter-box did not constitute burglary. *R.* v. *Paine*, 7 *C. & P.* 135.

And enter.]—And there must be an *entry*, as well as a breaking, to constitute burglary; although we have seen that the entry need not be on the same night as the breaking. (*Ante*, p. 625.) Any the least degree of entry, however, with any part of the body, or with any instrument held in the hand, is sufficient; as, for instance, after breaking the door or window, etc., to step over the threshold, to put a hand, or a finger, *R.* v. *Davis*, *R. & R.* 499, or a hook or other instrument in at a window to draw out goods, or a pistol, with intent to kill or demand money, are all of them burglarious entries. 1 *Andr.* 114; 1 *Hale*, 555; 1 *Hawk. c.* 38, *ss.* 11, 12; 3 *Co. Inst.* 54: *R.* v. *Gibbons* [1752] *Fost.* 107. *See R.* v. *Meal*, 3 *Cox*, 70, as to the amount of evidence necessary. So, if the defendant introduce his hand through a pane of glass broken by him, between the outer window and an inner shutter, for the purpose of undoing the window-latch, it is a sufficient entry. *R.* v. *Bailey*, *R. & R.* 341: *and see R.* v. *Tucker*, 1 *Cox*, 73. So, an entry down a chimney is a sufficient entry into a house, for the chimney is part of the house. *R.* v. *Brice*, *R. & R.* 450. But an entry through a hole in the roof left for the purpose of admitting light is not a sufficient entry to constitute burglary; for a chimney is a necessary opening and needs protection; whereas, if a man choose to leave a hole in the wall or roof of his house, instead of a fastened window, he must take the consequences. *R.* v. *Spriggs*, 1 *M. & Rob.* 357. It has even been said that discharging a loaded gun into a house is a sufficient entry. 1 *Hawk. c.* 38, *s.* 11; *secus* 1 *Hale*, 555. But there must be an entry: if, for instance, a man assault a house, or even break a hole in it, and before the entry the owner fling his money to the thief, it would not be burglary. 1 *Hawk. c.* 38, *s.* 3; 1 *Hale*, 555. So, if the instrument with which the house is broken happen to enter the house, but without any intention on the part of the burglar to effect his felonious intent (as, for instance, to draw out the goods) with it, this will not be a sufficient entry to constitute a burglary. *R.* v. *Hughes*, 1 *Leach*, 406; 2 *East*, *P. C.* 491. *See R.* v. *Roberts*, 2 *East*, *P. C.* 487: *R.* v. *O'Brien*, 4 *Cox*, 398. Where, therefore, the defendant threw up a window, and introduced a crow-bar to force the

shutters, which were three inches from the window, but no part of his hand was within the window, this was held not to be an entry, although the jury found that the defendant did this with intent to steal. *R.* v. *Rust*, 1 *Mood. C. C.* 183. Where the breaking with intent to commit a felony is proved, but there is no proof of entry, the jury may convict the prisoner of the attempt to commit burglary. *R.* v. *Spanner*, 12 *Cox*, 155, *per Bramwell*, B., *after consultation with Martin*, B.

Entry without breaking.]—The cases as to what constitutes entry are equally applicable to offences under 24 & 25 *Vict. c.* 96, *s.* 54 (*ante*, p. 621), which punishes entry by night into a dwelling-house without breaking with intent to commit a felony therein.

With intent, etc.]—The intent laid in the indictment must be to commit some *felony* (and whether a felony at common law or by statute is immaterial; *Kel.* (J.), 46, 67; 1 *Hawk. c.* 38, *s.* 38; 2 *East*, *P. C.* 513) in the dwelling-house, such as larceny, murder, rape, etc.; and the intent must be proved as laid. Where the intent is at all doubtful it may be laid in different ways in different counts. *R.* v. *Thompson*, 2 *East*, *P. C.* 515; 2 *Leach*, 1105, *n.*

Where the intent laid was to kill a horse, and the intent proved was merely to lame him, in order to prevent him from running a race, the variance was held fatal. *R.* v. *Dobbs*, 2 *East*, *P. C.* 513. If the intent laid be to murder, and the intent proved be to beat the party merely, the variance is fatal. 1 *Hale*, 561. So, where the intent laid was to steal, and the intent proved was to rescue uncustomed goods which had been seized, the judges held that the indictment was not sustained by the evidence. *R.* v. *Knight*, 2 *East*, *P. C.* 510. But where the indictment alleged the intent to be generally "the goods and chattels in the said dwelling-house then and there being" to steal, and charged the defendant with stealing the goods of A. therein, it was held to be satisfied by proof of a breaking into the house, with intent to steal the goods there generally, though the goods actually stolen did not belong to A. alone. *R.* v. *Clarke*, 1 *C. & K.* 421: *R.* v. *Lawes*, 1 *C. & K.* 62.

The best evidence of the intent is, that the defendant actually committed the felony alleged to have been intended by him: *see R.* v. *Locost*, *Kel.* (J.) 30: or you may give in evidence any other facts from which the intent may be presumed by the jury. (*See ante*, p. 308.) Where the defendant was discovered in the chimney of a shop in the night-time, and the jury found him guilty of the burglary with intent to steal, it was held that the evidence was sufficient to warrant the conviction. *R.* v. *Brice*, *R. & R.* 450.

And then and there in the said dwelling-house, etc.]—There must be an actual and not merely a constructive taking, but in all other respects the larceny must be proved in the manner directed (*ante*, p. 434, *et seq.*). Then prove that it was committed in the dwelling-house of J. N., situate as described in the indictment, or in some building occupied therewith and connected or communicating therewith, either immediately or by means of a covered and enclosed passage. 24 & 25 *Vict. c.* 98, *s.* 53 (*ante*, p. 621; *post*, p. 645). It seems, however, that to convict the defendant of the felony charged to have been committed, it must appear to have been concurrent with the burglary; you cannot give evidence of a felony committed at a different time. Where it appeared in evidence, that, upon entering the house at three o'clock in the day, the owner found that some person had removed certain goods to a different part of the house

from that in which he had placed them, seemingly for the purpose of stealing them; and the defendants afterwards, on the same evening, having broken and entered the house, were taken in it, before they had attempted to move or carry away anything: having failed at the trial to prove the burglary, the prosecutor was proceeding to prove the defendants guilty of the antecedent larceny: but the court refused to receive the evidence, saying, that the transactions were perfectly distinct, and that the prosecutor might as well attempt to prove a larceny committed seven years before. *R.* v. *Vandercomb*, 2 *Leach*, 708; 2 *East, P. C.* 514.

If you succeed in proving a larceny, but fail in proving it to have been committed in the dwelling-house, or the goods to be of the value of five pounds, and if you also fail in proving the burglary, the defendant may be convicted of the simple larceny, or of stealing in the dwelling-house. *R.* v. *Withal*, 1 *Leach*, 88; 2 *East, P. C.* 515, 517: *and see R.* v. *Compton*, 3 *C. & P.* 418. If two or more are indicted, one may be found guilty of the burglary and larceny, and the other of the larceny only. *R.* v. *Butterworth*, *R. & R.* 520 (*see ante*, p. 87); *R.* v. *Turner*, 1 *Sid.* 171, *contra*. Where a room-door was latched, and a person lifted the latch and entered the room, and concealed himself for the purpose of committing a larceny there, which he afterwards effected; and two other persons were present with him when he lifted the latch, for the purpose of assisting him to enter, and screened him from observation by opening an umbrella, it was held that those two were in law parties to the breaking and entering, and were answerable for the larceny which afterwards took place, though they were not near the spot when it was perpetrated. *R.* v. *Jordan*, 7 *C. & P.* 432. Where the breaking is on one night, and the entry the night after, a person present at the breaking, though not present at the entering, is in law guilty of the whole offence. *Id.*

Indictment for Burglary by breaking out of a House after stealing therein. (24 & 25 *Vict. c.* 96, *s.* 51, *ante*, p. 621.)

Surrey, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, about the hour of eleven in the night of the same day, being in the dwelling-house of J. N., situate in the parish of B., in the county of S., one silver sugar-basin of the value of three pounds, six silver table-spoons of the value of three pounds, and twelve silver tea-spoons [of the value of two pounds], of the goods and chattels of one J. O., in the said dwelling-house of the said J. N. then being, in the said dwelling-house feloniously did steal, take and carry away; and that he the said J. S. being so as aforesaid in the said dwelling-house, and having committed the felony aforesaid, in manner and form aforesaid, afterwards, to wit, on the same day and year aforesaid, about the hour of eleven in the night of the same day, feloniously and burglariously did break out of the said dwelling-house of the said J. N.; against the form [*as ante*, p. 465.]

An indictment stating that the prisoner "did break to get out," or "did break and get out," was held bad, the words of the statute being "break out." R. v. *Compton*, 7 *C. & P.* 139.

Felony: 24 & 25 *Vict. c.* 96, *s.* 51 (*ante*, p. 621). *This section of the statute declares, that "whosoever shall enter the dwelling-house of another, with intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be guilty of burglary." The punishment is the same as stated in the last precedent* (*ante*, p. 624).

This offence is now triable at quarter sessions. 55 & 56 *Vict.* c. 57, s. 1 (*ante*, pp. 126, 623).

Evidence.

Prove a larceny in the dwelling-house of J. N., as directed *ante*, pp. 434, 634. And prove a breaking of the house by the defendant, in the night-time in order to get out of the same. In *R.* v. *Lawrence*, 4 *C.* & *P.* 231, *Bolland*, B., held that escaping from a house by lifting a heavy flap-door which had no fastening, but was kept down by its own weight, was not a sufficient breaking *out* of a house, although, as we have seen (*ante*, p. 632), it would constitute a good breaking *into* a house. But in *R.* v. *McKearney*, *Jebb* (*Circ. Ct. Ir.*) 96, it was held that a man was properly convicted of burglary by breaking out, who broke a skylight from within and put his head out but was struck and captured before he could get out. It is not the less a burglary, because the defendant was *lawfully* in the house, as a lodger, or a guest at an inn. *R.* v. *Wheeldon*, 8 *C.* & *P.* 747.

If it be doubtful whether a felony can be proved, but there be sufficient evidence of an intent to commit a felony, a count may be added stating the intent. To prove this count, the prosecutor must prove the entry, the intent as in other cases, and the breaking out.

Indictment for being found by Night armed, with intent to break into a Dwelling-house and to commit a Felony therein. (24 & *Vict.* c. 96, s. 58, *ante*, p. 622.)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of December, in the year of our Lord ——, about the hour of eleven in the night of the same day, at the parish of ——, in the county of London, and within the jurisdiction of the said Court, was found unlawfully armed with a certain dangerous and offensive instrument, that is to say a crow-bar [*any dangerous or offensive weapon or instrument whatsoever*], with intent then to break and enter [*break or enter*] into a certain dwelling-house of J. S. there situate, and the goods and chattels in the said dwelling-house then being feloniously to steal, take, and carry away; against the form (*as ante*, p. 465). *It is not necessary to aver that the goods and chattels were the property of any particular person*; *R.* v. *Lawes*, 1 *C.* & *K.* 62 (*post*, p. 639). *The indictment must, as in burglary, allege the ownership and situation of the premises intended to be broken into*, *R.* v. *Jarrald*, *L.* & *C.* 301; 32 *L. J.* (*M. C.*) 258; 9 *Cox*, 307 (*C. C. R.*); *and it seems also that it ought to allege the particular felony intended to have been committed. Id. per Crompton*, J. *For the form of an indictment after a previous conviction, under* 24 & 25 *Vict.* c. 96, s. 59 (*ante*, p. 622), *see post, Book II. Part V., tit.* "*Offences after previous convictions.*"

Misdemeanor: penal servitude for not less than three years and not exceeding five years, or imprisonment, with or without hard labour, not exceeding two years; 24 & 25 *Vict.* c. 96, s. 58; 54 & 55 *Vict.* c. 69, s. 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour*, 24 & 25 *Vict.* c. 96, s. 117 (*ante*, p. 431). *And for the like offence after a previous conviction for felony or such misdemeanor, penal servitude for not more than ten nor less than three years, or imprisonment, with or without hard labour, not exceeding two years*, 24 & 25 *Vict.* c. 96, s. 59; 54 & 55

Vict. c. 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

Evidence.

Prove that the defendant was found by night, that is, between nine o'clock p.m. and six o'clock a.m., *see* 24 & 25 *Vict. c.* 96, *s.* 1 (*ante*, p. 620), and armed as alleged in the indictment. Then prove the intent, which may be inferred from the nature of the weapon or instrument with which the defendant is found armed, the place in which he is found, or from his declarations, or from other circumstances (*see ante*, pp. 303, 308, 341). It is necessary that the defendant should be proved to have had the intent of breaking into or entering some particular building, and proof of a general intent to break into houses will be insufficient. *R.* v. *Jarrald*, *ubi supra*.

Indictment for having in Possession, by Night, Implements of Housebreaking. (24 & 25 *Vict. c.* 96, *s.* 58, *ante*, p. 622.)

Commencement as in last precedent]—about the hour of eleven in the night of the same day, at the parish of ——, etc. (*see last precedent*), was found, he the said J. S., then and there, by night as aforesaid, unlawfully having in his possession, without lawful excuse, certain implements of housebreaking, that is to say, ten picklocks, ten keys, and two crows; against the form [*as ante*, p. 465]. *In the printed copies of* 24 & 25 *Vict. c.* 96, *s.* 58, *as also in those of the repealed enactment*, 14 & 15 *Vict. c.* 19, *s.* 1, *the words are thus punctuated*,—"any picklock key, crow, jack, bit, or other implement of housebreaking:" *but it seems that there should be a comma between the words* "picklock" and "key;" *see R.* v. *Oldham*, 2 *Den.* 472; 3 *C. & K.* 249; 21 *L. J.* (*M. C.*) 134 (*C. C. R.*) *An indictment on this part of the section need not allege an intent to commit a felony. R.* v. *Bailey*, *Dears.* 244; *L. J.* (*M. C.*) 13; 6 *Cox*, 241 (*C. C. R.*).

Misdemeanor: 24 & 25 *Vict. c.* 96, *s.* 58 (*ante*, p. 622). *See the last precedent.*

Evidence.

Prove that the defendant was found by night (that is, between nine p.m. and six a.m., *see supra*), having in his possession one or more of the implements of housebreaking mentioned in the indictment. Every instrument which from its nature is capable of being used for housebreaking, although ordinarily used for lawful purposes, *e.g.* a house door-key, or a pair of pincers, is an implement of housebreaking within the statute, if the jury are of opinion, from the circumstances, that at the time when the defendant was found in possession of it, it was his intention to use it as such. *R.* v. *Oldham*, 2 *Den.* 472; 3 *C. & K.* 249; 21 *L. J.* (*M. C.*) 134 (*C. C. R.*). The lawful excuse for possession, if any, must be proved by the defendant. Where several persons are found at night acting in pursuance of a common purpose to break into houses, but one only has housebreaking implements, all may be convicted of possessing them. *R.* v. *Thompson*, 11 *Cox*, 362 (*C. C. R.*).

Semble, that it was a misdemeanor at common law to *have possession* of instruments of housebreaking, with intent to break into a house and steal the goods therein: *see R.* v. *Lee*, *Cas.* (*K. B.*) *temp. Hardw.* 371 (*cit.*); *sed quære*; *see ante*, p. 3.

Indictment for breaking and entering a Church or Chapel and stealing therein. (24 & 25 *Vict. c.* 96, *s.* 50, *ante*, p. 621.)

Commencement as ante, p. 433]—the church of the parish of ——, in the county of ——, [*or* a certain chapel, situate in the parish of ——, in the county of ——] ("*any church, chapel, meeting-house, or other place of divine worship*") feloniously did break and enter, and then, in the said church, one silver cup, of the goods and chattels of the parishioners of the said parish, feloniously did steal, take, and carry away; against the form [*as ante*, p. 465].

If a chapel which is private property be broken and entered, lay the property as in other cases of larceny.

If a parish church be broken and entered, add a count stating the chattel to be the chattel of the rector, and another stating it to be the chattel of the churchwardens. See 2 *East, P. C.* 651.

As to burglary in a church, see R. v. *Baker*, 3 *Cox*, 581. *As to breaking into a church with intent to commit felony, see* 24 & 25 *Vict. c.* 96, *s.* 57 (*ante*, p. 622).

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour—24 & 25 *Vict. c.* 96, *s.* 50 (*ante*, p. 621); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances, and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant broke and entered the church or chapel described in the indictment, in the same manner as in burglary (*ante*, p. 631), except that it need not be proved to have been done in the night-time. The vestry is part of the church for this purpose. *R.* v. *Evans*, *C. & Mar.* 298. So is a church tower, unless it is a structure quite separate from the church. *R.* v. *Wheeler*, 3 *C. & P.* 585. If the evidence fail in this respect, the defendant may be convicted for simple larceny. Then prove the larceny, as directed (*ante*, *p.* 434, *et seq.*) The words "any goods" in 1 *Edw.* 6, *c.* 12 (*rep.*), were held not to be confined to goods used for divine service, but to extend to articles used in the church to keep it in repair, as a pot used to hold charcoal for airing the vaults, and a snatch-block used to raise weights if the bells wanted repair. *R.* v. *Rourke*, *R. & R.* 386. 7 & 8 *G.* 4, *c.* 29, *s.* 10 (*rep.*), contained the word "chattel": but the present enactment extends to the commission of *any felony* in a church. In *R.* v. *Nicholas*, 1 *Cox*, 218, on an indictment for breaking into a church in the night-time, it was held unnecessary to lay the ownership of the property in the church in any person. The allegation of property in the parishioners, rector or churchwardens, will be sufficiently proved by evidence that the church is a parish church; but the property in goods in a chapel must be proved as in ordinary cases. Upon an indictment for stealing goods from a dissenting chapel, the first count of the indictment described them as the property of the trustees of the chapel, and the second as the property of a person who was employed to take care of the chapel, kept the keys of the chapel, and received a salary for so doing; the first count was not proved, and the judges held that the second could not be sustained, because the goods could not be considered as belonging to the chapel-keeper. *R.* v. *Hutchinson*, *R. & R.* 412. Where a prisoner was indicted for stealing a Bible, a hymn-book, and a pair of brass sconces, the property of J. B. and others, which it

appeared had been stolen from a Methodist chapel at Fakenham, and the Bible and hymn-book had been presented to the Society of Methodists there, of which J. B. was one, and also a trustee of the chapel, but the trust deed was not produced, *Parke*, J., held, that as J. B. was one of the society, the property was well laid in him. *R.* v. *Boulton*, 5 *C. & P.* 537. Where the property stolen was a box containing money collected for the poor, which was screwed to the outside of a pew in the centre aisle of a church, the box was held not to be affixed to the freehold, and the property was held to be well laid in the churchwardens in their individual names. *R.* v. *Wortley*, 1 *Den.* 162; 2 *C. & K.* 283; 2 *Cox*, 32. Lastly, prove that the church or chapel is situate as described in the indictment.

The words "meeting-house, or other place of divine worship," in 24 & 25 *Vict. c.* 96, *s.* 50, which were not contained in 7 & 8 *G.* 4. *c.* 29, *s.* 10 (*rep.*), apply to places of worship not belonging to the Church of England.

Indictment for stealing in and breaking out of a Church or Chapel. (24 & 25 *Vict. c.* 96. *s.* 50, *ante*, *p.* 621.)

Commencement as ante, p. 433]—one silver cup, of the goods and chattels of the parishioners of the parish of ——, in the county of ——, in the church of the said parish, there situate, feloniously did steal, take, and carry away; and that the said J. S., so being in the said church as aforesaid, afterwards, and after he had committed the said felony in the said church as aforesaid, on the day and year aforesaid, feloniously did break out of the said church; against the form [*as ante*, p. 465]. *See the last precedent.*

Felony, 24 & 25 *Vict. c.* 96, *s.* 50. *See the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 *c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the larceny, as directed (*ante*, p. 434); prove the breaking out as in burglary (*ante*, p. 631), except that it need not be proved to have been done in the night-time; and prove the local situation of the church or chapel, as described in the indictment.

Indictment for Housebreaking. (24 & 25 *Vict. c.* 96, *s.* 56, *ante*, p. 621.)

Commencement as ante, p. 433.]—the dwelling-house of J. N., situate in the parish of ——, in the county of ——, feloniously did break and enter, with intent the goods and chattels of the said J. N., in the said dwelling-house then being, feloniously to steal, take, and carry away, and one dressing-case of the value of five pounds, of the goods and chattels of the said J. N., then in the said dwelling-house then feloniously did steal, take, and carry away; against the form [*as ante*, p. 465]. *See as to the form of the indictment, R.* v. *Andrews, C. & Mar.* 121, *overruling R.* v. *Smith*, 2 *M. & Rob.* 115 (*post*, p. 641). *An indictment was held sustainable, which charged as a misdemeanor that the defendant unlawfully broke and entered the dwelling-house of J. N., with intent the goods and chattels in the said dwelling-house then being to steal, without stating whose goods he intended to steal. R.* v. *Lawes*, 1 *C. & K.* 62. *See now* 24 & 25 *Vict. c.* 97, *s.* 57 (*ante*, p. 622). *If the evidence fail to prove the actual stealing,*

but the breaking, entry and intent to steal be proved, the prisoner may be convicted under this indictment of the felony described in 24 & 25 *Vict. c.* 96, *s.* 57, *supra. If the evidence fail to prove the breaking, but if the stealing in the dwelling-house to the amount of* 5*l. be proved, the prisoner may be convicted of the felony described in* 24 & 25 *Vict. c.* 96, *s.* 60 (*ante*, p. 622).

Felony 24 & 25 *Vict. c.* 96, *s.* 56 (*ante*, p. 621): *penal servitude for not more than fourteen nor less than three years, or imprisonment not exceeding two years, with or without hard labour.*—24 & 25 *Vict. c.* 96, *s.* 56; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2, (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 & 25 *Vict. c.* 96, 117 (*ante*, p. 431).

Evidence.

The dwelling-house of J. N.]—This must be proved in the same manner as in burglary. As to what buildings are included in the term dwelling-house, *see* 24 & 25 *Vict. c.* 96, *s.* 53 (*ante*, p. 621).

Did break and enter.]—This must be proved in the same manner as in burglary; 1 *Hale*, 596; *Fost.* 108 (*see ante*, p. 631); except that it need not be proved to have been done in the night-time, but if it be proved to have been done in the night-time, so as to amount to burglary, the defendant may notwithstanding be convicted upon this indictment.

In the said dwelling-house, etc.]—There must be an actual and not merely a constructive taking, but in all other respects the larceny may be proved in the manner directed *ante*, p. 434, *et seq.* Where the prosecutor, in consequence of the threat of an armed mob, fetched provisions out of his house and gave them to the mob, who stood outside the door, this was held not to be stealing in the dwelling-house. *R.* v. *Leonard, Cheshire Special Commission*, 1842. Where it appeared that the prisoner, after breaking and entering the house, took two half-sovereigns from a bureau in one of the rooms, but, being immediately detected, threw them under the grate in that room, *Park*, J., held that this was a sufficient asportation to constitute a stealing within this section of the statute. *R.* v. *Amier*, 6 *C. & P.* 344. The value of the goods is immaterial, if a breaking and entry be proved.

If the prosecutor succeed in proving the larceny, but fail in proving any of the other circumstances above mentioned, the defendant may be convicted of simple larceny; or if the prosecutor fail in proving the breaking and entry, and the goods be laid and proved to be of the value of five pounds, the defendant may be convicted of stealing in the dwelling-house. The defendant cannot, on this indictment, be convicted of breaking and entering the dwelling-house, and attempting to steal the prosecutor's goods, when it appears that the goods specified in the indictment were not in the house at the time, though other goods of the prosecutor's were. *R.* v. *M'Pherson, Dears. & B.* 197; 36 *L. J.* (*M. C.*) 134; 7 *Cox*, 281 (*C. C. R.*). He may, however, it would seem, under such circumstances, be convicted of breaking and entering with intent to commit a felony under 24 & 25 *Vict. c.* 96, *s.* 57 (*ante*, p. 622); *and see R.* v. *Ring*, 61 *L. J.* (*M. C.*) 116 (*ante*, p. 464).

Indictment for breaking into and stealing in a Shop. (24 & 25 *Vict. c.* 96, *s.* 56 (*ante*, p. 621.)

Commencement as ante, p. 433]—the shop of J. N., situate in the parish of ——, in the county of ——, feloniously did break and enter with intent

the goods and chattels of the said J. N., in the said shop then being, feloniously to steal, take, and carry away, and twenty yards of muslin of the goods and chattels of the said J. N., then in the said shop, then feloniously did steal, take, and carry away; against the form [*as ante*, p. 465]. *The indictment need not allege expressly that the defendant stole the goods in the shop: R.* v. *Andrews, C. & Mar.* 121: *overruling R.* v. *Smith*, 2 *M. & Rob.* 115.

Felony: *see the last precedent.* 24 & 25 *Vict. c.* 96, *s.* 56 (*ante*, p. 621).

Evidence.

Prove that the defendant broke and entered the shop, etc., in question, in the same manner as upon an indictment for burglary (*ante*, p. 631), except that it is immaterial whether the breaking and entry be by night or by day; if this proof fail, the defendant may be convicted of the simple larceny. Prove that the shop, etc., was at the time, etc., the shop of J. N., that is, that he occupied it, and carried on the business there: then prove the larceny of the goods enumerated in the indictment, in the same manner as upon an indictment for housebreaking (*supra*), or stealing in the dwelling-house (*post*, p. 642). The value is immaterial. And, lastly, prove that the shop, etc., is situate as described in the indictment.

A "warehouse," to be within the meaning of 7 & 8 *G.* 4, *c.* 29, *s.* 15 (*rep.*), need not be such as factors or traders keep their goods for sale in, and where customers go to view them, but includes such as are used for the safe keeping of goods merely: *R.* v. *Hill*, 2 *M. & Rob.* 458, *Rolfe*, B. There is a *dictum* of *Alderson*, B., upon 7 & 8 *G.* 4, *c.* 29, *s.* 15 (*rep.*), that a *shop*, to be within it, must be a shop for the sale of goods, and that a mere workshop (such as a carpenter's or blacksmith's shop) would not be sufficient: *R.* v. *Sanders*, 9 *C. & P.* 79; but in *R.* v. *Carter*, 1 *C. & K.* 173, Lord *Denman*, C.J., dissented from that *dictum*, and held that a blacksmith's shop, used as a workshop only, was within 7 & 8 *G.* 4, *c.* 29, *s.* 15 (*rep.*).

As to what building is a *counting-house* within the statute, *see R.* v. *Potter*, 2 *Den.* 235; *C. & K.* 179; 20 *L. J.* (*M. C.*) 170; 5 *Cox*, 187 (*C. C. R.*), decided on 7 & 8 *G.* 4, *c.* 29, *s.* 15 (*rep.*).

Opening by a servant of the door of a shop under the same roof as the house in which he served, was held a breaking and entering within 7 & 8 *G.* 4, *c.* 29, *s.* 12 (*rep.*). *R.* v. *Wenmouth*, 8 *Cox*, 348.

Indictment for stealing in a Dwelling-house, some Person therein being put in fear. (24 & 25 *Vict. c.* 96, *s.* 61, *ante*, p. 622.)

Commencement as ante, p. 433.]—one silver basin, of the value of five pounds, of the goods and chattels of J. N., in the dwelling-house of the said J. N., situate in the parish of ——, in the county of ——, feloniously did steal, take, and carry away; one J. L. and M. his wife then, to wit, at the time of the committing of the felony aforesaid, being in the said dwelling-house, and therein by the said J. S. by a certain menace and threat then used by the said J. S. then being put in bodily fear; against the form [*as ante*, p. 465]. *The indictment must expressly allege that some person in the house was put in fear by the defendant. R.* v. *Etherington*, 2 *Leach*, 671; 2 *East, P. C.* 635. *The value if amounting to* 5*l.*, *had better*

always be inserted, as the prisoner may be convicted on this indictment of stealing to the value of 5l., in the dwelling-house, if no menace or threat should be proved.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment not exceeding two years, with or without hard labour —24 & 25 *Vict. c.* 96, *s.* 61 (*ante*, p. 622); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

Evidence.

Prove the larceny in the dwelling-house as directed (*ante*, pp. 434, 625). The value is immaterial, if some person was in the house at the time, and was put in bodily fear by a menace or threat of the defendant; which may be either by words or gestures. *R.* v. *Jackson*, 1 *Leach*, 267. Lastly, prove that the person mentioned in the indictment was in the house at the time, and was put in fear by the menaces or threats of the defendant or his accomplices. *R.* v. *Etherington* (*ante*, p. 641). It is not necessary that all the accused should be in the house if some entered and all acted together. *R.* v. *Murphy*, 6 *Cox*, 340. On the former statutes, which did not require that the party should be put in fear *by a menace or threat*, it does not appear to have been settled whether it was necessary to prove an actual sensation of fear; but now, by the express words of the present statute, it must be proved that the putting in fear was by an actual menace or threat.

If the prosecutor fail to prove that the person mentioned in the indictment was in the dwelling-house, and was put in fear, the defendant may still be convicted of simple larceny; or if the goods stolen in the dwelling-house be laid and proved to be of the value of five pounds, he may be convicted of stealing in the dwelling-house.

Indictment for stealing in a Dwelling-house to the value of 5l.
(24 & 25 *Vict. c.* 96, *s.* 60, *ante*, p. 622.)

Commencement as ante, p. 433]—one silver sugar basin, of the value of three pounds, six silver table-spoons, of the value of three pounds, and twelve silver tea-spoons, of the value of two pounds, of the goods and chattels of J. G., in the dwelling-house of J. N., situate in the parish of ——, in the county of ——, feloniously did steal, take, and carry away; against the form [*as ante*, p. 465]. *As to local description, see* 14 & 15 *Vict. c.* 100, *s.* 23 (*ante*, pp. 67, 298).

For forms of indictment for the attempt, see R. v. *Johnson, L. & C.* 489; 34 *L. J.* (*M. C.*) 24; 10 *Cox*, 13 (*C. C. R.*).

Felony: see the last precedent. 24 & 25 *Vict. c.* 96, *s.* 60 (*ante*, p. 622).

Evidence.

Prove the larceny as directed *ante*, p. 434, *et seq.* Prove it to have been committed in the dwelling-house of J. N., or in some building occupied therewith, and connected or communicating therewith, either immediately or by means of a covered and enclosed passage leading from the one to the other (24 & 25 *Vict. c.* 96, *s.* 53, *ante*, p. 621); and prove the goods stolen to be of the value of five pounds or more.

If you fail to prove the larceny, the defendant must be acquitted altogether, unless you prove an *attempt* to commit larceny, in which case the defendant may be convicted of such attempt under 14 & 15 *Vict.* c. 100, *s.* 9 (*ante*, p. 219). If you fail to prove the larceny to have been committed in a dwelling-house or some building communicating therewith (such as burglary might be committed in, 2 *East, P. C.* 644; *and see ante*, p. 625), or fail to prove that it was the dwelling-house of J. N., *R.* v. *White*, 1 *Leach*, 252: *R.* v. *Woodward, Id.* 253, *n.*; or fail to prove the goods (stolen at any one time, *R.* v. *Petrie*, 1 *Leach*, 294: *see R.* v. *Hamilton, Id.* 348; *R.* v. *Jones*, 4 *C. & P.* 217: *R.* v. *Dunn*, 1 *Mood. C. C.* 146: *R.* v. *Smith, Id.* 178) to be of the value of five pounds, the defendant must be acquitted of the compound offence, and may be found guilty of simple larceny only, without a separate count for that offence. *See Campbell* v. *R.*, 11 *Q. B.* 799, at p. 812, *and ante*, p. 88.

It was held in several early cases, that if a man steal the goods of another in his own house (*R.* v. *Thompson*, 1 *Leach*, 338), or a woman steal the goods of a stranger in the house of her husband (*R.* v. *Gould*, 1 *Leach*, 217), it is not within the statute, which was not intended to protect property which might be in a house from the owner of the house, but from the depredations of others; but these cases appear to be overruled by *R.* v. *Bowden*, 1 *C. & K.* 147; 2 *Mood. C. C.* 285, where all the judges agreed that stealing in a dwelling-house to the value of 5*l.*, by the owner of the house, was within 7 & 8 *G.* 4, *c.* 29, *s.* 12 (*rep.*). *Cf. R.* v. *Taylor, R. & R.* 418.

If the goods be under the protection of the *person* of the prosecutor at the time they are stolen, the case will not be within the statute. As, for instance, where the defendant procured money to be delivered to him for a particular purpose and then ran away with it; *R.* v. *Campbell*, 2 *Leach*, 564; 2 *East, P. C.* 644, and where the prosecutor, by the trick of ring dropping, was induced to lay down his money upon a table, and the defendant took it up and carried it away; *R.* v. *Owen*, 2 *Leach*, 572; 2 *East, P. C.* 645; these cases were held not to be within the statute. For a case to be within the meaning of the statute, it is necessary that the goods should be under the protection of the house, and be deposited in it for safe custody. But property left at a house for a person supposed to reside there, will be under the protection of the house, and the stealing of it will be within the statute. Two boxes belonging to A., who resided at 38, Rupert Street, were delivered by a porter (whether by mistake or design did not appear) at No. 33 in the same street; the owner of the house, imagining that they were for the defendant, who lodged there, delivered them to him; the defendant converted the contents of the boxes to his own use, and absconded; it was doubted at the trial whether the goods were sufficiently within the protection of the dwelling-house to bring the case within the statute, but the judges held that they were, and that the conviction for the capital offence was therefore correct. *R.* v. *Carroll*, 1 *Mood. C. C.* 89. If one, on going to bed, put his clothes and money by his bedside, these are under the protection of the dwelling-house, and not of the person. *R.* v. *Thomas, Car. Supp.* 295. So, where a man went to bed with a prostitute having put his watch in his hat on a table, and the woman stole the watch while he was asleep; this was held to be a stealing in the dwelling-house, and not a stealing from the person. *R.* v. *Hamilton*, 8 *C. & P.* 49. It is a question for the court and not for the jury, whether goods are under the protection of the dwelling-house, or in the personal care of the owner. *R.* v. *Thomas, supra.*

Indictment for breaking and entering a Dwelling-house, etc., with intent to commit any Felony therein. (24 & 25 *Vict. c.* 96, *s.* 57, *ante*, p. 622.)

Commencement as ante, p. 433]—the dwelling-house of J. N. ("*any dwelling-house, school-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage, school-house, shop, warehouse or counting-house*"), situate in the parish of ——, in the county of ——, feloniously did break and enter, with intent to commit a felony therein, to wit, the goods and chattels of the said J. N., in the said dwelling-house then being, then feloniously to steal, take, and carry away; against the form of the statute in such case made and provided.

Felony, 24 & 25 *Vict. c.* 96, *s.* 57 (*ante*, p. 622): *penal servitude for not more than seven nor less than three years, or imprisonment not exceeding two years, with or without hard labour*—24 & 25 *Vict. c.* 96, *s.* 57; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

Evidence.

Prove that the prisoner broke and entered the dwelling-house in question, and that it was at the time in the occupation of J. N., and also the prisoner's intent to steal. Lastly, prove that the dwelling-house is situate as described in the indictment. The intent to steal may no doubt often be reasonably inferred from the mere fact of breaking and entering.

Where the prisoner was indicted under 24 & 25 *Vict. c.* 96, *s.* 27, for breaking and entering a shop with intent to commit a felony, viz., to steal, and it appeared that the prisoner broke in the roof, intending to enter and steal, and was then disturbed, but there was no evidence that he ever actually entered the shop, he was held to have been rightly convicted of the misdemeanor of attempting to commit a felony. *R.* v. *Bain*, *L. & C.* 129; 31 *L. J.* (*M. C.*) 88; 9 *Cox*, 98 (*C. C. R.*).

Indictment for breaking into a Building within the curtilage of a Dwelling-house, etc. (24 & 25 *Vict. c.* 96, *s.* 55, *ante*, p. 621); *and see s.* 53 (*ante*, p. 621.)

Commencement as ante, p. 433]—a certain building of one J. N., situate in the parish of ——, in the county of ——, feloniously did break and enter (the said building then being within the curtilage of the dwelling-house of the said J. N., there situate, and by the said J. N. then and there occupied therewith, and there being then [and there] no communication between the said building and the said dwelling-house, either immediate or by means of any covered and enclosed passage leading from the one to the other), with intent the goods and chattels of the said J. N. in the said building then being, feloniously to steal, take, and carry away, and that the said J. S. then [and there] in the said building, one silver watch, of the goods and chattels of the said J. N., feloniously did steal, take, and carry away; against the form [*as ante*, p. 465]. *This count may be added to an indictment for burglary, house-breaking, or stealing in a dwelling-house to the amount of five pounds, and should be added whenever it is doubtful whether the building is in strictness a dwelling-house. If the evidence fail to prove the actual stealing, but the breaking, entry, and intent to steal be proved, the prisoner may be convicted under this indictment of the felony described in* 24 & 25 *Vict. c.* 96, *s.* 57 (*ante*, p. 623).

Felony: penal servitude for not more than fourteen nor less than three

years, or imprisonment not exceeding two years, with or without hard labour; 24 & 25 *Vict. c.* 96, *s.* 55 (*ante*, p. 622); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

Evidence.

To support this indictment, you must prove that the defendant broke and entered the building in question; that the building so broken and entered was occupied, at the time when the offence was committed, by J. N., together with his dwelling-house, and was within the curtilage thereof; that the defendant there stole the goods, etc., enumerated in the indictment; and that the building is situate as described in the indictment.

The breaking and entering must be proved in the same manner as in burglary (*ante*, p. 631), except that it is immaterial whether it be done in the day or night. If this proof fail, the defendant may be convicted of simple larceny.

Within the curtilage.]—The building described in the statute is "any building within the *curtilage* of a dwelling-house, and occupied therewith, not being part of the dwelling-house," that is, "not communicating with the dwelling-house, either immediately or by means of a covered and enclosed passage leading from the one to the other." In "*Termes de la Ley*," curtilage is defined as a "garden, yard, or piece of void ground lying near to or belonging to the messuage;" so also "*Shepherd's Touchstone*," 94, with the further explanation, "something which would pass by conveyance of the messuage." To break and enter a building within the curtilage was, before the present statute, burglary, or house-breaking. If the barn, stable, or warehouse be parcel of the mansion-house, and within the same common fence, though not under the same roof and contiguous, a burglary may be committed therein; 4 *Bl Com.* 224; but if the buildings be removed at any distance from the house, "it has not been usual of late to proceed against offences therein as burglaries;" 1 *Hawk. c.* 38, *s.* 22: *see* 28 *L. J. Newsp.*, 858; and although the present enactment, which expressly defines the building meant thereby to be a building within the *curtilage*, excludes many buildings which were formerly deemed parcel of the dwelling-house, from their adjoining to the dwelling-house, and being occupied therewith, although not within any common enclosure or curtilage; yet some of the cases decided upon these subjects may afford some guide to the construction of the present section. Where the defendant broke into a goose-house, which opened into the prosecutor's yard, into which yard the prosecutor's house also opened, and the yard was surrounded, partly by other buildings of the homestead, and partly by a wall in which there was a gate leading to the road, and some of the buildings had doors opening into the lane, as well as into the yard, the goose-house was held to be part of the dwelling-house. *R.* v. *Clayburn*, *R.* & *R.* 360. Where the prosecutor's house was at the corner of a street, and adjoining thereto was a workshop, beyond which a coach-house and stable adjoined, all of which were used with the house, and had doors opening into a yard belonging to the house, which yard was surrounded by adjoining buildings, and was altogether enclosed, but the shop had no internal communication with the house, had a door opening into the street, and its roof was higher than that of the house, the workshop was held to be parcel of the dwelling-house. *R.* v. *Chalking*, *R.* & *R.* 334. So, a warehouse, which

had a separate entrance from the street, and had no internal communication with the dwelling-house, with which it was occupied, but was under the same roof, and had a back-door opening into the yard into which the house also opened, and which enclosed both, was held to be part of the dwelling-house. *R.* v. *Lithgo*, *R. & R.* 357. So, where in one range of buildings the prosecutor had a warehouse and two dwelling-houses, formerly one house, all of which had entrances into the street, but had also doors opening into an enclosed yard belonging to the prosecutor; and the prosecutor let one of the houses between his house and the warehouse together with certain easements in the yard; it was held that the warehouse was parcel of the dwelling-house of the prosecutor before the division of the house, and remained so afterwards. *R.* v. *Walters*, 1 *Mood. C. C.* 13. And where the dwelling-house of the prosecutor was in the centre of a space of about an acre of land, surrounded by a garden wall, the front wall of a factory, and the wall of the stable-yard, the whole being the property of the prosecutor, who used the factory, partly for his own business and partly in a business in which he had a partner; and the factory opened into an open passage, into which the outer door of the dwelling-house also opened; it was held that the factory was properly described as the dwelling-house of the prosecutor. *R.* v. *Hancock*, *R. & R.* 170. *See R.* v. *Egginton*, 2 *Leach*, 913; 2 *B. & P.* 508; 5 *R. R.* 689: *R.* v. *Sefton*, *R. & R.* 202 (*ante*, p. 630). But a building separated from the dwelling-house by a public thoroughfare cannot be deemed to be part of the dwelling-house. *R.* v. *Westwood*, *R. & R.* 495; nor, *semble*, to be within the curtilage. So, neither is a wall, gate, or other fence, being part of the outward fence of the curtilage, and opening into no building, but into the yard only, part of the dwelling-house. *R.* v. *Bennett*, *R. & R.* 289; nor is a gate of an area, which opens into the area only, if there be a door or fastening to prevent persons from passing from the area into the house, although that door or other fastening may not be secured at the time. *R.* v. *Davis*, *R. & R.* 322. Where the building broken into was in the fold-yard of the prosecutor's farm, to get to which from the house it was necessary to pass through another yard called the pump-yard, into which the back door of the house opened, the pump-yard being divided from the fold-yard by a wall four feet high, in which there was a gate, and the fold-yard being bounded on all sides by the farm buildings, a wall from the house, a hedge and gates; it was held that the building was within the curtilage. *R.* v. *Gilbert*, 1 *C. & K.* 84. As to the meaning of "curtilage" in connexion with a will or conveyance of lands: *see Wright* v. *Wallaseg Local Board*, 18 *Q. B. D.* 783; *Marson* v. *L. C. & D. R. Co.*, *L. R.* 6 *Eq.* 101; 37 *L. J.* (*Ch.*) 433 *and Stroud Jud. Dict.* (2nd ed.) *s. v.*

From analogy to the authorities cited, *ante*, p. 80, it would seem to be unnecessary to negative, in the indictment, that the building communicated with the dwelling-house, either immediately or by means of a covered and enclosed way: and from the same analogy it would seem that the defendant might be convicted upon this indictment, though the building should appear in fact to be part of the dwelling-house, and the evidence amount to proof of a burglary. But as this point has not been directly decided, the analogy between this and the cases alluded to may be questioned; the prosecutor should therefore be prepared with evidence to prove that the building did not so communicate with the dwelling-house, and if it be doubtful whether the building be in fact part of the dwelling-house, a count should be added for burglary or housebreaking.

The larceny in the building must be proved in the same manner as upon an indictment for housebreaking (*ante*, p. 640), or stealing in a dwelling-house (*ante*, p. 642).

SECT. 6.

ARSON.

SETTING FIRE TO HOUSES AND OTHER BUILDINGS, ETC.

Common Law.

At common law, arson is the malicious and voluntary burning of the house of another by night or day: 1 *Hale*, 566; 1 *Hawk. c.* 39, *ss.* 1, 7–15. "House" includes not only the dwelling-house but all outhouses which are present thereof, though not contiguous nor under the same roof, such as the barn, stable, cow-house, sheep-house, dairy-house, or mill-house. 1 *Hale*, 567. The common law has been supplemented by the enactments given below. Under the statute it is immaterial whether the house be that of a third person or be in the possession of the person charged with setting fire to it. *R.* v. *Newboult*, *L. R.* 1 *C. C. R.*, 344: 41 *L. J.* (*M. C.*) 62; 12 *Cox*, 148.

Statutes.

12 *G.* 3, *c.* 24, *s.* 1—*Setting fire to Crown Dockyards, etc.*—(*see post*, p. 658).

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 1—*Setting fire to churches, etc.*]—Whosoever shall unlawfully and maliciously set fire to any church, chapel, *meeting-house, or other place of divine worship*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping.] *This section re-enacts* 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 3; *and* 9 & 10 *Vict. c.* 25, *s.* 9, *with the alterations italicized. For indictment, see post*, p. 655.]

Sect. 2.—*Setting fire to dwelling-houses, any person being therein.*]—Whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 *W.* & *Vict. c.* 89, *s.* 2. *For indictment, see post*, p. 656].

Sect. 3.—*Setting fire to houses, etc., etc., with intent to injure or defraud.*]—Whosoever shall unlawfully and maliciously set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, storehouse, granary, hovel, shed, or fold, or to any farm building, or to any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof, whether the same shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned. . . and, if a male under the age of sixteen years, with or without whipping. [*This section was framed from* 7 *W.* 4 & 1 *Vict. c.* 89,

s. 3; 7 *&* 8 *Vict. c.* 62, *s.* 1, *and* 9 *&* 10 *Vict. c.* 25, *s.* 9. *For indictment, see post,* p. 651.]

Sect. 4—*Setting fire to railway station, etc.*]—Whosoever shall unlawfully and maliciously set fire to any station, engine house, warehouse, or other building belonging or appertaining to any railway, *port*, dock, or *harbour*, or to any canal or other navigation, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 14 *&* 15 *Vict. c.* 19, *s.* 8, *with the addition of the words italicized.*]

Sect. 5.—*Setting fire to public buildings.*]—Whosoever shall unlawfully and maliciously set fire to any building, other than such as are in this Act before mentioned, belonging to the [King], or to any county, riding, division, city, borough, poor law union, parish or place, or belonging to any university, or college or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section was new law in* 1861; *see R.* v. *Donnavan*, 1 *Leach*, 69; 2 *W. Bl.* 683; 2 *East, P. C.* 1020.]

Sect. 6—*Setting fire to other buildings.*]—Whosoever shall unlawfully and maliciously set fire to any building other than such as are in this Act before mentioned shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section was new law in* 1861.]

Sect. 7—*Setting fire to goods in buildings.*]—Whosoever shall unlawfully and maliciously set fire to any matter or thing being in, against, or under any building, *under such circumstances that if the building were thereby set fire to, the offence would amount to felony*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen . . . years, or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section was framed from* 7 *&* 8 *Vict. c.* 62, *s.* 2; *and* 14 *&* 15 *Vict. c.* 19, *s.* 8. *The words in italics were added to get rid of R.* v. *Lyons, Bell*, 38; 28 *L. J.* (*M. C.*) 33; 8 *Cox*, 84 (*C. C. R.*)

In indictments under this s. it is not necessary to allege any intent to injure or defraud: R. v. *Heseltine*, 12 *Cox*, 404, *Pollock*, B.]

Sect. 8—*Attempt to fire buildings.*]—Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any building, or any matter or thing in the last preceding section mentioned, *under such circumstances that if the same were thereby set fire to the offender would be guilty of felony*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen . . . years, or to be imprisoned . . . and, if a male, under the age of sixteen years, with or without whipping.

[*This section re-enacts* 9 & 10 *Vict. c.* 25, *s.* 7, *with the addition in italics. For indictment, see post*, p. 656].

Sect. 56—*Accessories, etc.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act, shall be liable to be proceeded against, indicted, and punished as a principal offender. [*See ante*, pp. 12–21.]

Sect. 57—*Persons loitering at night, and suspected of felony against this Act may be apprehended.*]—Any constable or peace officer may take into custody, without warrant, any person whom he shall find lying or loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed or being about to commit *any felony* against this Act, and shall take such person as *soon as reasonably may be* before a justice of the peace, to be dealt with according to law. [*This section is an extension of* 9 & 10 *Vict. c.* 25, *ss.* 13, 14.]

Sect. 58—*Malice against owner of property unnecessary.*]—Every punishment and forfeiture by this Act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise. [*This section re-enacts* 7 & 8 *Vict. c.* 30, *s.* 25, *and* 8 & 9 *Vict. c.* 44, *s.* 2.]

Sect. 59—*Act to apply to persons in possession of property injured.*]—Every provision of this Act not hereinbefore so applied shall apply to every person who, with intent to injure or defraud any other person, shall do any of the acts hereinbefore made penal, although the offender shall be in possession of the property against or in respect of which such act shall be done. [*This was new law in* 1861, *and intended to bring tenants and bailees within the Act. As to the former law, see Mills* v. *Collett*, 6 *Bing.* 85.]

Sect. 60—*Indictment—Intent to injure or defraud.*]—It shall be sufficient in any indictment for any offence against this Act, where it shall be necessary to allege any intent to injure or defraud, to allege that the party accused did the act with intent to injure or defraud (as the case may be), without alleging an intent to injure or defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be). [*This section was new law as to malicious damage in* 1861.]

Sect. 61—*Apprehension of offenders.*]—Any person found committing any offence against this Act, whether the same be punishable upon

indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 30, *s.* 28.]

Sect. 67—*Summary conviction a bar to other proceedings.*]—When any person convicted of any offence punishable upon summary conviction by virtue of this Act shall have paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the crown, or the lord-lieutenant . . . of Ireland, or shall have suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or shall have been so discharged from his conviction by any justice as aforesaid, he shall be released from all further or other proceedings for the same cause. [*This section was framed from* 7 & 8 *G.* 4, *c.* 30, *s.* 36, *and* 22 & 23 *Vict. c.* 32.]

Sect. 72—*Admiralty offences.*]—All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed "on the high seas:" provided that nothing herein contained shall alter or affect any of the laws relating to the government of [his] Majesty's land or naval forces. (*See ante*, pp. 39–43.)

Sect. 73—*Fine and sureties.*]—Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act, the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized; provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year. (*See ante*, p. 240.)

Sect. 75—*Whipping.*]— . . . whenever whipping may be awarded for any indictable offence under this Act, the court may sentence the offender to be once privately whipped; and the number of strokes, and the instrument with which they shall be inflicted, shall be specified by the court in the sentence. (*See ante*, p. 239.)

Sect. 77—*Cost of prosecutions.*]—The court before which any indictable misdemeanor against this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum

of money mentioned therein paid and repaid upon the same terms and in the same manner in all respects as in cases of felony. [*This was new law in* 1861; *see ante*, p. 246, *et seq.*]

Indictment for setting Fire to a House, with Intent, etc. (24 & 25 *Vict. c.* 97, *s.* 3, *ante*, p. 647.)

Central Criminal Court to wit:—The jurors of our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, feloniously, unlawfully, and maliciously did set fire to a certain house ("*any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, store-house, granary, hovel, shed, or fold, or any farm-building, or building or erection used in farming land or in carrying on any trade or manufacture, or any branch thereof*") situate in the parish of B., and county of L., and within the jurisdiction of the said Court, with intent thereby to injure [*or* to defraud ("*to injure or defraud any person*")]; against the form [*as ante*, p. 465]. *Where the indictment omitted the word "unlawfully," the judges held it to be bad. R.* v. *Reader*, 4 *C. & P.* 245; 1 *Mood. C. C.* 239. *It is not necessary to state the ownership of the house, and if it is stated it is immaterial and need not be proved. R.* v. *Newboult, L. R.*, 1 *C. C. R.* 344; 41 *L. J.* (*M. C.*) 63; 12 *Cox*, 148. *It is sufficient to allege that the party accused did the act with intent to injure or defraud* (*as the case may be*) *without alleging an intent to injure or defraud any particular person.* 24 & 25 *Vict. c.* 97, *s.* 60 (*ante*, p. 649): *R.* v. *Newboult, ubi supra.*

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour, and, if a male under sixteen years of age, with or without whipping. 24 & 25 *Vict. c.* 97, *s.* 3; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

On the first day of June, etc.]—The time here stated need not be proved as laid: if the offence be proved to have been committed at any time before or after, provided it be some day before the finding of the indictment, it is sufficient. (*See ante*, p. 297.)

The parish is material, for it is stated as part of the local description of the house burnt. (*Ante*, p. 298.) Therefore, if the house be proved to be situate in another parish, the defendant must be acquitted, unless the variance be amended.

Feloniously, unlawfully, and maliciously.]—The burning must be done wilfully and maliciously, in order to be an offence, either at common law or under the statute; and therefore no negligence or mischance amounts to it. 4 *Bl. Com.* 222: 3 *Co. Inst.* 67; 1 *Hawk. c.* 39, *s.* 19; 1 *Hale*, 566; unless the prisoner does the act recklessly, without caring whether the house is set on fire or not. *R.* v. *Child, L. R.* 1 *C. C. R.* 307; 40 *L. J.* (*M. C.*) 127: *R.* v. *Pembliton, L. R.* 2 *C. C. R.* 119; 43 *L. J.* (*M. C.*) 91: *R.* v. *Welch*, 1 *Q. B. D.* 23; 45 *L. J.* (*M. C.*) 17; 13 *Cox*, 121 (*and see post*, p. 701). For which reason, though an unqualified person, by shooting with a gun, happen to set fire to the thatch of a house, this Lord *Hale* determines not to be felony, contrary to the opinion of former writers. 1 *Hale*,

569. But *see R.* v. *Dossett*, 2 *C. & K.* 306 (*post*, p. 653). But if a man, intending to commit a felony, by accident set fire to another's house, this, it has been said, would be arson at common law, and also within the old statutes. But *see R.* v. *Faulkner*, 13 *Cox*, 550; *Ir. Rep.* 11 *C. L.* 8 (*post*, p. 659). If, intending to set fire to the house of A., he accidentally set fire to that of B., it is felony. 1 *Hale*, 569. And if a man, by wilfully setting fire to his own house, burn also the house of one of his neighbours, it will be felony (*see R.* v. *Probert*, 2 *East, P. C.* 1030; *R.* v. *Isaac*, *Id.* 1031); for the law, in such a case, implies malice, particularly if the party's house were so situate that the probable consequence of its taking fire was that the fire would communicate to the houses in its neighbourhood; and generally, if the act be proved to have been done wilfully, it may be inferred to have been done maliciously, unless the contrary be proved. *Bromage* v. *Prosser*, 4 *B. & C.* 247, 255 (*ante*, p. 343). The absence of malice or spite against the owner or occupier is no answer to the charge. 24 & 25 *Vict. c.* 97, *s.* 58 (*ante*, p. 649); *see R.* v. *Salmon*, *R. & R.* 26; *R.* v. *Davies*, 1 *F. & F.* 69.

Set fire to.]—The words in 24 & 25 *Vict. c.* 97, *ss.* 1-7, are "set fire to," merely; and therefore it is not necessary to aver in the indictment that the house, etc., was *burnt*; nor need it be proved that the house, etc., was actually consumed, nor that any flame was visible. *R.* v. *Salmon*, *R. & R.* 26: *R.* v. *Stallion*, 1 *Mood, C. C.* 398. But within this Act, as well as to constitute the offence of arson at common law, there must be an actual burning of some part of the house; a bare intent, or attempt to do it, is not sufficient. Where, upon an indictment under 9 *G.* 1, *c.* 22 (*rep.*), for setting fire to a paper-mill, it appeared that the defendant set fire to some paper that was drying in one of the lofts, but that no part of the mill itself was burnt; the judges held, that it did not amount to an offence within the Act. *R.* v. *Taylor*, 1 *Leach*, 49. And where the defendant set fire to a parcel of unthreshed wheat it was held not to be within that statute. *R.* v. *Judd*, 2 *T. R.* 255; 1 *R. R.* 477. But the burning and consuming of any part of the house, however trifling, was sufficient, although the fire be afterwards extinguished. 1 *Hawk. c.* 39, *s.* 17; 3 *Co. Inst.* 66; 1 *Hale*, 569; *Dalt. c.* 159. Where, on an indictment under 7 *W.* 4 & 1 *Vict. c.* 89. *s.* 3 (*rep.*), it was proved that the "floor of a room was scorched; that it was charred in a trifling way; it had been at a red heat, but not in a blaze," this was held a sufficient burning to support the indictment. *R.* v. *Parker*, 9 *C. & P.* 45, *Bosanquet*, J., and *Parke*, B. But where, a small faggot having been set on fire on the boarded floor of a room, the boards were thereby "scorched black, but not burnt," and no part of the wood was consumed: this was not held sufficient. *R.* v. *Russell, C. & Mar.* 541, *Cresswell*, J. By 24 & 25 *Vict. c.* 97, *s.* 7 (*ante*, p. 648), the maliciously setting fire to "any matter or thing being in, against, or under any building, under such circumstances that if the building were thereby set fire to the offence would amount to felony," is itself made a felony. The prisoner maliciously set fire to goods in a dwelling-house with intent to injure the owner of the goods, who was a lodger in the house, and not to injure the house or the landlord. The house, though endangered, was not set fire to. The prisoner was indicted for the offence described in section 7, *supra*, and the jury found him "guilty, but not so that if the house had caught fire, the setting fire to the house would have been wilful and malicious." This was held to be equivalent to a finding that the prisoner was not aware that what he was doing would probably set the house on fire, and so necessarily injure the owner; and that he was not reckless as to whether it took fire or not;

and that upon such finding the prisoner was not properly convicted. *R.* v. *Child*, *L. R.*, 1 *C. C. R.* 307; 40 *L. J.* (*M. C.*) 127; 12 *Cox*, 64. If a person maliciously, with intent to injure another by merely burning his goods, sets fire to such goods in his house, that does not amount to a felony under section 7, even although the house catches fire, unless the circumstances are such as to show that the person setting fire to the goods knew that by so doing he would probably cause the house also to take fire, and was reckless whether it did so or not, in which case there would be abundant evidence that he intended to bring about the probable consequence of his act, namely, the burning of the house. *R.* v. *Nattrass*, 15 *Cox*, 73: *R.* v. *Harris*, *Id.* 75; 95 *Cent. Cr. Ct. Sess. Pap.* 523, *Hawkins*, J. It is not necessary in an indictment under section 7 to allege an intent to defraud, and it is sufficient to follow the words of the section without setting forth the particular "circumstances" relied on as constituting the offence. *R.* v. *Heseltine*, 12 *Cox*, 404, *Pollock*, B., *after consulting with Archibald*, J. Wilfully throwing a light into a post-office letter-box in a house with intent to burn the letters, but not the house, is not a felony within section 7. *R.* v. *Batstone*, 10 *Cox*, 20.

It is seldom that a wilful burning by the defendant can be made out by direct proof; the jury, in general, have to presume the defendant's guilt from circumstantial evidence. (*See ante*, p. 340.) Where a house was robbed and burnt, the defendant being found in possession of some of the goods which were in the house at the time it was burnt, was admitted as evidence tending to prove him guilty of the arson. *R.* v. *Rickman*, 2 *East*, *P. C.* 1035. So, where the question is whether the burning was accidental or wilful, evidence is admissible to show that on another occasion the defendant was in such a situation as to render it probable that he was then engaged in the commission of the like offence against the same property. *R.* v. *Dossett*, 2 *C. & K.* 306; 2 *Cox*, 243, *Maule*, J. *And see R.* v. *Taylor*, 5 *Cox*, 138: *R.* v. *Harris*, 4 *F. & F.* 342, *Willes*, J.: *R.* v. *Gray*, 4 *F. & F.* 1102, *Willes*, J. (*ante*, p. 310). But on a charge of arson, where the question was as to the identity of the prisoner, evidence that a few days previous to the fire in question another building of the prosecutor's was on fire, and that the prisoner was then standing by with a demeanor which showed indifference or gratification, was rejected. *R.* v. *Harris*, *ubi supra*. As to the admissibility of evidence of the commission of other offences in support of a charge of arson, *see ante*, p. 309.

Evidence of experiments made after a fire are admissible to show how the building was set on fire. *R.* v. *Heseltine*, 12 *Cox*, 404, *Pollock*, B.

A certain dwelling-house.]—As to the common law, *see ante*, p. 647. The present statute extends to the burning of any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, storehouse, granary, hovel, shed, or fold, or of any farm-building, or any building or erection used in farming land or in carrying on any trade or manufacture, or any branch thereof. Upon an indictment for burning a dwelling-house, either at common law or under the statute, it would, perhaps, be sufficient to prove a burning of a building, parcel of the dwelling-house. (*See ante*, p. 625.) Outhouse seems to mean some building annexed or accessory to a dwelling-house. *R.* v. *Hammond*, 1 *Cox*, 60, *Alderson*, B. Where an outhouse was burnt, and an indictment under 9 *G.* 1, *c.* 22 (*rep.*), described it as a "certain outhouse," an objection, that the offence should have been described as a burning of the dwelling-house (the word "outhouse" in the statute meaning, as it was suggested, an outhouse which is not parcel of the dwelling-house), was overruled by the judges. *R.* v. *North*, 2 *East*, *P. C.* 1021. So, where the

indictment described the house, in some of the counts, as "a certain outhouse," in others as a "certain house," and the evidence was of a burning of a school-room, separated from the dwelling-house by a small passage, but the roof of one extending over the roof of the other; it was held that the evidence satisfied the description in both sets of counts. *R.* v. *Winter*, *R. & R.* 295. Where the indictment under 9 *G.* 1, *c.* 22 (*rep.*), charged the burning of "a certain house" of the corporation of Liverpool, and the proof was of a burning of a gaol belonging to the corporation, the judges held it to be sufficient. *R.* v. *Donnavan*, 1 *Leach*, 69; 2 *East*, *P. C.* 1020; 2 *W. Bl.* 683. But in *R.* v. *Connor*, 2 *Cox*, 65, a gaol was held by *Parke*, B., not to be a dwelling-house, and it falls rather within 24 & 25 *Vict. c.* 97, *s.* 5 (*ante*, p. 648). An unfinished building, intended, when finished, to be used as a house, is not a "house" within 24 & 25 *Vict. c.* 97, *s.* 3 (*ante*, p. 647). *R.* v. *Edgell*, 11 *Cox*, 132. But an unfinished house, of which all the walls, external and internal, are built and finished, the roof on and finished, the flooring of a considerable part laid, and the internal walls and ceilings prepared for plastering, is a "building" within 24 & 25 *Vict. c.* 97, *s.* 6 (*ante*, p. 648); *R.* v. *Manning*, *L. R.* 1 *C. C. R.* 338; 41 *L. J.* (*M. C.*) 11; *quære*, however, whether an unfinished house, the walls of which had only been raised a short distance from the ground, would be a "building" within *s.* 6. *Id.* Many of the distinctions raised in the older cases were rendered immaterial by 7 & 8 *Vict. c.* 62, *s.* 1 (*rep.*), (of which 24 & 25 *Vict. c.* 97, *s.* 3, is in this respect a re-enactment), which extends to "any hovel, shed, or fold, or any farm building, or any building or erection used in farming land: and arson in respect of "any building other than such are in this Act before mentioned" is specifically dealt with in section 6 of the present statute. A building twenty-four feet square, with wooden sides, glass windows, slated roof, and commonly called the workshop, used as a storehouse for seasoned timber, as a place for the deposit of tools, and for the working up of timber, was held to be well described as a "shed" under 7 & 8 *Vict. c.* 62, *s.* 1 (*rep.*), *ubi supra*. *R.* v. *Amos*, 2 *Den.* 65; 20 *L. J.* (*M. C.*) 103; 5 *Cox*, 222; *cf. R.* v. *Munson*, 2 *Cox*, 186, *Coleridge*, J.

It is unnecessary, in an indictment under *s.* 3 of 24 & 25 *Vict. c.* 97, to allege the ownership of the house, nor need the ownership be proved. *R.* v. *Newboult*, *L. R.* 1 *C. C. R.* 344; 41 *L. J.* (*M. C.*) 63; 12 *Cox*, 148; in that case the house was described in the indictment as "of and belonging to" the prisoner, and he was charged with setting fire to it "with intent thereby to injure," without mentioning the person intended to be injured: it was held that he might be convicted of setting fire to the house, of which he was proved to be merely the tenant, with intent to injure the landlord. *R.* v. *Newboult* renders of little practical value the following decisions under former statutes: *R.* v. *Glandfield*, 2 *East*, *P. C.* 1034: *R.* v. *Rickman*, *Id.*: *R.* v. *Ball*, 1 *Mood. C. C.* 30: and *R.* v. *Wallis*, *Id.* 344. At common law, and under 9 *G.* 1, *c.* 22 (*rep.*), it was necessary to describe and prove the house to be the house of another; as a man could not commit arson by firing his own house. *See R.* v. *Gowen*, 1 *Leach*, 246, *n.*; 2 *East*, *P. C.* 1027: *R.* v. *Harris*, 2 *East*, *P. C.* 1023.

With intent, etc.]—It is not necessary to allege or prove an intent to injure or defraud any particular person, but it is sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be). 24 & 25 *Vict. c.* 97, *s.* 60 (*ante*, p. 649). Where the offence consists of the setting fire to the house of a third person, the intent to injure that person is inferred from the act, for every person is deemed to intend the necessary consequences of his own act: and

therefore where the defendant was indicted for setting fire to a certain mill, with intent to injure the occupiers thereof, it was held that he was properly convicted, although it appeared at the trial that he was a harmless, inoffensive man, and had no motive to induce him to commit the act. *R.* v. *Farrington*, *R. & R.* 207. (*See ante*, p. 343.) But this doctrine can only arise where the act is wilful; and therefore, if the fire appear to be the result of accident, the party who is the cause of it will not be liable. (*Ante*, p. 652, *and see* 14 *G.* 3, *c.* 78, *s.* 86.) On the other hand, where the defendant is charged with setting fire to his own house, the intent to defraud cannot be inferred from the act itself, but must be proved by other evidence. Where, therefore, upon an indictment for arson with intent to defraud an insurance company, the policy must be produced, or secondary evidence of it given after a proper notice to produce. It is now immaterial whether the policy is stamped: 54 & 55 *Vict. c.* 39, *s.* 14, *sub-s.* 4 (*ante*, p. 383). And where a sufficient notice to produce the policy had not been given, it was held that secondary evidence of it could not be given, and there being no other evidence of the insurance, that the defendant must be acquitted. *R.* v. *Kitson*, *Dears.* 187; 22 *L. J.* (*M. C.*) 118; 6 *Cox*, 159 (*C. C. R.*): *R.* v. *Doran*, 1 *Esp.* 127. As to the length of notice necessary, *see R.* v. *Ellicombe*, 1 *M. & Rob.* 260; 5 *C. & P.* 522: *R.* v. *Barker*, 1 *F. & F.* 326. Where on a trial for arson, with intent to defraud an insurance office, no policy of insurance was produced, and the only evidence of its existence was that of the agent of the insurance company, who stated that the prisoner came to him in May, 1867, about effecting an insurance on the premises, the subject of the alleged arson, and that on the 30th of August, 1871 (about a month before the alleged arson), the prisoner came again to him, and said he wished to *renew* his policy, and then paid 10*s*. This was held to be sufficient evidence of the existence of an insurance, as being an admission by the prisoner that there was a policy. *R.* v. *Newboult* (*ante*, p. 654). It was held before the passing of the *Married Women's Property Act*, 1882 (*see s.* 16, *ante*, p. 443), that a married woman could not be indicted for setting fire to the house of her husband with intent to injure him. *R.* v. *March*, 1 *Mood. C. C.* 182. Where, on an indictment for arson, the counsel for the prosecution, in opening the case, suggested as a motive for the act the desire to realize the sum insured by the prisoner upon her goods, evidence was admitted to show that she was in easy circumstances, so as to negative the motive suggested. *R.* v. *Grant*, 4 *F. & F.* 322, *Pollock*, C.B.

Indictment for setting Fire to a Church or Chapel. (24 & 25 *Vict. c.* 97, *s.* 1, *ante*, p. 647.)

Commencement as ante, p. 651]—feloniously, unlawfully, and maliciously did set fire to a certain church ("*any church, chapel, meeting-house, or other place of divine worship*") situate at the parish of B., in the county of M.; against the form [*as ante*, p 465].

Felony: 24 & 25 *Vict. c.* 97, *s.* 1. *See the precedent, ante*, p. 651.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant set fire (*see ante*, p. 652) to the church or chapel, situate as described in the indictment (*see ante*, p. 653). It seems unnecessary in an indictment for setting fire to a dissenting chapel to allege or prove that it has been registered under 31 *G.* 3, *c.* 32; 52 *G.*

3, *c.* 153, and 18 & 19 *Vict. c.* 81, since the words "duly registered as recorded" which occurred in 7 & 8 *G.* 4, *c.* 30, *s.* 8, were not re-enacted when that statute was repealed by 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 3, and do not appear in 24 & 25 *Vict. c.* 97, *s.* 1.

Indictment for setting Fire to a Dwelling-house, some Person being therein. (24 & 25 *Vict. c.* 97, *s.* 2, *ante*, p. 647.)

Commencement as ante, p. 651]—feloniously, unlawfully and maliciously did set fire to a certain dwelling-house ("*any dwelling-house*") of J. N., situate at the parish of B., in the county of M., one J. L., and M., his wife, then, to wit, at the time of the committing of the felony aforesaid, being in the said dwelling-house; against the form [*as ante*, p. 465]. *The defendant cannot, upon this indictment, be convicted under s.* 3 (*ante*, p. 647), *because under that section an intent to injure or defraud must be alleged and proved. R.* v. *Paice*, 1 *C. & K.* 73.

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 2 (*ante*, p. 647); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 649).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant wilfully set fire to the dwelling-house (*see ante*, p. 652); and that at the time J. L. and his wife were in the house. It is not sufficient to prove that they were in the house at the time when the defendant set fire to an adjoining building, from which the flames communicated to the house, they having then left it. *R.* v. *Fletcher*, 2 *C. & K.* 215: *R.* v. *Warren*, 1 *Cox*, 68. The offence is committed even if the prisoner was the only person in the house when he sets fire to it. *R.* v. *Pardoe*, 17 *Cox*, 715, *Coleridge*, C.J. If any one in the house is burnt by an offence within this section the incendiary is indictable for murder. *R.* v. *Serné*, 16 *Cox*, 311, *Stephen*, J.

Indictment for Attempting to set Fire to a Building. (24 & 25 *Vict. c.* 97, *s.* 8, *ante*, p. 648.)

Commencement as ante, p. 651]—feloniously, unlawfully and maliciously did attempt by then, etc. (*state the overt act—"by any overt act"*) feloniously, unlawfully and maliciously, to set fire to a certain building (describe the building *as in the precedents*, pp. 651, 655, *and supra*: "*any building or any matter or thing 'being in, against, or under any building,' under such circumstances that if the same were thereby set fire to, the offence would amount to felony*") situate at the parish of B., in the county of M., [with intent thereby then to injure (*injure or defraud*)]; against the form [*as ante*, p. 465]. See Greaves' *Crim. Law Cons. Acts* (2nd ed.), 213–215.

Felony: penal servitude for not more than fourteen and not less than three years, or imprisonment not exceeding two years with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 8; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 649).

Evidence.

Prove that the defendant attempted, by the means stated in the indictment, wilfully to set fire to the house (*see ante*, p. 652): and that it was situated as described in the indictment. (*See ante*, p. 653.) And prove circumstances from which the jury may infer the intent as laid. (*See ante*, p. 340.) In many cases no allegation or proof of intent will be necessary: (*see ss.* 1, 2, 4, 5, 6, 7, *ante*, pp. 647, 648). Wilfully throwing a light into a post-office letter-box in a house with intent to burn the letters, but not the house, is not a felony within this enactment. *R.* v. *Batstone*, 10 *Cox*, 20.

SETTING FIRE TO COAL MINES, ETC.

Statute.

24 & 25 *Vict.* 97 (*Malicious Damage Act*, 1861), *s.* 26.]—Whosoever shall unlawfully and maliciously set fire to any mine of coal, cannel coal, *anthracite, or other mineral fuel* shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . and if a male under the age of sixteen years, with or without whipping. [*This section is taken from* 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 9, *and* 9 & 10 *Vict. c.* 25, *s.* 9, *with the additions italicized.*]

Sect. 27—Attempting to set fire to mines.]—Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any mine, *under such circumstances that if the mine were thereby set fire to the offender would be guilty of felony*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen . . . years, or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 9 & 10 *Vict. c.* 25, *s.* 7, *with the additions italicized.*]

Indictment for setting Fire to a Coal Mine. (24 & 25 *Vict. c.* 97, *s.* 26.)

Commencement as ante, p. 651]—feloniously, unlawfully, and maliciously did set fire to a certain mine of coal ("*any mine of coal, cannel coal, anthracite, or other mineral fuel*") [of J. N.] situate at the parish of B., in the county of M.; against the form [*as ante*, p. 465].

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 26; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant set fire to the mine as described in the indictment. (*See ante*, pp. 652, 653.) As to proof of the allegation "of J. N." *see R.* v. *Newboult*, *L. R.* 1 *C. C. R.* 344 (*ante*, p. 654). It is equally an offence within this Act to set fire to a mine in the possession of the party himself, where it is proved to be done with intent to injure or defraud any other person; *s.* 59 (*ante*, p. 649).—*See ante*, p. 654.

SETTING FIRE TO OR DESTROYING SHIPS, ETC.

Statutes.

12 *G.* 3, *c.* 24 (*Dockyards, etc., Protection Act*, 1772), *s.* 1. If any person or persons shall either within this realm, or in any of the islands, countries, forts, or places thereunto belonging, wilfully and maliciously set on fire or burn, or otherwise destroy, or cause to be set on fire, or burnt, or otherwise destroyed, or aid and procure, abet, or assist in the setting on fire, or burning, or otherwise destroying any of his Majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built, in any of his Majesty's dockyards, or building or repairing in any private yards, for the use of his Majesty, or any of his Majesty's arsenals, magazines, dockyards, rope-yards, victualling offices, or any of the buildings erected therein or belonging thereto, or any timber or materials therein placed for building or repairing, or fitting out of ships or vessels; or any part of his Majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places where such military, naval, or victualling stores, or other ammunition of war is or shall be kept, or deposited; that then the person or persons guilty of any such offence being thereof convicted in due form of law shall be guilty of felony, and shall suffer death as in cases of felony . . . [*For indictment, see post*, p. 661.]

Sect. 2.—*Venue.*]—*See ante*, p. 38.

29 *&* 30 *Vict. c.* 109 (*Naval Discipline Act*), *s.* 34.]—Every person subject to this Act who shall unlawfully set fire to any dockyard, victualling yard, or steam factory yard, arsenal, magazine, building, stores, or to any ship, vessel, hoy, barge, boat, or other craft, or furniture thereunto belonging, not being the property of an enemy, pirate, or rebel, shall suffer death or such other punishment as hereinafter mentioned.

24 *&* 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861, *s.* 42.]—Whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 *W.* 4 *&* 1 *Vict. c.* 89, *ss.* 4, 6. *In R. v. Guy, Hants assizes, July*, 1902, *G. was indicted under s.* 42 *for unlawfully and maliciously setting fire to a yacht of which he was captain. He did so in conjunction with the owner in order as he knew to defraud underwriters. Held by Bigham, J., that though s.* 43 *dealt with this offence specifically, G. could be convicted under s.* 42.]

Sect. 43.]—Whosoever shall unlawfully and maliciously set fire to, or cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned

. . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 *W.* 4 *&* 1 *Vict. c.* 89, *s.* 6.]

Sect. 44—*Attempting to set fire to ships.*]—Whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to, *cast away, or destroy* any ship *or vessel, under such circumstances that if the ship or vessel were thereby set fire to, cast away, or destroyed, the offender would be guilty of felony,* shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, without or without whipping. [*This section re-enacts* 9 *&* 10 *Vict. c.* 25, *s.* 7, *with the additions italicized.*]

Indictment for setting Fire to a Ship. (24 *&* 25 *Vict. c.* 97, *s.* 42, *supra.*)

Cornwall, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the 1st day of June, in the year of our Lord ——, feloniously, unlawfully and maliciously did set fire to a certain ship ("*any ship or vessel, whether the same be complete or in an unfinished state*") called the "Rattler," the property of J. N.; against the form [*as ante*, p. 465]. *If the offence be committed upon the high seas, see the next precedent.*

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour, and, if a male under sixteen years, with or without whipping.—24 *&* 25 *Vict. c.* 97, *s.* 42; 54 *&* 55 *Vict. c.* 69, *s.* 8, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 *&* 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant set fire to the ship. (*See ante*, 652.) Where a sailor on board a ship entered a part of the vessel where spirits were kept, for the purpose of stealing rum, and, while tapping a cask of rum, a lighted match, held by him, came in contact with the spirits which were flowing from the cask tapped by him, and a fire ensued which destroyed the vessel, it was held that a conviction for arson of the ship could not be upheld. *R.* v. *Faulkner, Ir. Rep.* 11 *C. L.* 8; 13 *Cox*, 550. It is immaterial whether the ship were complete or in an unfinished state. 24 *&* 25 *Vict. c.* 97, *s.* 42. Where a pleasure boat, eighteen feet long, was set fire to, *Patteson*, J., inclined to think that it was a vessel within the meaning of 7 *&* 8 *G.* 4, *c.* 30, *s.* 10 (*rep.*), but the prisoner was acquitted on the merits, and no decided opinion was given. *R.* v. *Bowyer*, 4 *C. & P.* 559, *Patteson*, J. Upon an indictment for firing a barge. *Alderson*, B., said, that if the prisoner was convicted he would take the opinion of the judges as to whether a barge was within the meaning of that statute: the prisoner was acquitted. *R.* v. *Smith*, 4 *C. & P.* 569. The burning of a ship, of which the defendant was a part-owner, was held within 7 *&* 8 *G.* 4, *c.* 30, *s.* 10: *R.* v. *Wallace, C. & Mar.* 200; 2 *Mood. C. C.* 200. (*See s.* 59, *ante*, p. 649.)

Prove that it was done maliciously (*see ante*, p. 651), and prove the ownership of the ship as described in the indictment. Where, upon an indictment against the defendant for setting fire to a ship with intent to prejudice E. and G. his part-owners, it appeared that the defendant had

declared that E. and G. were part-owners, and a bill of sale was produced, by which forty-three sixty-fourths of the vessel were transferred by the defendant, the sole owners to E. and G.; and also an entry in the books of registry, in the following form:—Custom House, Padstow, 11th August, 1829. W. P., of etc., has sold, by bill of sale, dated, etc., forty-three sixty-fourth shares, to N. G., of etc., and R. E., of etc., Signed," etc.,— and it was objected that the bill of sale was not valid, because by 6 *G.* 4, *c.* 110, *s.* 37 (*rep.*), the entry must contain not only the date of the bill of sale, but also the date of the production of it, the judge thought that the date, 11th August, in the commencement of the entry, might be considered as the date of the production of it, particularly as the entry followed the form given by the statute; and it was held that the defendant was properly convicted. *R.* v. *Philp*, 1 *Mood. C. C.* 263. Indeed, it would seem that acts of ownership would of themselves be sufficient to prove this allegation, subject to contradiction by the entry in the register. Registry of a British ship is now proved under 57 *&* 58 *Vict. c.* 60, *s.* 64 (*ante*, p. 351).

Indictment for setting Fire to a Ship, with Intent, etc.
(24 *&* 25 *Vict. c.* 97, *s.* 43, *ante*, p. 658.)

Yorkshire, to wit:—The jurors for our lord the King, upon their oath present, that J. S., on the first day of August, in the year of our Lord ——, on board a certain ship called the "Rattler," the property of J. N., on a certain voyage upon the high seas, then being upon the high seas, feloniously, unlawfully, and maliciously did set fire to the said ship ("*any ship or vessel*"), with intent thereby to prejudice the said J. N., the owner ("*owner or part-owner*") of the said ship; [*or*, one E. F., the owner of certain goods, then laden and being on board the said ship; *or*, one E. F., who had before then underwritten a certain policy of assurance on the said ship (*or*, on the freight of the said ship; *or*, on certain goods then being on board the said ship), which said policy was then in full force and operation ("*the owner or part-owner of such ship or vessel, or of any goods on board the same, or any person who has underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same*");] against the form [*as ante*, p. 465). *The intent may be stated in different ways in different counts. See R.* v. *Smith*, 4 *C. & P.* 569: *R.* v. *Bowyer*, *Id.* 559. *As to the venue, see ante*, p. 38 *et seq.*

Felony: 24 *&* 25 *Vict. c.* 97, *s.* 43. *The punishments are the same as under the last precedent.*

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

If the intent be laid to prejudice the owner of the ship or goods, prove the case as directed under the last form; and in the latter case prove the shipment of the goods. In *R.* v. *Philp*, 1 *Mood. C. C.* 263 (*supra*), there was no proof of malice against the owners, and the ship was insured for more than its value; but the judge thought that the defendant must be understood to contemplate the consequence of his act; and the judges held that, as to this point, the conviction was right. *See R.* v. *Newill*, 1 *Mood. C. C.* 458. The destruction of a vessel by a part-owner shows an intent to prejudice the other part-owners, though he has insured the whole ship, and promised that the other part-owners shall have the

benefit thereof. *Id. See R.* v. *Wallace, C. & Mar.* 200 (*ante*, p. 659). The underwriters on a policy of goods fraudulently made are within the statute, though no goods be put on board. *S. C.*, 2 *Mood. C. C.* 200.

If the intent be laid to prejudice the underwriters, then, in addition to this evidence, prove the policy (*see ante*, p. 655), and that the ship sailed on her voyage.

If the intent is not proved as laid, but the wilful and malicious setting fire is proved, it appears that the accused may be convicted of an offence under 24 & 25 *Vict. c.* 97, *s.* 42, and that section seems to render it unnecessary to indict under *s.* 43.

Indictment for setting Fire to Ships of War, etc.
(12 *G.* 3, *c.* 24, *s.* 1, *ante*, p. 659.)

An indictment for setting on fire or burning ships of war may be in the same form as the precedent, ante, p. 659, *except as to the description of the property, namely*, "one of his Majesty's vessels of war in his Majesty's dockyard at ——" [*or any private yard*], or "certain timber there placed for building or repairing the same," *or* "certain military, [naval, or victualling] stores," *or* "other munitions of war, or any place where the same shall be kept." 12 *G.* 3, *c.* 24, *s.* 1. [*See the indictment in R.* v. *Hill*, 20 *St. Tr.* 1318: *and as to venue, see ante*, p. 38.]

Felony: punishment, death. 12 *G.* 3, *c.* 24, *s.* 1. *The sentence of death may be recorded.* (*See ante*, p. 233.)

And see 29 & 30 *Vict. c.* 109, *s.* 34 (*ante*, p. 658).

This offence is not triable at quarter sessions. See 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

SETTING FIRE TO CROPS, STACKS, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 16—*Setting fire to crops, etc.*]—Whosoever shall unlawfully and maliciously set fire to any crop of *hay, grass*, corn, grain, or pulse, *or of any cultivated vegetable produce*, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 30, *s.* 17 *with the addition of the words italicized.*]

Sect. 17—*Setting fire to stacks, etc.*]—Whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, *or of any cultivated vegetable produce*, or of furze, *gorse*, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood *or bark*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned, . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 10, *with the addition of the words italicized. The words* "*haulm*"

and "stubble" appear to have been added in the repealed statute to get rid of R. v. Reader and Turner, 4 C. & P. 245 ; 1 Mood. C. C. 239, decided on 7 & 8 G. 4, c. 30. s. 17.]

Sect. 18—Attempting to set fire to crops or stacks.]—Whosoever shall unlawfully and maliciously by any overt act attempt to set fire to any such matter or thing as in either of the last two preceding sections mentioned, *under such circumstances that if the same were thereby set fire to the offender would be, under either of such sections, guilty of felony,* shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven . . . years or to be imprisoned, . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts 9 & 10 Vict. c. 25, s. 7, with the addition of the words italicised. It is a sufficient overt act to constitute an attempt if the prisoner went to a stack and lit a match to fire the stack, but desisted on finding that he was watched. R. v. Taylor, 1 F. & F. 511, Pollock,* C.B.]

Indictment for setting Fire to Stacks of Corn, etc.
(24 & 25 *Vict. c. 97, s. 17, ante,* p. 662.)

Commencement as ante, p. 651]—feloniously, unlawfully, and maliciously did set fire to a certain stack of wheat ("*any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or any steer of wood or bark*") of J. N.; against the form [*as ante,* p. 465]. *Where the word "unlawfully" was omitted, the judges held the indictment to be bad. R. v. Reader and Turner (ubi supra.) No intent need be stated. R. v. Newill, 1 Mood. C. C. 458. No local description of the position of the stack is necessary. R. v. Woodward, Id. 323.*

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 *Vict. c. 97, s. 17;* 54 & 55 *Vict. c. 69, s. 1, sub-ss. 1, 2 (ante,* p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 & 25 *Vict. c. 97, s. 73 (ante,* p. 650).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c. 38, s. 1 (ante,* p. 126).

Evidence.

Prove that the defendant wilfully set fire to the stack of wheat, etc., as stated in the indictment (*see ante,* p. 652); and prove the ownership of the property. Indictments for setting fire to a stack of beans (*R. v. Woodward,* 1 *Mood. C. C.* 323); or barley (*R. v. Swatkins,* 4 *C. & P.* 548), have been held good, the court taking judicial notice that beans are pulse, and that barley is corn. A stack composed of the flax-plant with the seed or grain in it (the jury finding that the flax-seed is a grain) was held to be a stack of grain within 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 10 (*rep.*). *R. v. Spencer, Dears. & B.* 131; 26 *L. J.* (*M. C.*) 16; 7 *Cox,* 189 (*C. C. R.*). A haycock has been held not to be a stack within the statute. *R. v. McKeever* [1871] *Ir. Rep.* 5 *C. L.* 86; and a stack of sedge and rushes was held not to be within 7 *W.* 4 & 1 *Vict. c.* 89; *R. v. Baldock,* 2 *Cox,* 55. *Qu.* whether it is "cultivated vegetable produce" within the present Act. A quantity of straw, packed on a lorry, in course of transmission to market, and left for the night in an inn yard, is not a stack of straw

within section 17 of 24 & 25 *Vict. c.* 97. *R.* v. *Satchwell*, *L. R.* 2 *C. C. R.* 21; 42 *L. J.* (*M. C.*) 63; 12 *Cox*, 449. Upon 7 & 8 *G.* 4, c. 30, s. 17 (*rep.*), which did not contain the word "haulm," *or the words "any cultivated vegetable produce,"* it was held that an indictment for setting fire to a stack of straw was not supported by proof that the stack was composed partly of stubble and partly of cole-seed straw. *R.* v. *Tottenham*, 7 *C. & P.* 237; 1 *Mood. C. C.* 461, *cit.* The prisoner was indicted for setting fire to a stack of wood, and it appeared that the wood set fire to consisted of a score of faggots heaped on each other in a temporary loft over the gateway: *Parke*, J., held this not to be a stack of wood. *R.* v. *Aris*, 6 *C. & P.* 348.

Indictment for setting Fire to Crops of Corn, etc. (24 & 25 *Vict. c.* 97, *s.* 16, *ante*, p. 661.)

Commencement as ante, p. 651]—feloniously, unlawfully, and maliciously, did set fire to a certain crop of wheat ("*any crop of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or any part of any wood, coppice or plantation of trees, or any heath, gorse, furze or fern, wheresoever the same may be growing*"), of the goods and chattels of J. N., then standing and growing; against the form [*as ante*, p. 465].

Felony: penal servitude for not more than fourteen and not less than three years, or imprisonment not exceeding two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 16; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze or fern, is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126). *That statute, however, does not exclude from the jurisdiction of sessions the setting fire to crops of hay or grass, or to crops of any cultivated vegetable produce, other than of corn, grain, or pulse.*

Evidence.

Prove that the defendant set fire to the crop of wheat, etc., as stated in the indictment, and prove the ownership of the property. *See the last precedent.* Proof of setting fire to a single detached tree will not, it seems, support the indictment. *R.* v. *Davy*, 1 *Cox*, 60, *Alderson*, B.

Where the defendant set fire to a summer-house in a wood, and the fire was thence communicated to the wood, he was held to be properly convicted on an indictment charging him with setting fire to the wood. *R.* v. *Price*, 9 *C. & P.* 729: *and see ante*, p. 652. Where the prisoner was indicted for setting fire to growing furze, *Lopes*, J., directed the jury that if she set fire to the furze thinking, although erroneously, that she had a right to do so, they ought not to convict. *R.* v. *Twose*, 14 *Cox*, 327.

SECT. 7.

MALICIOUS DAMAGE.

ENDANGERING LIFE OR PROPERTY BY USE OF EXPLOSIVES.

Statutes.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 9—*Attempting to blow up dwelling-houses, etc.*]—Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling-house, any person being therein, or of any building, whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 9 & 10 *Vict. c.* 25, *ss.* 1, 2. *For indictments, see post*, pp. 667, 668.]

Sect. 10—*Putting explosives near buildings with intent, etc.*]—Whosoever shall unlawfully and maliciously place or throw in, into, upon, under, against, or near any building, any gunpowder, or other explosive substance, with intent to destroy or damage any building, or any engine, machinery, working-tools, fixtures, goods or chattels, shall, whether or not any explosion take place, and whether or not any damage be caused, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen . . . years or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 9 & 10 *Vict. c.* 25, *s.* 6. *For indictment, see post*, p. 668.]

Sect. 45—*Damaging ships by explosives.*]—*See post*, p. 680.

Sect. 54.—*Manufacturing, etc., explosive substances, etc., for the purpose of committing offences.*]—Whosoever shall make or manufacture, or knowingly have in his possession, any gunpowder or other explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing with intent thereby or by means thereof to commit, or for the purpose of enabling any other person to commit, *any of the felonies* in this Act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 9 & 10 *Vict. c.* 25, *s.* 8, *with the alterations italicized. Cf.* 24 & 25 *Vict. c.* 100, *s.* 64, *post, tit.* "*Attempting to Murder.*"]

Sect. 55.] — *Power to justices to issue search warrants for such explosives.*

46 & 47 *Vict. c.* 3 (*Explosive Substances Act*, 1883), *s.* 2—*Causing*

explosion likely to endanger life or property.]—Any person who unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not, be guilty of felony, and on conviction shall be liable to penal servitude for life, or for any less term (not less than the minimum term allowed by law [*see* 54 & 55 *Vict. c.* 69, *s.* 1, *sub-s.* 1, *ante*, p. 235]), or to imprisonment with or without hard labour for a term not exceeding two years. [*For indictment, see post*, p. 669.]

Sect. 3—*Attempt to cause explosion, or for making or keeping explosives with intent to endanger life or property.*]—Any person who, within or (being a subject of [his] Majesty) without [his] Majesty's dominions, unlawfully and maliciously—

(*a*) Does any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance an explosion in the United Kingdom of a nature likely to endanger life or to cause serious injury to property; or

(*b*) Makes, or has in his possession, or under his control, any explosive substance, with intent by means thereof to endanger life, or cause serious injury to property in the United Kingdom, or to enable any other person by means thereof to endanger life, or cause serious injury to property in the United Kingdom,

Shall, whether any explosion does or does not take place, and whether any injury to person or property has been actually caused or not, be guilty of felony, and on conviction shall be liable to penal servitude for a term not exceeding twenty years [*nor less than three years*, 54 & 55 *Vict. c.* 69, *s.* 1, *sub-s.* 1, *ante*, p. 235], or to imprisonment with or without hard labour for a term not exceeding two years, and the explosive substance shall be forfeited.

Sect. 4—*Making or possession of explosive under suspicious circumstances —competency of defendant and his or her wife or husband as witness.*]—(1) Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control, for a lawful object, be guilty of felony, and, on conviction, shall be liable to penal servitude for a term not exceeding fourteen years [*nor less than three years*, 54 & 55 *Vict. c.* 69, *s.* 1, *sub-s.* 1, *ante*, p. 235], or to imprisonment for a term not exceeding two years, with or without hard labour, and the explosive substance shall be forfeited.

(2) In any proceeding against any person for a crime under this section, such person and his wife, or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case. [*This enactment seems to be superseded by the Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *ante*, p. 392, *et seq.*]

Sect. 5—*Accessories.*]—Any person who, within or (being a subject of [his] Majesty) without [his] Majesty's dominions, by the supply of or solicitation for money, the providing of premises, the supply of materials, or in any manner whatsoever, procures, counsels, aids, abets, or is accessory to, the commission of any crime under this Act, shall be guilty of felony, and shall be liable to be tried and punished for that crime, as if he had been guilty as a principal. [*See ante*, pp. 12-21.]

Sect. 6—Inquiry by the Attorney-General.]—(1) Where the Attorney-General has reasonable ground to believe that any crime under this Act has been committed, he may order an inquiry under this section, and thereupon any justice for the county, borough, or place in which the crime was committed, or is suspected to have been committed, who is authorized in that behalf by the Attorney-General, may, although no person may be charged before him with the commission of such crime, sit at a police-court, or petty sessional or occasional court-house or police-station in the said county, borough, or place, and examine on oath concerning such crime any witness appearing before him, and may take the deposition of such witness, and, if he see cause, may bind such witness by recognizance to appear and give evidence at the next petty sessions, or when called upon within three months from the date of such recognizance; and the law relating to the compelling of the attendance of a witness before a justice, and to a witness attending before a justice and required to give evidence concerning the matter of an information or complaint, shall apply to compelling the attendance of a witness for examination and to a witness attending under this section.

(2) A witness examined under this section shall not be excused from answering any question on the ground that the answer thereto may criminate, or tend to criminate, himself; but any statement made by any person in answer to any question put to him on any examination under this section shall not, except in the case of an indictment or other criminal proceeding for perjury, be admissible in evidence against him in any proceeding, civil or criminal.

(3) A justice who conducts the examination under this section of a person concerning any crime shall not take part in the committing for trial of such person for such crime.

(4) Whenever any person is bound by recognizance to give evidence before justices, or any criminal court, in respect of any crime under this Act, any justice, if he sees fit, upon information being made in writing, and on oath, that such person is about to abscond or has absconded, may issue his warrant for the arrest of such person, and if such person is arrested any justice, upon being satisfied that the ends of justice would otherwise be defeated, may commit such person to prison until the time at which he is bound by such recognizance to give evidence, unless in the meantime he produces sufficient sureties: Provided that any person so arrested shall be entitled on demand to receive a copy of the information upon which the warrant for his arrest was granted.

Sect. 7—No prosecution except by leave of Attorney-General. Form of indictment—Local jurisdiction—Saving for common law and other Acts.]—(1) If any person is charged before a justice with any crime under this Act, no further proceeding shall be taken against such person without the consent of the Attorney-General, except such as the justice may think necessary by remand, or otherwise, to secure the safe custody of such person.

(2) In framing an indictment the same criminal act may be charged in different counts as constituting different crimes under this Act, and upon the trial of any such indictment the prosecutor shall not be put to his election as to the count on which he must proceed.

(3) For all purposes of and incidental to arrest, trial, and punishment, a crime for which a person is liable to be punished under this Act, when committed out of the United Kingdom, shall be deemed to have been committed in the place in which such person is apprehended or is in custody.

(4) This Act shall not exempt any person from any indictment or proceeding for a crime or offence which is punishable at common law, or by any Act of Parliament other than this Act, but no person shall be punished twice for the same criminal act (*cf.* 52 & 53 *Vict. c.* 63, *s.* 33, *ante*, pp. 4, 170).

Sect. 8.—*Application of provisions of Explosives Act*, 1875 (38 & 39 *Vict. c.* 17), *as to search warrants, etc.*

Sect. 9—*Definitions*—"*Explosive substance*"—"*Attorney-General.*"]—(1) In this Act, unless the context otherwise requires—

The expression "explosive substance" shall be deemed to include any materials for making any explosive substance; also any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine, or implement.

The expression "Attorney-General" means [his] Majesty's Attorney-General for England or Ireland, as the case may be, and in case of his inability, or of a vacancy in the office, [his] Majesty's Solicitor-General for England or Ireland, as the case requires.

(2) *Application of Act to Scotland.*

Indictment for destroying by Explosion part of a Dwelling-house, some Person being therein. (24 & 25 *Vict. c.* 97, *s.* 9, *ante*, p. 664.)

Commencement as ante, p. 651]—feloniously, unlawfully, and maliciously did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy ("*destroy, throw down, or damage*") a certain part ("*the whole or any part*") of the dwelling-house of J. N., situate at the parish of B., in the county of M., one A. N. then being in the said dwelling-house; against the form [*as ante*, p. 465]. *Add counts for* "*throwing down*" *and* "*damaging*" *part of the dwelling-house.*

Felony: penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, not exceeding two years; and, if a male under sixteen years, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 9; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant, by himself or with others, destroyed, or was present aiding and abetting in the destruction of, some part of the dwelling-house in question, by the explosion of gunpowder or other explosive substance mentioned in the indictment. It is submitted that a destruction, etc., of some part of the *freehold* must be shown, by analogy to the decisions under 7 & 8 *G.* 4, *c.* 30, *s.* 8 (*rep.*) (*see post*, pp. 701, 702). It has been held that firing a gun loaded with powder through the key-hole of the door of a house, in which were several persons, and by which the lock of the door was blown to pieces, is not within 24 & 25 *Vict. c.* 97, *s.* 9. *R.* v. *Brown*, 3 *F.* & *F.* 821. Prove that it was the dwelling-house of J. N., and situate as described in the indictment. Prove that the act was done maliciously, *i.e.* wilfully. (*See ante*, p. 651, *post*, p. 701.) Prove

also that A. N. was in the house at the time of the setting fire to it. (*See ante*, p. 656.) No particular intent need be laid or proved.

Indictment for blowing up a House whereby Life was endangered. (24 & 25 *Vict. c.* 97, *s.* 9, *ante*, p. 664.)

Commencement as ante, p. 651]—feloniously, unlawfully, and maliciously did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy ("*destroy, throw down, or damage*") the dwelling-house of J. N., situate at the parish of B., in the county of M., whereby the life of one A. N. was then endangered; against the form [*as ante*, p. 465]. *Add a count for "damaging" the house with the like consequence.*

Felony, 24 & 25 *Vict. c.* 97, *s.* 9. *See the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant destroyed or damaged the house in question, or was present aiding and abetting the destruction, or damaging of it by the explosion of gunpowder or other explosive substances mentioned in the indictment. Prove that it was the dwelling-house of J. N., and situate as described in the indictment. Prove that the act was done maliciously. (*See ante*, p. 651, *post*, p. 701.) And prove that the life of A. N. was endangered by the defendant's act. This will depend of course, in almost all cases, on medical evidence. The endangering of life, to be within the mischief of 24 & 25 *Vict. c.* 97, *s.* 9, must result from the damage to the house in question: but the persons put in danger need not be within it; and it is not necessary to prove actual injury, but sufficient to show such exposure to risk or chance of injury as will satisfy the jury that actual danger to life was caused. *R.* v. *McGrath*, 14 *Cox*, 598.

Indictment for throwing Gunpowder into a Building with Intent, etc. (24 & 25 *Vict. c.* 97, *s.* 10, *ante*, p. 664.)

Commencement as ante, p. 651]—feloniously, unlawfully, and maliciously did throw into a certain building, to wit [*describe the building*], situate at the parish of B., in the county of M. ("*place or throw in, into, upon, under, against, or near any building*"), a large quantity, to wit, two pounds, of a certain explosive substance, that is to say, gunpowder, with intent thereby then to destroy ("*destroy or damage*") the said building; against the form [*as ante*, p. 465]. *Add counts varying the statement of the act, and also stating the intent to be to "damage" the house.*

Felony: penal servitude for not more than fourteen and not less than three years, or imprisonment, with or without hard labour, not exceeding two years; and, if a male under the age of sixteen, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 10; 54 & 55 *Vict. c.* 69, *s.* 1. *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

Evidence.

Prove the act done by the defendant, as alleged in the indictment; that it was done maliciously (*see ante*, p. 651, *post*, p. 701); that the house was the

dwelling-house of J. N., situate as described in the indictment; and prove circumstances from which the jury may infer the intent to destroy or damage the house, as stated in the indictment. Where the prisoner was indicted under 24 & 25 *Vict. c.* 97, *s.* 10, for throwing gunpowder against a house, and the evidence was that the prisoner had thrown a bottle containing gunpowder against the house, and that there was a fuse in the neck of the bottle, *Kelly*, C.B., ruled that unless the fuse was lighted at the time the bottle was thrown against the house the offence was not made out, and said that, "if anybody merely threw a bottle containing gunpowder, that would not comply with the conditions of the statute. If the fuse was not lighted it could not cause an explosion, and it would be merely throwing a bottle against a house." *R.* v. *Sheppard*, 11 *Cox*, 302.

Indictment for causing Explosion likely to endanger Life or Property.
(46 & 47 *Vict. c.* 3, *s.* 2, *ante*, p. 665).

Commencement as ante, p. 651]—feloniously, unlawfully, and maliciously did cause, by a certain explosive substance, to wit [*e.g.* "*gunpowder enclosed in a metal case*," or "*an iron cylinder fitted with two iron caps, being a machine adapted for causing an explosion*"], an explosion of a nature likely to endanger life ("*likely to endanger life, or to cause serious injury to property*"); against the form (as *ante*, p. 465).

Add counts describing the explosion as "*likely to cause serious injury to property*," *and the explosive substance as one* "*the name and description of which are to the jurors aforesaid unknown*," *or otherwise varying the description of the same as may be necessary. As to venue, see* 46 & 47 *Vict. c.* 3, *s.* 7 (3), *ante*, p. 666.

An indictment for having in possession explosives (46 & 47 *Vict. c.* 3, *s.* 4) *can easily be framed from the above precedent.*

Felony: penal servitude for life or for not less than three years, or imprisonment with or without hard labour not exceeding two years. 46 & 47 *Vict. c.* 3, *s.* 2 (*ante*, p. 665); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c*, 38, *s.* 1 (*ante*, p. 126.)

Evidence.

Prove that the defendant by himself or with others, caused or was present aiding and abetting in the causing of the explosion in question, by the explosion of gunpowder or other explosive substance mentioned in the indictment. Prove that the act was done maliciously, *i.e.* wilfully and not by accident (*see ante*, p. 651, *post*, p. 701). Prove that the explosion was of a nature likely to endanger life, etc.; it is not necessary (as it is under 24 & 25 *Vict. c.* 97, *s.* 9) to prove that life was actually endangered. No *intent* need be laid or proved. Any part of a vessel which when filled with an explosive substance is adapted for causing an explosion is an explosive substance within the Act. *R.* v. *Charles*, 17 *Cox*, 499, *Hawkins*, J. If several persons are connected in a common design to have articles amounting to an explosive substance within the Act made for an unlawful purpose, each of the confederacy is responsible in respect of such articles as are in the possession of others connected in the carrying out of their common design. *Id.*

RIOTOUSLY DEMOLISHING HOUSES, ETC.

Statute.

24 & 25 *Vict.* c. 97 (*Malicious Damage Act*, 1861), *s.* 11—*Riotously demolishing houses, etc.*]—If any persons, riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force demolish, or pull down or destroy, or begin to demolish, pull down, or destroy, any church, chapel, meeting-house, or other place of divine worship, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, *shed, hovel, or fold*, or any building or erection used *in farming land*, or in carrying on any trade or manufacture, or any branch thereof, *or any building, other than such as are in this section before mentioned, belonging to the* [*King*], *or to any county, riding, division, city, borough, poor law union, parish, or place, or belonging to any university, or college or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution*, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine or other engine for sinking, working, *ventilating*, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . [*This section re-enacts* 7 & 8 *G.* 4, *c.* 30, *s.* 8, *with the additions in italics.*]

Sect. 12—*Riotously damaging houses, etc.*]—If any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force injure or damage any such church, chapel, meeting-house, place of divine worship, house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine, staith, bridge, waggon-way, or trunk, as in the last preceding section mentioned, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . . : Provided that, if, upon the trial of any person for any felony in the last preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offence in this section mentioned, then the jury may find him guilty thereof, and he may be punished accordingly. [*This section was new law in* 1861, *and was framed to obviate the effect of the decisions in R.* v. *Thomas*, 4 *C.* & *P.* 237: *R.* v. *Price*, 5 *C.* & *P.* 510: *R.* v. *Batt*, 6 *C.* & *P.* 329: *R.* v. *Howell*, 9 *C.* & *P.* 437; 3 *St. Tr., N. S.*, 1087: *and R.* v. *Adams*, *C.* & *Mar.* 299, *in which it was held that to justify a conviction under* 7 & 8 *G.* 4, *c.* 30, *s.* 8 (*rep.*), *it was necessary to prove an intent to demolish the whole building.*]

Indictment. (24 & 25 *Vict.* c. 97, *s.* 11, *supra.*)

Central Criminal Court, to wit:—The jurors for our lord the King, upon their oath present, that on the first day of June, in the year of our Lord ——, at the parish of B., in the county of L., and within the jurisdiction of the said court, in the county of London, J. S., J. W., and E. W., together with divers other evil-disposed persons, to the jurors

aforesaid unknown, unlawfully, riotously and tumultuously did assemble together, to the disturbance of the public peace: and being then and there so unlawfully, riotously and tumultuously assembled together as aforesaid, did then and there feloniously, unlawfully and with force, begin to demolish and pull down the dwelling-house of one J. N. there situate ("*any church, chapel, etc., house, etc.*"); against the form [*as ante*, p. 465].

Felony: penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 97, *s.* 11; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove a riotous assembly, as stated *post, Chap. IV., Sect.* 3, *tit.* "*Riot.*" The number of persons composing it is not material, provided they were three at the least. Prove that the assembly began "with force to demolish the house" in question, and that it was the dwelling-house of J. N., and situate in the parish and county described in the indictment. It must appear that they began to demolish some part of the *freehold*: for instance, the demolition of moveable shop shutters is not sufficient. *R.* v. *Howell*, 9 *C. & P.* 437; 3 *St. Tr., N. S.* 1087. A demolition *by fire* is within the statute. *Id.*: *R.* v. *Christian*, 12 *L. J.* (*M. C.*) 26: *R.* v. *Harris, C. & Mar.* 661; 4 *St. Tr., N. S.* 1387. Prove that the defendants were either active in demolishing the house, or present aiding and abetting. *R.* v. *Harris, ubi supra*; *R.* v. *Simpson, C. & Mar.* 669; 4 *St. Tr., N. S.* 1387. To convict under *s.* 11 the jury must be satisfied that the ultimate object of the rioters was to demolish the house, and that, if they had carried their intention into effect, they would in point of fact have demolished it; for if the rioters merely do an injury to the house, and then of their own accord go away, as having completed their purpose, it is not a beginning to demolish within section 11, though it may be an offence within section 12. *See* cases in note to that section, *supra*; and *Drake* v. *Footitt*, 7 *Q. B. D.* 201; 50 *L. J.* (*M. C.*) 141: *Drake* v. *Hankin*, *Id.* But on an indictment under 7 & 8 *G.* 4, *c.* 30, *s.* 8 (*rep.*), containing a count for riotously, etc., demolishing a dwelling-house, it was held that it was not necessary to prove, though the parties were not interrupted: it was enough if the house be destroyed *as a dwelling*. Therefore, the fact that the rioters left a chimney remaining would not prevent the statute from applying. *R.* v. *Phillips*, 2 *Mood. C. C.* 252; *S. C. as R.* v. *Langford, C. & Mar.* 602, *Patteson*, J.

Where a mob, after the obnoxious person had escaped, continued to attack a house until the police interfered, *Gurney*, B., left it to the jury to say whether they had not the intention to demolish the house as well as to injure the person; and the jury, being of that opinion, found the defendants guilty. *R.* v. *Batt*, 6 *C. & P.* 329.

If the demolition be in the *bonâ fide* assertion of a supposed, though unfounded, claim of right, it is not within the statute, though it be accompanied by a riot. *R.* v. *Phillips* (*ubi supra*); and *see* notes to section 51 (*post*, p. 701): *R.* v. *Clemens* [1898] 1 *Q. B.* 556; 67 *L. J. Q. B.* 482; 19 *Cox*, 18: *Heaven* v. *Crutchley*, 68 *J. P. Rep.* 53.

If the demolishing, etc., be not proved so as to constitute a felony, but the house be damaged or injured (the other requisites of this section being satisfied), the offenders may, upon this indictment, be convicted of a misdemeanor under section 12, and punished as therein provided.

INJURIES TO HOUSES, ETC., BY TENANTS.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 13.]—Whosoever being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish, the same or any part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture being fixed in or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of a misdemeanor. [*This section was framed on* 9 *G.* 4, *c.* 56, *s.* 24 (*Ir.*)].

Indictment.

Middlesex, to wit:—The jurors for our lord the King, upon their oath present, that on the first day of June, in the year of our Lord ——, J. S., then being possessed of a certain dwelling-house ["*dwelling-house or other building*"] situate in the parish of B., in the county of M., then held by him the said J. S. for a term of years then unexpired ["*held for any term of years or other less term, or at will, or held over after the determination of any tenancy*"], unlawfully and maliciously did pull down and demolish the said dwelling-house ["*pull down or demolish, or begin to pull down or demolish the same or any part thereof*," or "*pull down or sever from the freehold any fixture being fixed in or to such dwelling-house or building*"]; against the form [*as ante*, p. 465].

Misdemeanor (24 & 25 *Vict. c.* 97, *s.* 13): *punishable by imprisonment without hard labour* (*see ante*, p. 238) *or fine* (24 & 25 *Vict. c.* 97, *s.* 73, *ante*, p. 660), *or both. As to recognizances, see s.* 73.

Evidence.

Prove that the defendant was possessed of the dwelling-house for a subsisting term of years, or other less term, or at will, or that he was holding it over after the determination of his tenancy therein. If the tenancy was created by a lease or agreement in writing, the terms of it must be proved by the written instrument itself, or its non-production must be accounted for in order to let in other evidence of its contents. (*See ante*, pp. 315, 316.) Prove that the dwelling-house was situate as described in the indictment. Then prove that the defendant, or some other person or persons by his direction, demolished or began to demolish the house, or some part thereof. (*See ante*, p. 671.) Lastly, prove that the act was done maliciously; that is, wilfully, and without any claim or pretence of right to do it. (*See ante*, p. 671, *and post*, p. 701.)

DESTROYING GOODS IN PROCESS OF MANUFACTURE, AND MACHINERY.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 14.]—Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any goods or article of silk,

woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or any frame-work-knitted piece, stocking, hose, or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture, or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, cotton, *hair*, mohair, *or alpaca*, or of any one or more of those materials mixed with each other or mixed with any other material, *or shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or render useless*, any loom, frame, machine, engine, rack, tackle, tool, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles, or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 *&* 8 *G.* 4, *c.* 30, *s.* 3, *with addition of the words in italics to settle doubts expressed in R.* v. *Ashton*, 2 *B. & Ad.* 750.]

Indictment for Cutting, etc., Goods in the Loom, etc.

Commencement as ante, p. 433]—twenty-five yards of woollen cloth ("*any goods or article of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace*," of the goods and chattels of J. N., in a certain loom ("*in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture*") then being, feloniously, unlawfully, and maliciously did cut and destroy ("*cut, break, or destroy, or damage with intent to destroy or to render useless*"); against the form [*as ante*, p. 465]. *The words* "with intent, etc.," *appear to apply only to the word* "damage" *and not to the preceding words* "cut, break." *See R.* v. *Smith*, 6 *Cox*, 198. *The words* "in any stage or process of manufacture" *appear to include products until fit for sale. R.* v. *Woodhead*, 1 *M. & Rob.* 549, *and see R.* v. *Clegg*, 3 *Cox*, 295.

Felony: penal servitude for life or for not less than three years, or imprisonment with or without hard labour, not exceeding two years; and, if a male under sixteen years, with or without whipping.—24 *&* 25 *Vict. c.* 97, *s.* 14; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 *&* 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant cut or destroyed, etc., the goods in the loom as stated in the indictment, and that they were the property of J. N., either absolutely or specially. Then prove that it was done maliciously. (*See ante*, p. 651, *post*, p. 701.) It is not necessary to prove that it was done out of actual malice to the owner. 24 *&* 25 *Vict. c.* 97, *s.* 58 (*ante*, p. 649).

If an intent be charged in the indictment, it must be proved by

circumstances, if it cannot be inferred from the act itself. (*See ante*, pp. 303, 308, 340).

Indictment for Breaking, etc., Warps of Silk, etc., or Machinery, etc. (24 & 25 *Vict.* c. 97, *s.* 14, *ante*, p. 672).

Commencement as ante, p. 433]—a certain warp of silk ("*any warp or shute of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle* (*see R.* v. *Smith*, 6 *Cox*, 198), *tool, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles*"), of the goods and chattels of J. N., feloniously, unlawfully, and maliciously did cut and destroy ("*cut, break, or destroy, or damage with intent to destroy or to render useless*"); against the form [*as ante*, p. 465].

Felony: punishable as in the last case.—24 & 25 *Vict.* c. 97, *s.* 14.

This offence is not triable at quarter sessions. 5 & 6 *Vict.* c. 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant cut or destroyed, etc., the warp of silk, etc., the property of J. N., as stated in the indictment. Where the prisoner, in company with others, unfastened and took away a certain part of a stocking-frame called the half-jack, without which the frame was useless, but did no further injury either to the half-jack or to the frame, than the removal of the half-jack; the judges were unanimously of opinion that this was a damaging the frame within 28 *G.* 3, c. 55, *s.* 4 (*rep.*), as it made the frame imperfect and inoperative. *R.* v. *Tacey*, *R.* & *R.* 452; *cf. R.* v. *Fisher*, *L. R.* 1 *C. C. R.* 7; 35 *L. J.* (*M. C.*) 57; 10 *Cox*, 146. Prove also that it was done maliciously (*see ante*, p. 651), as in the last case. And if an intent be charged in the indictment, prove it from circumstances, if it cannot be inferred from the Act itself. (*See ante*, pp. 303, 308, 340.)

Indictment for entering by force into a House, etc., with intent to cut or destroy, etc., Silk Goods, etc. (24 & 25 *Vict.* c. 97, *s.* 14, *ante*, p. 672.)

Commencement as ante, p. 433]—into a certain house ("*any house, shop, building, or place*" [of J. N.] situate at the parish of B., in the county of M., feloniously and by force did enter, with intent certain woollen goods of the said J. N., in a certain loom then and there being ("*with intent to commit any of the offences aforesaid*," *see the last two precedents*), feloniously, unlawfully and maliciously to cut and destroy; against the form [*as ante*, p. 465].

Felony: see the last precedent but one.—24 & 25 *Vict.* c. 97, *s.* 14.

This offence is not triable at quarter sessions. 5 & 6 *Vict.* c. 38, *s.* 1 (*ante*, p. 126.)

Evidence.

Prove that the defendant entered by force the house in question, that such house was the house of J. N., that the house was situate as described in the indictment, that the woollen goods were in the house; and prove from circumstances the defendant's intent to be such as is charged in the indictment. (*See ante*, pp. 303, 308, 340.)

DESTROYING MACHINES USED IN AGRICULTURE OR CERTAIN MANUFACTURES.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 15.]—Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any machine or engine, whether fixed or moveable, used or intended *to be used for sowing, reaping, mowing*, thrashing, *ploughing or draining, or for performing any other agricultural operation*, or any machine or engine, or any tool or implement, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, cotton, *hair*, mohair, *or alpaca* goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any frame-work-knitted piece, stocking, hose, or lace), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 30, *s.* 4, *with the additions italicized.*]

Indictment.

Commencement as ante, p. 433]—a certain thrashing-machine ("*any machine or engine, whether fixed or moveable, used or intended to be used for sowing, reaping, mowing, thrashing, ploughing or draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or moveable, prepared for or employed in any manufacture whatsoever, except the manufacture of silk, woollen, linen, cotton, hair, mohair, or alpaca goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any frame-work-knitted piece, stocking, hose, or lace*") the property of J. N., feloniously, unlawfully and maliciously did cut, break, and destroy ("*cut, break, or destroy, or damage with intent to destroy or render useless*"); against the form [*as ante*, p. 465]. *Omission of the word "feloniously" is fatal. R.* v. *Gray, L. & C.* 365; 33 *L. J.* (*M. C.*) 78; 9 *Cox*, 417.

Felony: penal servitude for not more than seven nor less than three years, or imprisonment, with or without hard labour, not exceeding two years; and, if a male under sixteen years of age, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 15; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

Evidence.

Prove that the defendant cut, broke, or destroyed the thrashing-machine in question (*see ante, p.* 673; *R.* v. *Tacey, R. & R.* 452); and that it was the property of J. N. Prove that it was done maliciously (*see ante*, p. 651): but whether from malice to the owner or otherwise is immaterial. 24 & 25 *Vict. c.* 97, *s.* 58 (*ante*, p. 649). In *R.* v. *Crutchley*, 5 *C. & P.* 133, upon an indictment under 7 & 8 *G.* 4, *c.* 30, *s.* 4 (*rep.*), for breaking a thrashing-machine, *Patteson*, J., allowed the prisoner's counsel to ask whether the mob had not compelled several persons to join them, and to give each a blow with a sledge-hammer to every machine that was

broken; he also allowed the witnesses for the prisoner to prove that he had been forced by the mob to join them, and had resolved to escape on the first opportunity. If the damage is alleged to have been done with intent to destroy the machine, or to render it useless, the intent must be proved by circumstances, if it cannot be implied from the act done. (*See ante*, pp. 303, 308, 340.) If a thrashing-machine be taken to pieces and separated by the owner, the destruction of any part of it is within that statute. *R.* v. *Mackerel*, 4 *C. & P.* 448. So is the destruction of a water-wheel, by which a thrashing-machine is worked. *R.* v. *Fidler*, 4 *C. & P.* 449; or the displacing of a machine. *R.* v. *Foster*, 6 *Cox*, 25. So, though the side-boards of the machine be wanting, without which it will act, but not perfectly, it is within the statute. *R.* v. *Bartlett*, 2 *Deacon, Cr. L.* 1517: *and see R.* v. *Chubb*, *Id.* 1518; *R.* v. *Hutchins*, *Id.* 1517. But if the machine be taken to pieces, and in part destroyed by the owner from fear, the remaining parts do not constitute a machine within the meaning of the statute. *R.* v. *West*, *Id.* 1518. It is not necessary that the damage done should be of a permanent kind. Therefore where the prisoner was indicted under 24 & 25 *Vict. c.* 97, *s.* 15, for maliciously damaging a steam-engine, and the evidence was that he had maliciously screwed up parts of the engine, so that they would not work while so screwed up, and had reversed the plug of the pump which supplied the engine with water, and that the engine was thus rendered temporarily useless and liable to burst, but the screws were loosened and the plugs properly replaced by the prosecutor, who discovered the state of the engine before any permanent damage was done, and the engine was then just as good as before, it was held that the prisoner was properly convicted. *R.* v. *Fisher*, *L. R.* 1 *C. C. R.* 7; 35 *L. J.* (*M. C.*) 57; 10 *Cox*, 146.

A table, with a hole in it for water, used in the manufacture of bricks, was held not to be a "machine prepared for or employed in any manufacture" within 7 & 8 *G.* 4, *c.* 30, *s.* 4 (*rep.*). *R.* v. *Penny*, *Chester Sum. Ass.* 1855 (*per Jervis*, C.J., *after consulting Lord Campbell*, C.J.). But it would no doubt be held to be a "tool" or "implement" within the present statute.

DROWNING MINES, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 28.]—Whosoever shall unlawfully and maliciously cause any water to be conveyed *or run* into any mine, or into any subterranean passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up, or obstruct, *or damage with intent to destroy, obstruct, or render useless* any airway, water-way, drain, pit, level or shaft, of or belonging to any mine, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping.

Provided that this provision shall not extend to any damage committed underground by any owner of any adjoining mine, in working the same, or by any person duly employed in such working. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 30, *s.* 6, *with the additions italicized.*]

Indictment for Drowning a Mine. (24 & 25 *Vict. c.* 97, *s.* 28.)

Commencement as ante, p. 433]—feloniously, unlawfully, and maliciously did cause a quantity of water ("*any water*") to be conveyed into a certain mine ("*into any mine or into any subterraneous passage communicating therewith*") of J. N., situate at the parish of B., in the county of M., with intent thereby then feloniously to destroy ("*destroy or damage, or hinder or delay the working thereof*") the said mine; against the form [*as ante*, p. 465]. *The mine may be laid as the property of a person in possession of and working it, though only as agent for others. R.* v. *Jones*, 1 *C. & K.* 181; 2 *Mood. C. C.* 293. *But this case does not seem definitely to decide that it is necessary to prove the ownership.*

Felony: penal servitude for not more than seven nor less than three years, or imprisonment, with or without hard labour, not exceeding two years; and, if a male under sixteen years of age, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 28; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

Evidence.

Prove that the defendant caused the water to be conveyed into the mine in the occupation of J. N., as described in the indictment. Prove that it was done maliciously. (*See ante*, p. 651, *post*, 701.) And prove the intent by circumstances from which it may be inferred. (*See ante*, pp. 303, 308, 340.) Underground damage by adjoining mine owners and their servants is not punishable under this section: *see the proviso.*

Indictment for pulling down, etc., Airways, etc., of Mines. (24 & 25 *Vict. c.* 97, *s.* 28.)

Commencement as ante, p. 403]—feloniously, unlawfully, and maliciously did pull down ("*pull down, fill up, or obstruct, or damage with intent to destroy, obstruct, or render useless*") a certain airway ("*airway, waterway, drain, pit, level, or shaft*") of and belonging to a certain mine of J. N., situate at the parish of B., in the county of M., with intent thereby then to destroy ("*destroy, or damage, or hinder, or delay the working thereof*") the said mine; against the form [*as ante*, p. 465]. *If the offence be an obstruction of an airway, etc., the mode of obstruction may be stated in a second count.*

Felony. 24 & 25 *Vict. c.* 97, *s.* 28. *See the last precedent.*

Evidence.

Prove that the defendant pulled down, etc., the airway of a mine in the occupation of J. N., as described in the indictment. If workmen stop up an airway by order of their master in a portion of his mine, it is not felony in the workmen, even though the master know that he has no right to the airway; but if the workmen know that the stopping of the airway is a malicious act of the master, it is felony in the workmen. *R.* v. *James*, 8 *C. & P.* 131. Prove that it was done maliciously. (*See ante*, p. 651, *post*, p. 701.) And prove the intent, as in the last precedent. If the act is done by the prisoner under a *bonâ fide* claim of right, it is not within the statute. *R.* v. *Matthews*, 14 *Cox*, 5, *Brett*, J.: *cf. R.* v. *Phillips*, 2 *Mood. C. C.* 252: *R.* v. *Clemens* [1898] 1 *Q. B.* 556. The proviso to 24 & 25 *Vict. c.* 97, *s.* 28 (*ante*, p. 676), applies to this offence.

DESTROYING ENGINES, ERECTIONS, ETC., USED IN MINES.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 29.]—Whosoever shall unlawfully and maliciously pull down and destroy, or damage with intent to destroy or render useless, any steam engine or other engine for sinking, draining, *ventilating*, or working, or for in anywise assisting in *sinking, draining, ventilating, or* working any mine, or any appliance or apparatus in connection with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggon-way, or trunk be completed or in an unfinished state, or shall unlawfully and maliciously stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct, or delay the working thereof, *or shall unlawfully and maliciously wholly or partially cut through, sever, break, or unfasten, or damage with intent to destroy or render useless, any rope, chain, or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway or other way, or other work whatsoever in anywise belonging or appertaining to or connected with or employed in any mine, or the working or business thereof*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section was framed from* 7 & 8 *G.* 4, *c.* 30, *s.* 7, *and* 23 & 24 *Vict. c.* 29, *s.* 1, *with the additions in italics.*]

Indictment.

Commencement as ante, p. 433]—a certain steam-engine, the property of J. N., for the draining and working of a certain mine of the said J. N., situate at the parish of B., in the county of M. ("*any steam-engine or other engine for sinking, draining, ventilating, or working any mine, etc., etc.*") feloniously, unlawfully, and maliciously did pull down and destroy ("*pull down or destroy, or damage with intent to destroy or render useless*"); against the form [*as ante*, p. 465].

Felony. 24 & 25 *Vict. c.* 97, *s.* 29. *See the last precedent but one.*

Evidence.

Prove that the defendant pulled down or destroyed the engine described in the indictment, and that it was erected for the purposes described in the indictment. It is immaterial whether it was completed or in an unfinished state. 24 & 25 *Vict. c.* 97, *s.* 29. A scaffold, erected at some distance above the bottom of a mine, for the purpose of working a vein of coal on a level with the scaffold, was held to be an *erection* used in conducting the business of the mine within the meaning of 7 & 8 *G.* 4, *c.* 30, *s.* 7 (*rep.*). *R. v. Whittingham*, 9 *C. & P.* 234. Where a steam-engine used in working a mine had been stopped and locked up for the night, and the defendant got into the engine-house and set it going, and there being no machinery attached, the engine went with great velocity, and received

injury, this was held to be a damaging of the engine within that statute. *R.* v. *Norris*, *Id.* 241. Where a mine was worked by a steam-engine, which caused a cylinder called a drum to revolve, and take up the rope as the coal was drawn up from the mine, it was held on 7 & 8 *G.* 4, c. 30, s. 7 (*rep.*), that proof of damaging the drum would not support an indictment which charged the damaging of the steam-engine. *R.* v. *Whittingham*, *supra*. But the words of the present statute include "any appliance or apparatus in connexion with any such steam or other engine," and apply also to many other injurious acts which were not mentioned in the former statutes. Prove that the mine was in the possession of J. N. Prove that the act was done maliciously (*see ante*, p. 651, *post*, p. 701); and, if an intent be stated, prove it from circumstances from which that intent may be inferred, if it cannot be implied from the act itself. (*See ante*, pp. 303, 308, 340.)

DESTROYING SHIPS, WITH INTENT, ETC.

Statute.

24 & 25 *Vict.* c. 97, ss. 42, 43, 44.]—*Ante*, pp. 658, 659.

Indictment. (24 & 25 *Vict.* c. 97, s. 42, *ante*, p. 658.)

Commencement as ante, p. 433]—on the high seas feloniously, unlawfully, and maliciously did cast away and destroy ("*cast away, or in anywise destroy*") a certain ship ("*any ship or vessel, whether the same be complete or in an unfinished state*") with intent thereby to prejudice one J. N., the owner ("*owner or part owner*") of the said ship [*or*, one E. F., the owner of certain goods then laden and being in and on board the said ship, *or*, one E. F., who had before then underwritten a certain policy of insurance on the said ship (*or*, on the freight of the said ship, *or*, on certain goods then being on board the said ship) which said policy was then in full force and operation (*see ante*, p. 660)]; against the form [*as ante*, p. 465]. *If the offence be committed in the body of a county, see the precedent ante*, p. 659.

Felony. (*For punishment, see ante*, pp. 658, 659.)

This offence is not triable at quarter sessions. 5 & 6 *Vict.* c. 38, s. 1 (*ante*, p. 126).

Evidence.

Prove that the defendant cast away or otherwise destroyed the vessel, the property of J. N., as stated. (*See ante*, p. 659.) It is immaterial whether the ship were complete or in an unfinished state. 24 & 25 *Vict.* c. 97, s. 42. A pleasure boat eighteen feet long is, it seems, a vessel within the meaning of these sections. *R.* v. *Bowyer*, 4 *C.* & *P.* 559. *See R.* v. *Smith*, 4 *C.* & *P.* 569 (*ante*, p. 659). If the ship had only run aground, and it were afterwards got off in a condition so as to be easily refitted, it seems it would not be an offence within the Act. *See R.* v. *De Londo*, 2 *East*, *P. C.* 1098. Prove the offence to have been done maliciously (*see ante*, p. 651, *post*, p. 701); and also prove the offence to have been committed with the intent charged in the indictment. Proving that it was done wilfully is of itself sufficient evidence from which the jury may presume that it was committed with intent to prejudice either the owner or part-owner of the ship or of the goods; but if the intent

charged be to prejudice the underwriters, you must prove the policy (*see ante*, p. 655), the inception of the risk, and circumstances from which the jury may infer the intent. (*See ante*, pp. 303, 308, 340.)

DAMAGING SHIPS WITH INTENT, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 46—*Damaging ships otherwise than by fire or explosives.*]—Whoever shall unlawfully and maliciously damage, otherwise than by fire, *gunpowder, or other explosive substance*, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same or render the same useless, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 30, *s.* 10, *with the additions italicized.*]

Sect. 45—*Attempting to damage ships with explosives.*]—Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any ship or vessel, any gunpowder or other explosive substance with intent to destroy or damage any ship or vessel, or any machinery, working tools, goods, or chattels, shall, whether or not any explosion take place, and whether or not any injury be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 9 & 10 *Vict. c.* 25, *s.* 6.]

Indictment.

Commencement as ante, p. 433]—on the high seas feloniously, unlawfully, and maliciously did damage a certain ship ("*any ship or vessel, whether complete or in an unfinished state*") to wit, by (*state how*) ("*damage otherwise than by fire, gunpowder, or other explosive substance*") with intent thereby to destroy the said ship, [*or*, to render useless the said ship]; against the form [*as ante*, p. 465]. *If the offence be committed in the body of a county, see the precedent* (*ante*, p. 659). *It is not necessary to state the damage to have been done "otherwise than by fire," if the manner of doing the damage is stated. R.* v. *Bowyer*, 4 *C.* & *P.* 559.

Felony: penal servitude for not more than seven nor less than three years, or imprisonment with or without hard labour, not exceeding two years; and, if a male under sixteen years of age, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 46; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 *ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

An indictment under section 45, *for attempting to destroy or damage a ship by the explosion of gunpowder, etc., may easily be framed from the precedent* (*ante*, p. 656).

Evidence.

Prove that the defendant damaged the ship in the mode stated in the indictment. It is immaterial whether the ship were in a complete or

unfinished state. 24 & 25 *Vict. c.* 97, *s.* 46. Prove that the act was done maliciously. (*See ante*, p. 651, *post*, p. 701.) Prove the ownership of the ship (*see ante*, p. 659); and prove, also, circumstances from which the intent stated in the indictment may be inferred (*see ante*, pp. 303, 308, 340), if it cannot be presumed from the act itself. A pleasure boat eighteen feet long is, it seems, within this enactment. *R.* v. *Bowyer*, 4 *C. & P.* 559. *See R.* v. *Smith*, 4 *C. & P.* 569 (*ante*, p. 659).

EXHIBITING FALSE SIGNALS, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 47.]—Whosoever shall *unlawfully mask, alter, or remove any light or signal*, or unlawfully exhibit any false light or signal, with intent to bring any ship, vessel, *or boat* into danger, or shall unlawfully and maliciously do anything tending to the immediate loss or destruction of any ship, vessel, *or boat, and for which no punishment is hereinbefore provided*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 5, *with the additions italicized.*]

57 & 58 *Vict. c.* 60 (*Merchant Shipping Act*, 1894), *ss.* 667 *to* 680 (1)]—*Proceedings for removal of false lights.*

Indictment for exhibiting False Signals. (24 & 25 *Vict. c.* 97, *s.* 47.)

Sussex, to wit.—The jurors of our lord the King upon their oath present, that before and at the time of committing the felony hereinafter mentioned, a certain ship ("*any ship, vessel, or boat*") the property of some person or persons to the jurors aforesaid unknown, was sailing on the high seas [*or*, in a certain river called the ——], near unto the parish of ——, in the county of S.; and that J. S., on the first day of June, in the year of our Lord ——, well knowing the premises, whilst the said ship was so sailing on the high seas, near unto the said parish as aforesaid, feloniously and unlawfully did exhibit a false light ("*any false light or signal*") with intent thereby to bring the said ship into danger; against the form [*as ante*, p. 465].

Felony: penal servitude for life or for not less than three years, or imprisonment with or without hard labour, not exceeding two years; and, if a male under sixteen years of age, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 47; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace.* 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the ship was sailing, as stated in the indictment, and that the defendant exhibited the false light or signal. The intent must be proved by the circumstances of the case which fairly and naturally lead to that conclusion, or by declarations made by the defendant. (*See ante*, pp. 303, 308, 340).

Indictment for doing an Act tending to the immediate Loss of a Ship. (24 & 25 *Vict. c.* 97, *s.* 47.)

Commencement as in the last precedent]—near unto the parish of ——, in the county of S.; and that J. S., on the first day of June, in the year of our Lord ——, well knowing the premises, whilst the said ship was so sailing near the said parish as aforesaid, feloniously, unlawfully, and maliciously did (*etc., stating the act done—"anything"*) the said act so done by the said J. S. as aforesaid then tending to the immediate loss ("*loss or destruction*") of the said ship; against the form [*as ante*, p. 465].

Felony. See the last precedent.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the act was done by the defendant maliciously (*see ante*, p. 651, *post*, p. 701); and that it tended to the immediate loss or destruction of the ship.

DESTROYING PARTS OF SHIPS IN DISTRESS, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 49.]—Whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . . [*This section re-enacts* 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 8.]

Indictment for destroying Part of a Ship, etc., in Distress.

Commencement as ante, p. 681]—a certain ship, the property of some person or persons to the jurors aforesaid unknown, was stranded and cast on shore ("*in distress, or wrecked, stranded, or cast on shore*") at the parish of ——, in the county of ——, and that J. S., on the first day of June, in the year of our Lord ——, and while the said ship was so stranded and cast on shore as aforesaid, the hull of the said ship ("*any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel*") feloniously, unlawfully, and maliciously did destroy; against the form [*as ante*, p. 465].

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment not exceeding two years, with or without hard labour. —24 & 25 *Vict. c.* 97, *s.* 49; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

Evidence.

Prove that the ship was stranded or cast ashore; prove the destruction of that part of the ship stated in the indictment, and that it was done by the defendant maliciously. (*See ante*, p. 651, *post*, p. 701).

CUTTING AWAY, ETC., BUOYS, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 48.]—Whosoever shall unlawfully and maliciously cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall unlawfully and maliciously do any act with intent to cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall in any other manner unlawfully and maliciously injure or conceal any boat, buoy, buoy-rope, perch, or mark used or intended for the guidance of seamen, or the purpose of navigation, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section was new law in* 1861.]

57 & 58 *Vict. c.* 60 (*Merchant Shipping Act*, 1894), *ss.* 666, 680.]—*Summary proceedings for injuring light-houses, removing buoys, etc.*

Indictment. (24 & 25 *Vict. c.* 97, *s.* 48.)

Sussex, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of August, in the year of our Lord ——, upon the high seas, feloniously, unlawfully, and maliciously did cut away a certain buoy ("*any boat, buoy, buoy-rope, perch, or mark*") then used for the guidance of seamen, and for the purpose of navigation ("*used or intended for the guidance of seamen or the purpose of navigation*"); against the form [*as ante*, p. 465]. *No intent need be charged in the indictment.*

Felony: penal servitude for not more than seven nor less than three years, or imprisonment not exceeding two years, with or without hard labour; and, if a male under sixteen years of age, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 48; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

Evidence.

Prove that the buoy, etc., in question was used or intended for the guidance of seamen, or in some manner for the purpose of navigation, and that the defendant cut it away maliciously, that is, wilfully. (*See ante*, p. 651, *post*, p. 701.)

DESTROYING SEA AND RIVER BANKS, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 30.]—Whosoever shall unlawfully and maliciously break down or cut down, *or otherwise damage or destroy*, any sea-bank or sea-wall, or the bank, dam, or wall of *or belonging to* any river, canal, drain, reservoir, *pool*, or marsh, whereby

any land *or building* shall be, or shall be in danger of being, overflowed or damaged, or shall unlawfully and maliciously throw, *break, or cut* down, level, undermine, or otherwise destroy, any *quay, wharf, jetty,* lock, sluice, flood-gate, weir, tunnel, towing-path, drain, water-course, or other work *belonging to any port, harbour, dock, or reservoir, or* on *or belonging to* any navigable river or canal, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts 7 & 8 G. 4, c. 30, s. 12, with the additions italicized.*]

Indictment for cutting down River or Sea Banks. (24 & 25 *Vict. c.* 97, *s.* 30, *ante,* p. 683.)

Commencement as ante, p. 433]—a certain part of the bank ("*any sea-bank, or sea-wall, or the bank, dam, wall of any river, canal, drain, reservoir, pool, or marsh*") of a certain river called the river ——, situate at the parish of B., in the county of M., feloniously, unlawfully, and maliciously did cut down and break down, by means whereof certain land was then overflowed and damaged [*or,* was in danger of being overflowed and damaged]; against the form [*as ante,* p. 465].

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 30; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante,* p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 & 25 *Vict. c.* 97, *s.* 78 (*ante,* p. 650).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante,* p. 126).

Evidence.

Prove that the defendant broke down or cut down the banks of the river, situate as described in the indictment. Prove, also, that the offence was committed maliciously (*see ante,* p. 651, *post,* p. 701); and prove that, in consequence of the breaking or cutting of the banks, certain land was, or was in danger of being, overflowed, as stated in the indictment.

Indictment for throwing down, etc., Locks on Rivers, etc. (24 & 25 *Vict. c.* 97, *s.* 30, *ante,* p. 683.)

Commencement as ante, p. 433]—a certain lock ("*any quay, wharf, jetty, lock, sluice, flood-gate, weir, tunnel, towing-path, drain, watercourse, or other work*") belonging to a certain canal ("*belonging to any port, harbour, dock, or reservoir, or on or belonging to any navigable river or canal*"), called the ——, situate in the parish of B., in the county of M., feloniously, unlawfully and maliciously did throw down ("*throw, break, or cut down, level, undermine, or otherwise destroy*"); against the form [*as ante,* p. 465].

Felony. See the last precedent.—24 & 25 *Vict. c.* 97, *s.* 30.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante,* p. 126.)

Evidence.

Prove that the defendant threw down, etc., the lock in question upon the canal or navigable river, as described in the indictment; prove the local situation of the canal or river, and prove that it was done maliciously. (*See ante,* p. 651, *post,* p. 701).

DESTROYING OR REMOVING, ETC., PILES, ETC., IN RIVERS, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 31.]—Whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea-bank or sea-wall, or the bank, dam or wall of any river, canal, *drain, aqueduct*, marsh, *reservoir, pool, port, harbour, dock, quay, wharf, jetty or lock*, or shall unlawfully and maliciously open or draw up any flood-gate or sluice, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing or maintaining the navigation thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 30, *s.* 12, *with the additions italicized.*]

Indictment for cutting, etc., Piles, etc., in Rivers or Sea-Banks. (24 & 25 *Vict. c.* 97, *s.* 31.)

Commencement as ante, p. 433]—a certain pile ("*any piles, chalk, or other materials fixed in the ground, and used for securing any sea-bank or sea-wall, or the bank, dam, or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty, or lock*") then fixed in the ground, and then used for securing the bank of a certain river called the river ——, situate in the parish of B., in the county of M., feloniously, unlawfully, and maliciously did cut off ("*cut off, draw up, or remove*"); against the form [*as ante*, p. 465].

Felony: penal servitude for not more than seven nor less than three years, or imprisonment not exceeding two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 31; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

Evidence.

Prove that the pile was fixed in the ground, and used to secure the bank of the river, situate as described in the indictment; prove that the defendant cut it, and prove that he did so maliciously. (*See ante*, p. 651, *post*, p. 701.)

Indictment for opening Flood-gates, etc., with intent, etc. (24 & 25 *Vict. c.* 97, *s.* 31.)

Commencement as ante, p. 433]—feloniously, unlawfully, and maliciously did open and draw up ("*open or draw up any flood-gate or sluice, or do any other injury or mischief to any navigable river or canal*") a certain flood-gate, situate in the parish of B., in the county of M., of and belonging to a certain navigable river called the river ——, with intent thereby ("*with*

intent and so as thereby") to obstruct and prevent ("*obstruct or prevent*") the carrying on ("*carrying on, completing or maintaining*") of the navigation of the said navigable river; and that the said J. S. thereby then did obstruct the carrying on of the navigation of the said navigable river; against the form [*as ante*, p. 465].

Felony. See the last precedent.—24 & 25 *Vict. c.* 97, *s.* 31.

Evidence.

Prove that the defendant opened or drew up the flood-gate of the navigable river in question, in the parish stated in the indictment. Prove that he did so maliciously (*see ante*, p. 651, *post*, p. 701); prove the intent from circumstances from which the jury may infer it (*see ante*, pp. 303, 308, 340); and prove that the navigation was obstructed, which even alone is reasonable evidence of the intent).

DESTROYING BRIDGES, VIADUCTS, AND AQUEDUCTS.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 33.]—Whosoever shall unlawfully and maliciously pull *or throw* down or in anywise destroy any bridge (*whether over any stream of water or not*), *or any viaduct or aqueduct, over or under which bridge, viaduct or aqueduct any highway, railway, or canal shall pass*, or do any injury with intent and so as thereby to render such bridge, *viaduct, or aqueduct, or the highway, railway, or canal passing over or under the same*, or any part thereof, dangerous or impassable, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 30, *s.* 13, *with additions, to settle doubts which existed as to what was a public bridge. See R.* v. *Oxfordshire*, 1 *B.* & *Ad.* 289; 35 *R. R.* 302: *R.* v. *same*, 1 *B.* & *Ad.* 297: *R.* v. *Derbyshire*, 2 *Q. B.* 745.]

Indictment for pulling down a Bridge. (24 & 25 *Vict. c.* 97, *s.* 33.)

Commencement as ante, p. 433]—a certain bridge ("*any bridge, whether over any stream of water or not*"), situate in the parish of B., in the county of M., feloniously, unlawfully and maliciously did pull down and destroy ("*pull or throw down, or in anywise destroy*"); against the form [*as ante*, p. 465].

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour; and, if a male under sixteen years, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 33; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant pulled down or destroyed the bridge, and that it was situate as described in the indictment; and prove that it was done maliciously. (*See ante*, p. 651, *post*, p. 701.)

Indictment for injuring a Bridge, etc. (24 & 25 *Vict. c.* 97, *s.* 33.)

Commencement as ante, p. 433]—feloniously, unlawfully, and maliciously did pull down ("*pull or throw down or otherwise destroy*") a certain bridge, situate in the parish of B., in the county of M., with intent thereby ("*with intent, and so as thereby*") to render the said bridge ("*such bridge or any part thereof*") dangerous and impassable ("*dangerous or impassable*"); and that the said J. S. did thereby then render the said bridge dangerous and impassable; against the form [*as ante*, p. 465].

Felony. See the last precedent.—24 & 25 *Vict. c.* 97, *s.* 33.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant did the injury to the bridge stated in the indictment. Prove that the bridge is situated as described: and prove that the act was done maliciously by the defendant. (*See ante*, p. 651, *post*, p. 701.) Circumstances must be proved, from which the intent may be inferred (*see ante*, pp. 303, 308, 340); and it must also be proved that the bridge was, by the act of the defendant, rendered dangerous or impassable, which, even alone, is reasonable evidence of the intent.

DESTROYING TOLL-BARS, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 34.]—Whosoever shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike-gate *or toll-bar*, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate *or toll-bar*, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any Act of parliament relating thereto, or any house, building or weighing-engine erected for the better collection, ascertainment, or security of any such toll, shall be guilty of a misdemeanor. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 30, *s.* 14.]

Indictment.

Commencement as ante, p. 433]—a certain toll-bar ("*any turnpike-gate or toll-bar, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate or toll-bar, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act or acts of parliament relating thereto, or any house, building, or weighing-engine erected for the better collection, ascertainment, or security of such toll*") situate at the parish of B., in the county of M., unlawfully and maliciously did throw down, level, and destroy ("*throw down, level, or otherwise destroy, in whole or in part*"); against the form [*as ante*, p. 465].

Misdemeanor: fine or imprisonment, without hard labour, or both.—24 & 25 *Vict. c.* 97, *s.* 34 (*see s.* 73, *ante*, p. 650, *and ante*, pp. 237, 238, 240).

Evidence.

Prove that the defendant threw down, levelled, or otherwise destroyed the toll-bar, situate as described in the indictment; and that it was done maliciously. (*See ante*, p. 651, *post*, p. 701.)

All turnpike trusts in England and Wales have now expired. As to toll-bars for collecting franchise tolls, *see New Windsor (Mayor, etc.)* v. *Taylor* [1899] *App. Cas.* 41.

INJURIES TO RAILWAY TRAINS AND TELEGRAPHS.

Statute.

3 & 4 *Vict. c.* 97 (*Regulation of Railways Act*, 1840), *s.* 13.]—*Summary punishment of railway servants guilty of misconduct or neglect, whereby life or limb of persons on the railway, or the works of the line might be endangered, or the passage of trains obstructed.*

Sect. 14.]—*Power to send the case to quarter sessions. For precedent of indictment, see R.* v. *Pardenton*, 6 *Cox*, 247.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 35—*Maliciously obstructing, etc., railways, etc.*] — Whosoever shall *unlawfully* and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall *unlawfully* and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall *unlawfully* and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall *unlawfully* and maliciously make or show, hide, or remove, any signal or light upon or near to any railway, or shall *unlawfully* and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure or destroy any engine, tender, carriage, or truck using such railway, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 14 & 15 *Vict. c.* 19, *s.* 6, *with the substitution of* "*unlawfully*" *for* "*wilfully.*]

Sect. 36—*Unlawfully obstructing railways.*]—Whosoever, *by any unlawful act, or by any wilful omission or neglect*, shall obstruct *or cause to be obstructed* any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. [*This section re-enacts* 3 & 4 *Vict. c.* 97, *s.* 15, *with the additions italicized. See R.* v. *Pardenton*, 6 *Cox*, 247.]

Sect. 37—*Destroying telegraphs.*] — Whosoever shall unlawfully and maliciously cut, break, throw down, destroy, injure, or remove any battery, machinery, wire, cable, post, or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph, or in the working thereof, or shall unlawfully and maliciously prevent or obstruct in any manner whatsoever the sending, conveyance, or delivery of any communication by any such telegraph, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour: Provided that if it shall appear to any justice, on the examination of any person charged

with any offence against this section, that it is not expedient to the ends of justice that the same should be prosecuted by indictment, the justice may proceed summarily to hear and determine the same, and the offender shall, on conviction thereof, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding ten pounds as to the justice shall seem meet. [*This section was new law in* 1861.] *The term "electric telegraph" seems to include telephone: Att.-Gen.* v. *Edison Telephone Co.*, 6 *Q. B. D.* 244: *and the preamble to s.* 1 *of the Telegraph Act*, 1892 (55 & 56 *Vict. c.* 59).

Sect. 38—*Attempts to commit offences against s.* 37.]—Whosoever shall unlawfully and maliciously, by any overt act, attempt to commit any of the offences in the last preceding section mentioned, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding ten pounds as to the justice shall seem meet. [*This section was new law in* 1861.]

Indictment for placing Wood on Rails, with Intent, etc. (24 & 25 *Vict. c.* 97, *s.* 35, *ante*, p. 658.)

Commencement as ante, p. 433)—feloniously, unlawfully, and maliciously did put and place a piece of wood upon a certain railway called ——, in the parish of B., in the county of M. ("*put, place, cast, or throw upon or across any railway any wood, stone, matter or thing*"), with intent thereby then to obstruct, upset, overthrow, and injure a certain engine and certain carriages using the said railway ("*with intent to obstruct, upset, overthrow, injure or destroy any engine, tender, carriage, or truck using such railway*"); against the form [*as ante*, p. 465]. [*The intent may be laid in different ways in other counts, if necessary.*]

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour; and, if a male, under sixteen years, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 35; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, *p.* 650). *As to summary trial of youthful offenders, see* 42 & 43 *Vict. c.* 49, *ss.* 10, 11, *sched.* 1.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant placed the piece of wood upon or across the railway named and situate as described in the indictment, or was present aiding and assisting in doing so. It does not matter whether the railway is public or private. *O'Gorman* v. *Sweet*, 54 *J. P.* 663. Prove that he did it maliciously (*see ante*, p. 651, *and R.* v. *Holroyd* 2 *M. & Rob.* 339). The intent may be inferred from the circumstances from which the jury may presume it (*see ante*, pp. 303, 308, 340). In general, the act being done wilfully, and its being likely to obstruct or upset the railway train, would be sufficient *primâ facie* evidence of an intent to do so. *See R.* v. *Upton*,

5 *Cox*, 298. *Semble*, the intent to injure or destroy a train, provided against by this section, is an intent to injure or destroy otherwise than by *burning*, which is specially mentioned in 24 & 25 *Vict. c.* 97, *s.* 4 (*ante*, p. 648). *See R.* v. *Sanderson*, 1 *F. & F.* 37. A person may be convicted of a misdemeanor under *s.* 36, though no train be in fact obstructed by his act, and the line be not formally open for traffic. *See R.* v. *Bradford, Bell*, 268; 29 *L. J.* (*M. C.*) 171; 8 *Cox*, 309. Where the defendant had unlawfully altered some railway signals at a railway station, and this alteration caused a train which would otherwise have passed the station without slackening speed, to slacken speed, and to come nearly to a stand, it was held (*Martin*, B., *diss.*) that he was guilty of "obstructing" a train within the meaning of *s.* 36 *of* 24 & 25 *Vict. c.* 97. *R.* v. *Hadfield*, *L. R.* 1 *C. C. R.* 253; 39 *L. J.* (*M. C.*) 131; 11 *Cox*, 574. And so where the defendant, by holding up his arms in the mode used by inspectors of the line when desirous of stopping a train, intentionally induced the driver of a train to reduce his speed from twenty miles to four miles an hour, although the train was not wholly stopped, but immediately afterwards resumed its ordinary speed, he was held to be guilty of an unlawful obstruction within that section. *R.* v. *Hardy*, *L. R.* 1 *C. C. R.* 278; 40 *L. J.* (*M.C.*) 62; 11 *Cox*, 656. "Any unlawful act" in *s.* 36 includes each of the acts mentioned in *s.* 35. *Id.* An acquittal on an indictment framed under *s.* 35 is no bar to a subsequent indictment upon the same facts for a misdemeanor under *s.* 36. *R.* v. *Gilmore*, 15 *Cox*, 85, *Huddleston*, B., *and see ante*, p. 170.

DESTROYING DAMS OF FISH-PONDS, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 32.]—Whosoever shall unlawfully and maliciously *cut through*, break down, or otherwise destroy the dam, *flood-gate, or sluice* of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime, or other noxious material, in any such pond or water, with intent thereby to destroy any of the fish *that may then be or that may thereafter be put* therein, or shall unlawfully and maliciously *cut through*, break down, or otherwise destroy the dam *or flood-gate* of any mill-pond, *reservoir, or pool*, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 30, *s.* 15, *with the additions italicized.*]

36 & 37 *Vict. c.* 71 (*Salmon, etc., Fisheries Act*, 1873), *s.* 18.]—The provisions of the 32nd section of the *Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97), so far as they relate to poisoning any water with intent to kill or destroy fish, shall be extended and apply to salmon rivers, as if the words "or in any salmon river" were inserted in the said section in lieu of the words "private rights of fishery" after the words "noxious material in any such pond or water."

Indictment for breaking down the Dam of a Fish-pond. (24 & 25 *Vict. c.* 97, *s.* 32, *ante, p.* 690.)

Commencement as ante, p. 433]—the dam of a certain fish-pond ("*the dam, flood-gate, or sluice of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery*") of one J. N., situate in the parish of B., in the county of M., unlawfully and maliciously did break down and destroy ("*cut through, break down, or otherwise destroy*"), with intent thereby then to take and destroy the fish in the said pond then being [*or,* and did thereby then cause the loss and destruction of divers of the fish in the said pond then being]; against the form [*as ante,* p. 465].

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment not exceeding two years, with or without hard labour; and, if a male under sixteen years of age, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 32: 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante,* p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour,* 24 & 25 *Vict. c.* 97, *s.* 73 (*ante,* p. 650).

Evidence.

Prove that the defendant broke down or destroyed the dam of the fish-pond of J. N., situate as described in the indictment, and that it was done maliciously (*see ante,* p. 651); and prove circumstances from which the intent may be inferred (*see ante,* pp. 303, 308, 340); and if the loss of fish be stated in the indictment, prove that fact.

Indictment for putting Lime into a Fish-pond. (24 & 25 *Vict. c.* 97, *s.* 32, *ante,* p. 690.)

Commencement as ante, p. 433]—unlawfully and maliciously did put a large quantity, to wit, ten bushels of lime ("*lime or other noxious material*") into a certain fish-pond (*see the last precedent*) of one J. N., situate at the parish of B., in the county of M., with intent thereby then to destroy the fish in the said pond then being; against the form [*as ante,* p. 465].

Misdemeanor. See the last precedent. 24 & 25 *Vict. c.* 97, *s.* 32.

Evidence.

Prove that the defendant put lime, etc., into the fish-pond of J. N., situate as described in the indictment, and that it was done maliciously (*see ante,* p. 651); and prove circumstances from which the jury may infer the intent (*see ante,* pp. 303, 308, 340), as that the lime or other noxious thing would destroy the fish.

Indictment for breaking down a Mill Dam. (24 & 25 *Vict. c.* 97, *s.* 32.)

Commencement as ante, p. 433]—the dam ("*dam or flood-gate*") of a certain mill-pond ("*mill-pond, reservoir, or pool*") of J. N., situate at the parish of B., in the county of M., unlawfully and maliciously did break down and destroy ("*cut through, break down, or otherwise destroy*"); against the form [*as ante,* p. 465].

Misdemeanor. See the last precedent but one.—24 & 25 *Vict.* c. 97, s. 32 (*ante*, p. 690).

Evidence.

Prove that the defendant broke down the dam of a mill-pond in the occupation of J. N., situate as described in the indictment; and prove that it was done maliciously. (*See ante*, p. 651, *post*, p. 701.)

KILLING OR MAIMING ANIMALS.

Statute.

24 & 25 *Vict.* c. 97 (*Malicious Damage Act*, 1861), s. 40—*Killing or maiming cattle.*]—Whosoever shall unlawfully and maliciously kill, maim or wound any cattle shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . [*This section re-enacts* 7 & 8 *G.* 4, c. 30, s. 16.]

Sect. 41—*Killing or maiming animals other than cattle.*]—Whosoever shall unlawfully and maliciously kill, maim, or wound any dog, bird, beast or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or for any domestic purpose, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of injury done, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever, having been convicted of any such offence, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months as the convicting justice shall think fit. [*This section was new law in* 1861. *The accused can elect to be tried on indictment.* 42 & 43 *Vict.* c. 49, s. 17 (*ante*, p. 6). *The indictment need not state the fact of the election* (*vide ante*, p. 490). *In Daniel* v. *Janes*, 2 *C. P. D.* 351; 41 *J. P.* 712, *it was held that it was not an offence under this section to place poisoned flesh in a garden for the purpose of destroying a dog which was in the habit of straying there*; *but see* 27 & 28 *Vict.* c. 115, s. 2. *In Smith* v. *Williams*, 56 *J. P.* 840; 9 *T. L. R.* 9, *it was held that the section did not apply to the shooting of trespassing fowls. But where a gamekeeper killed a trespassing dog at which he had shot* (*with the intention of driving it away, and in order to protect his master's pheasants*), *it was held that the test of liability to be convicted under this section was whether he acted under the bonâ fide belief that what he did was necessary for the protection of his master's property, and that it was the only way in which it could be protected. Miles* v. *Hutchings* [1903], 2 *K. B.* 714; 72 *L. J.* (*K. B.*) 775; 20 *Cox*, 455; *and cf. Armstrong* v. *Mitchell*, 67 *J. P. Rep.* 629.

The above enactments are concerned only with animals as the subject of property. As to cruelty to animals, see post, Book II., Part II., chap. vi., s. 7.]

Indictment for killing a Horse (24 & 25 *Vict. c.* 97, *s.* 40).

Commencement as ante, p. 433]—certain cattle, to wit, one horse ("*any cattle*"), of the goods and chattels of J. N., feloniously, unlawfully, and maliciously did kill ("*kill, maim, or wound*"); against the form [*as ante*, p. 465]. *The particular species of cattle killed, maimed, or wounded, must be specified; an allegation that the prisoner maimed certain cattle is not sufficient. R. v. Chalkley, R. & R.* 258. *The word "cattle" is the only word used in the 40th section of the statute; and this, in former statutes upon this subject* (9 *G.* 1, *c.* 22, *s.* 1; 4 *G.* 4, *c.* 54, *s.* 2), *was held to include horses, as well as oxen, etc., R. v. Paty*, 2 *W. Bl.* 721; 2 *East, P. C.* 1074; *and also pigs, R. v. Chapple, R. & R.* 77; 15 *R. R.* 736; *and asses, R. v. Whitney*, 1 *Mood. C. C.* 3. *Where the injured animals were agisted, the property may be laid in the agister. R. v. Woodward*, 2 *East, P. C.* 653, *and see ante*, p. 58.

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment not exceeding two years, with or without hard labour. —24 & 25 *Vict. c.* 97, *s.* 40; 54 & 55 *Vict. c.* 69, *s.* 1, *sub.-ss.* 1, 2 (*ante*, p. 235.) *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

Evidence.

Prove that the defendant killed the horse, the property of J. N. Prove also that it was done maliciously (*see ante*, p. 651, *post*, p. 701); but it is not now necessary, as it was formerly, to prove the offence to have been committed from malice to the owner. 24 & 25 *Vict. c.* 97, *s.* 58 (*ante*, p. 649); *R. v. Tivey*, 1 *Den. xviii.*, 63; 1 *C. & K.* 704. On an indictment under 7 & 8 *G.* 4, *c.* 30, *s.* 16 (*rep.*), for unlawfully and maliciously killing a mare, it was proved that the prisoner caused the death of the mare through injuries inflicted by his inserting the handle of a fork into her vagina. There was no evidence that the prisoner was actuated by ill-will towards the owner of the mare, or spite towards the mare, or by any motive except the gratification of his own depraved taste. The jury found that the prisoner did not intend to kill the mare; but that he knew what he was doing would or might kill her, and nevertheless did what he did recklessly, and not caring whether the mare was injured or not. The jury having convicted the prisoner, it was held that there was sufficient malice, and that the conviction was right. *R. v. Welch*, 1 *Q. B. D.* 23; 45 *L. J.* (*M. C.*) 17.

Upon an indictment for administering sulphuric acid to a horse, evidence may be given of other acts of administering, in order to show the intent. *R. v. Mogg.* 4 *C. & P.* 364, *and ante*, pp. 308–312.

To constitute *maiming*, a *permanent* injury must be inflicted on the animal. *R. v. Jeans*, 1 *C. & K.* 539. But if a *wounding* be alleged, it is not necessary to prove a permanent injury. Where the wounding proved was driving a nail into the frog of a horse's foot, but it appeared that the horse was likely to recover, it was objected that no wounding was within the meaning of 9 *G.* 1, *c.* 22 (*rep.*), that was not productive of permanent injury to the animal; but the judges overruled the objection, holding that the word "wound" was used by the legislature as contra-distinguished from maiming, which is a permanent injury. *R. v. Haywood*, 2 *East, P. C.* 1076; *R. & R.* 16. It is not necessary to constitute a wounding within this section that any instrument other than the hand should be used. *R. v. Bullock, L. R.* 1 *C. C. R.* 115; 37 *L. J.* (*M. C.*) 47; 11 *Cox*, 125.

Upon an indictment for killing, wounding, and maiming a mare, it appeared that the defendant poured nitrous acid into her ears, some of

which either ran into her eye, or was poured into it, and blinded her; she was killed by her owner, and surgeons proved that the injuries done to the ear were not wounds, but ulcers; the defendant was therefore convicted of the maiming, and the judges held the conviction right. *R.* v. *Owens*, 1 *Mood. C. C.* 205.

Upon an indictment for wounding a sheep, it appeared that the prisoner set a dog at the sheep, which bit it; and *Parke*, J., held that this was not a wounding within the meaning of 4 *G.* 4, *c.* 54, *s.* 2 (*rep.*). *R.* v. *Hughes*, 2 *C. & P.* 420. *But see R.* v. *Elmsly*, 2 *Lewin*, 126. And where the prisoner set fire to a cow-house, in which was a cow, which was burnt to death, *Taunton*, J., held that the prisoner could be convicted upon an indictment for killing the cow. *R.* v. *Haughton*, 5 *C. & P.* 559.

Where the injury is done in self-defence, the defendant is entitled to acquittal. *See Hanway* v. *Boultbee*, 4 *C. & P.* 350; 1 *M. & Rob.* 15.

As to injuries to trespassing animals see note to *s.* 41 (*ante*, p. 692), and *R.* v. *Fetzer* [1900] 19 *N. Z. L. R.* 438.

DESTROYING HOPBINDS.

Statute.

24 *& 25 Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 19.]—Whosoever shall unlawfully and maliciously cut or otherwise destroy any hopbinds growing on poles in any plantation of hops shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 *&* 8 *G.* 4, *c.* 30, *s.* 18, *as to which see R.* v. *Boucher*, 5 *Jur.* 709.]

Indictment.

Commencement as ante, p. 433]—one thousand hopbinds, the property of J. N., then growing on poles in a certain plantation of hops of the said J. N., situate in the parish of B., in the county of K., feloniously, unlawfully, and maliciously did cut and destroy ("*cut or otherwise destroy*"): against the form [*as ante*, p. 465].

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment not exceeding two years, with or without hard labour; and, if a male under the age of sixteen, with or without whipping.—24 *&* 25 *Vict. c.* 97, *s.* 19; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 *&* 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

Evidence.

Prove that the defendant cut or otherwise destroyed the hopbinds, or some part of them, as alleged; that they were at the time growing in a plantation of hops, situate as described; and that the plantation belonged to J. N. Prove, also, that the act was done maliciously. (*See ante*, p. 651, *post*, p. 701).

DESTROYING TREES, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 20—*Destroying trees in parks, etc.*]—Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house (in case the amount of the injury done shall exceed the sum of one pound) shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 *G* 4, *c.* 30, *s.* 19.]

Sect. 21—*Destroying trees not in parks, etc.*]—Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage, the whole or any part of any tree, sapling, or shrub, or any underwood, growing elsewhere than in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining to or belonging to any dwelling-house (in case the amount of injury done shall exceed the sum of five pounds) shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 30, *s.* 19.]

Sect. 53.]—*Extends power of summary punishment under s.* 52 (*post*, p. 701), *for damage under* 5*l.*, *to cases of wilful or malicious injury to trees, saplings, shrubs, or underwood, not within ss.* 20, 21, *supra, nor* 51, *post*, p. 700.

Indictment for cutting, etc., Trees, etc., in Parks, etc., Value above 1*l.* (24 & 25 *Vict. c.* 97, *s.* 20.)

Commencement as ante, p. 433]—two elm trees ("*the whole or any part of any tree, sapling, or shrub, or any underwood*"), the property of J. N., then growing in a certain park ("*park, pleasure-ground, garden, orchard, or avenue, or any ground adjoining or belonging to a dwelling-house*"), of the said J. N., situate in the parish of ——, in the county of ——, feloniously, unlawfully, and maliciously did cut and damage ("*cut, break, bark, root up, or otherwise destroy or damage*"), thereby then doing injury to the said J. N., to an amount exceeding the sum of one pound, to wit, the amount of two pounds; against the form (*as ante*, p. 465). *A count may be added for cutting with intent to steal the trees.* (*See ante, p.* 483.)

Felony: penal servitude for not less than three years and not exceeding five years, or imprisonment not exceeding two years, with or without hard labour; and, if a male under sixteen years of age, with or without whipping.—24 & 25 *Vict. c.* 97, *s.* 20; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

Evidence.

Prove that the defendant "cut, broke, barked, rooted up, or otherwise destroyed or damaged" one or more of the trees mentioned in the

indictment, and that the injury done exceeds the sum of one pound. A variance in the number of trees is not material. Prove that the trees, at the time, were growing in a park situate as described in the indictment (*or*, "in a pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to a dwelling-house") (*see R.* v. *Hodges, M. & M.* 341, *ante*, p. 484); and that they were the property of J. N. Prove, also, that the trees were cut maliciously (*see ante*, p. 651, *post*, p. 701); but if it be doubtful whether the defendant did not intend to steal the trees, add a count to meet that. (*See ante*, p. 484.)

Indictment for cutting, etc., Trees, etc., growing elsewhere, Value above 5l.
(24 & 25 *Vict. c.* 97, *s.* 21, *ante*, p. 695.)

Commencement as ante, p. 433]—ten elm trees (*see the last precedent*), the property of J. N., then growing in a certain close ("*elsewhere than in a park*," *etc., see the last precedent*) of the said J. N., situate in the parish of ——, in the county of ——, feloniously, unlawfully, and maliciously did cut and damage (*see the last precedent*), thereby then doing injury to the said J. N., to an amount exceeding the sum of five pounds, to wit, to the amount of six pounds; against the form (*as ante*, p. 465).

Felony: see the last precedent.—24 & 25 *Vict. c.* 97, *s*, 21.

Evidence.

Prove that the defendant cut, etc., the trees mentioned in the indictment, or some of them; that the trees were the property of J. N., that is, that they were growing on land belonging to him, or in his occupation; that damage exceeding five pounds was done at one time (*R.* v. *Williams*, 9 *Cox*, 338 (*C. C. R. Ir.*)), or as part of one continuing transaction (*see ante*, p. 642); and that the cutting was done maliciously (*ante*, p. 651, *post*, p. 701). The "amount of injury done" means the actual injury done to the trees, etc., by the defendant's act; it is not sufficient to bring the case within the statute, that, although the amount of such actual injury is less than 5*l.*, the amount of *consequential* damage (as by its being necessary, in consequence of the defendant's act, to stub up and replace a hedge) would exceed 5*l.* *R.* v. *Whiteman, Dears.* 353; 23 *L. J.* (*M. C.*) 120; 6 *Cox*, 370. (*See ante*, p. 484.) It is not necessary to prove that the trees grew elsewhere than in a park, etc.

DESTROYING TREES, ETC., AFTER TWO PREVIOUS CONVICTIONS.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 22.]—Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be growing, the injury done being to the amount of one shilling at the least, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour for any term not exceeding three months, or else shall forfeit and pay, over and above

the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and whosoever, having been convicted of any such offence, *either* against this *or any former* Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve months, as the convicting justice shall think fit; and whosoever, having been twice convicted of any such offence (*whether both or either of such convictions shall have taken place before or after the passing of this Act*), shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 30, *s.* 20. *The accused, when charged after a first conviction, can elect to be tried on indictment.* 42 & 43 *Vict. c.* 49, *s.* 17 (*ante*, p. 6). *The election need not be averred: see ante*, p. 490.]

Indictment after two previous Convictions for cutting Trees, etc., wheresoever growing, Value 1*s.*

Middlesex, to wit:—The jurors for our lord the King, upon their oath present, that J. S., on the —— day of ——, A.D. , one elm tree ("*the whole or any part of any tree, sapling, or shrub, or any underwood*") the property of J. N., then growing on certain land of the said J. N., in the parish of ——, in the county of ——, unlawfully and maliciously did cut and damage ("*cut, break, bark, root up, or otherwise destroy or damage*"), thereby then doing injury to the said J. N., to the amount of two shillings; against the form of the statute in such case made and provided: And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence hereinbefore mentioned [*stating the two previous convictions as in the precedent at* p. 486].—*The subsequent offence is* first *stated in this precedent, but it seems immaterial whether it be stated before or after the previous convictions, as* 24 & 25 *Vict. c.* 97, *contains no provision similar to that contained in s.* 116 *of* 24 & 25 *Vict. c.* 96 (*ante*, p. 430), *which, in cases falling under it, requires the subsequent offence to be first charged. It seems also to be the better opinion that the latter part of the last-named section, regulating the proceedings upon indictments for committing any offence after a previous conviction or convictions, only applied originally* (*before its operation was extended by* 34 & 35 *Vict. c.* 112, *s.* 9), *to subsequent offences against the Larceny Act* (*see Greaves' Criminal Law Consolidation Acts* (2nd ed.) p. 203; 2 *Russ. Cr.* (4th ed.) *by Greaves*, 349): *and there is no analogous provision in the* 24 & 25 *Vict. c.* 97. *The question is not affected by* 34 & 35 *Vict. c.* 112, *s.* 9 (*ante*, p. 185), *which only extends to indictments for crimes after previous convictions for* crimes *as there defined, whereas the previous convictions charged in this indictment are convictions for* offences. (*See s.* 20 *of* 34 & 35 *Vict. c.* 112.)

Misdemeanor; imprisonment not exceeding two years, with or without hard labour; and, if a male under sixteen years of age, with or without whipping. —24 & 25 *Vict. c.* 97, *s.* 22. *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour, Id. s.* 73 (*ante*, p. 650).

Evidence.

Prove that the defendant cut and damaged the tree, the property of J. N.; prove that it was done maliciously (*see ante*, p. 651, *post*, p. 701); and prove that the damage exceeds 1*s*. (*See ante*, p. 488.) Prove the two previous convictions in the manner directed by 34 & 35 *Vict. c.* 112, *s.* 18 (*ante*, p. 488), and the identity of the defendant.

In *Heaven* v. *Crutchley* [1903] 68 *J. P. Rep.* 52, it was held that a person could be convicted under this section for damage done in assertion of a legal right if the damage exceeded what could be reasonably supposed to be necessary for the assertion of the right. The court followed *R.* v. *Clemens* [1898] 1 *Q. B.* 556; 67 *L. J.* (*Q. B.*) 482; 19 *Cox*, 18.

DESTROYING PLANTS, ETC., AND FENCES.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 23—*Plants growing in gardens.*]—Whosoever shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hothouse, greenhouse, or conservatory shall on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet;

And whosoever, having been convicted of any such offence, *either* against this *or any former* Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 30, *s.* 21. *On a charge for a first offence the accused can elect to be tried on indictment.* 42 & 43 *Vict. c.* 49, *s.* 17, *ante*, p. 6. *The election need not be averred: see ante*, p. 490.]

Sect. 24—*Plants not growing in gardens.*]—Whosoever shall unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing on any land, open or enclosed, not being a garden, orchard, or nursery-ground, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one month, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding twenty shillings as to the justice shall seem meet, and in default of payment thereof, together with the costs, shall be committed as aforesaid for any term not exceeding one month, unless payment be sooner made;

And whosoever, having been convicted of any such offence, either against this or any former Act of Parliament, shall afterwards commit

any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding *six* months, as the convicting justice shall think fit. [*This section re-enacts* 7 *&* 8 *G.* 4, *c.* 30, *s.* 22. *On a charge for a second or subsequent offence, the accused can elect to be tried on indictment.* 42 *&* 43 *Vict. c.* 49, *s.* 17 (*ante*, p. 6). *The election need not be averred: see ante*, p. 490.]

Sect. 25—*Destroying fences.*]—Whosoever shall unlawfully and maliciously cut, break, throw down, or in anywise destroy any fence of any description whatsoever, or any wall, stile, or gate, or any part thereof respectively, shall, on conviction thereof, before a justice of the peace, for the first offence, forfeit and pay over and above the amount of the injury done, such sum of money not exceeding 5*l.*, as to the justice shall seem meet;

And whosoever having been convicted of any such offence, *either* under this *or any former* Act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted thereof in like manner, shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding twelve months, as the convicting justice shall think fit. [*This section is taken from* 7 *&* 8 *G.* 4, *c.* 30, *s.* 23. *On a charge for a second or subsequent offence, the accused can elect to be tried on indictment.* 42 *&* 43 *Vict. c.* 49, *s.* 17 (*ante*, p. 6). *The election need not be averred; see ante*, p. 490.]

Indictment after a previous Conviction, for destroying Plants, etc., in a Garden, etc. (24 *&* 25 *Vict. c.* 97, *s.* 23, *ante*, p. 698.)

Middlesex, to wit: The jurors for our lord the King, upon their oath present, that J. S., on the —— day of ——, A.D. 1902, certain fruits, to wit, twenty pounds' weight of grapes ("*any plant, root, fruit, or vegetable production*"), the property of J. N., in a certain garden ("*in any garden, orchard, nursery-ground, hothouse, greenhouse, or conservatory*") of the said J. N., situate in the parish of ——, in the county of ——, then growing, feloniously, unlawfully and maliciously did destroy ("*destroy or damage with intent to destroy*"), against the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do say, that heretofore and before the committing of the offence hereinbefore mentioned [*stating the previous conviction as in the precedent* (*ante*, p. 486)]. *See the note to the last precedent.*

Felony: penal servitude for not less than three years and not exceeding five years, or imprisonment not exceeding two years, with or without hard labour; and, if a male under sixteen years of age, with or without whipping.—24 *&* 25 *Vict. c.* 97, *s.* 23; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace.* 24 *&* 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650).

Evidence.

Prove the second offence stated in the indictment: that the defendant destroyed the grapes; that they were, at the time, growing in the garden of J. N., situate as described in the indictment; and that the offence was committed maliciously. (*See ante*, p. 651, *post*, p. 701.) Prove the

previous conviction in the manner directed by 34 & 35 *Vict. c.* 112, *s.* 18 (*ante*, p. 861), and the identity of the defendant.

The words "plant" or "vegetable production" do not apply to young trees. *R.* v. *Hodges*, *M. & M.* 341. (*See ante*, p. 484.)

DESTROYING OR DAMAGING WORKS OF ART, ETC., IN MUSEUMS, ETC.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 39.]—Whosoever shall unlawfully and maliciously destroy or damage any *book, manuscript, picture, print, statue, bust, or vase, or any other* article or thing kept for the purposes of art, science, or literature, or as an object of curiosity, in any museum, gallery, cabinet, library or other repository, which museum, gallery, cabinet, library or other repository, is either at all times, or from time to time, open for the admission of the public or of any considerable number of persons to view the same, either by the permission of the proprietor thereof, or by the payment of money before entering the same, or any picture, statue, monument, *or other memorial of the dead*, painted glass, or other ornament or work of art, in any church, chapel, *meeting-house*, or other place of divine worship, *or in any building belonging to the queen, or to any county, riding, division, city, borough, poor-law union, parish or place, or to any university, or college or hall of any university, or to any inn of court*, or in any street, square, *churchyard, burial-ground, public garden or ground*, or any statue or monument exposed to public view, or any ornament, railing, or fence surrounding such statue or monument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour, and, if a male under the age of sixteen years, with or without whipping:

Provided that nothing herein contained shall be deemed to affect the right of any person to recover, by action at law, damages for the injury so committed. [*This section was framed from* 8 & 9 *Vict. c.* 44, *ss.* 1, 4; *and* 17 & 18 *Vict. c.* 33, *s.* 6, *with the additions italicized. The defacing of tombs, etc., is said to be punishable at common law. See Corven's case*, 12 *Co. Rep.* 105; *Greaves Crim. Law Cons. Acts* (2nd ed.), p. 238.

MALICIOUS INJURIES TO PROPERTY TO AMOUNT OF FIVE POUNDS.

Statute.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 51.]—Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding five pounds, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour: and in case any such offence shall be committed between the hours of nine of the clock in the evening

and six of the clock in the next morning, shall be liable . . . to be kept in penal servitude. . . . [*This section was new law in* 1861.]

Sect. 52—[*Wilful or malicious injury to such property to the amount of less than 5l.*]—*Punishable on summary conviction only.*

Indictment.

An indictment under 24 *&* 25 *Vict. c.* 97, *s.* 51, *can be framed from the precedents, ante,* pp. 695, 696.

Evidence.

In order to justify a conviction under 24 *&* 25 *Vict. c.* 97, *s.* 51, the act done by the prisoner must be done wilfully, or at least recklessly; and therefore, where a prisoner was indicted under it for unlawfully and maliciously committing damage, above the value of 5*l.*, to a window in a house, and the jury found that the prisoner threw a stone which broke the window, but that he threw it at some people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window, and returned a verdict of guilty; it was held that upon this finding the conviction must be quashed. It was, however, intimated by the court that if the jury had found that the prisoner was aware that the window was where it was, and that he was likely to break it, and was reckless whether he did so or not, the case might have been different. *R.* v. *Pembliton, L. R.* 2 (*C. C. R.*) 119; 43 *L. J.* (*M. C.*) 91. And *see R.* v. *Latimer,* 17 *Q. B. D.* 359 (where the meaning of the decision in *R.* v. *Pembliton* is explained). In *R.* v. *Welch,* 1 *Q. B. D.* 23; 45 *L. J.* (*M. C.*) (*ante,* p. 693), where a thief broke a window in order to reach and steal goods in a shop, it was held that his act was a misdemeanor within the *Malicious Damage Act,* 1861. *M'Dowell* v. *Mayor, etc., of Dublin* [1903] 2 *Ir. Rep.* 541, *C. A.* In *re Borrowes* [1900], 2 *Ir. Rep.* 593 (*C. A.*), some boys who had been allowed to visit a demesne from motives of curiosity, broke open the doors and windows of a building in the demesne and entered the building. In getting out again, one of the boys broke some mirrors stored in the building by wilfully and recklessly climbing over them. It was held that these acts were wanton and malicious, and punishable under *s.* 52. Where the defence to an indictment under the section is that the acts complained of were done in exercise of the claim of right, it will fail unless the defendants can show that they acted in *bonâ fide* exercise of a supposed right, and did no more damage than they could reasonably suppose to be necessary for its assertion. *R.* v. *Clemens* [1898] 1 *Q. B.* 556; 67 *L. J.* (*Q. B.*) 482; 19 *Cox,* 18; *and see Heaven* v. *Crutchley,* 68 *J. P. Rep.* 53. In an indictment under this section for maliciously damaging certain articles of personal property, the damage exceeding 5*l.*, it is not necessary to allege the value of each article injured, but only that the amount of damage done to the several articles exceeded 5*l.* in the aggregate. *R.* v. *Thoman,* 12 *Cox,* 54 (*C. C. R.*); *cf. R.* v. *Forsyth, R. & R.* 274. The soil of a town moor was vested in the corporation of the town in fee, but freemen were under statute entitled to the "full right and benefit to the herbage" of the moor for pasturing cows. It was held that this right to the herbage was not "any real or personal property whatsoever" within the meaning of 24 *&* 25 *Vict. c.* 97, *s.* 52, which applies only to tangible property and not to a mere incorporeal right. *Laws* v. *Eltringham,* 8 *Q. B. D.* 283; 51 *L. J.* (*M. C.*) 13. But *see Gardner* v. *Mansbridge,* 19 *Q. B. D.* 217, where picking wild mushrooms was held not to be within *s.* 52: and *Gayford* v. *Chouler* [1898],

1 *Q. B.* 316, where damaging grass by walking over it was held within the section. It is to be noted that s. 52 has the words "*wilfully* or *maliciously*," whereas s. 51 has "*unlawfully* and *maliciously*": *see Roper* v. *Knott* [1898] 1 *Q. B.* 868; 67 *L. J. Q. B.* 574; 19 *Cox*, 69; "wilfully" means "deliberately and intentionally, not by accident or inadvertence": *see R.* v. *Senior* [1899] 1 *Q. B.* 283, 291; 68 *L. J. Q. B.* 175 (*C. C. R.*)

ATTEMPTED INJURIES TO POST OFFICE LETTER-BOXES.

Statute.

47 & 48 *Vict. c.* 76 (*Post Office Protection Act*, 1884), *s.* 3—*Placing injurious substances in or against post office letter-boxes — Punishment.*]—A person shall not place or attempt to place in or against any post office letter-box any fire, any match, any light, any explosive substance, any dangerous substance, any filth, any noxious or deleterious substance, or any fluid, and shall not commit a nuisance in or against any post office letter-box, and shall not do or attempt to do anything likely to injure the box, appurtenances or contents. Any person who acts in contravention of this section shall be guilty of a misdemeanor, and be liable, on summary conviction, to a fine not exceeding 10*l.*, and on conviction on indictment, to imprisoment, with or without hard labour, for a period not exceeding twelve months.

Sect. 16—*Saving clause as to liability.*]—This Act shall not exempt any person from any proceeding by indictment or otherwise for an offence which is punishable at common law, or under any Act other than this Act, so that no person be tried or punished twice for the same offence. When proceedings are taken before any court against a person in respect of an offence under this Act, which is also an offence punishable at common law, or under some Act other than this Act, the court may direct that, instead of such proceedings being continued, proceedings should be taken for punishing such person at common law, or under some Act other than this Act. *Cf.* 52 & 53 *Vict. c.* 63, *s.* 33 (*ante*, p. 170).

Sect. 19—"*Post office letter-box*," *meaning of the term. Evidence.*]—*Ante*, p. 507.

SECT. 8.

FORGERY.

Common Law.

The earliest law books treat of forgery only in the case of forging seals of state, which was treason. *Bracton de Coronâ, ff.* 118 *b.* 119 *b.* Other forms of forgery came to be treated as misdemeanors, in all cases of "forging any document by which any other person may be injured, or uttering any such document knowing it to be forged, with intent to defraud." *Steph. Dig. Cr. L.* (5th ed.), 350; 4 *Bl. Com.* 247. *R.* v. *Coogan*, 1 *Leach*, 448; *R.* v. *Ward*, 2 *Str.* 747; 2 *East, P. C.* 861: *R.* v. *Jones*,

2 *East, P. C.* 991: *R.* v. *Wilcox, R. & R.* 50. And knowingly and with fraudulent intent to insert in a document a false date which is material to the operation of the document is forgery. *R.* v. *Ritson, L. R.*, 1 *C. C. R.* 200; 39 *L. J.* (*M. C.*) 10; 11 *Cox*, 352.

Forgery at common law is defined by *Blackstone* (4 *Com.* 247) as the fraudulent making or alteration of a writing to the prejudice of another man's right; and this definition was accepted in *R.* v. *Elsworth*, 2 *East, P. C.* 986, and *R.* v. *Riley* [1896] 1 *Q. B.* 309; 18 *Cox*, 285 (*C. C. R.*). Forgery must be of a writing (*R.* v. *Closs, Dears. & B.* 460; 27 *L. J.* (*M. C.*) 54; 7 *Cox*, 494), but may be of the body of the writing, or the signature or the seal. *R.* v. *Collins*, 1 *Cox*, 57, and for a discussion as to what amounts to forgery at common law, *see R.* v. *White*, 1 *Den.* 208.

The following have been held to be forgeries at common law:—Counterfeiting a letter of credit, *Style*, 12; a bill of lading, *R.* v. *Stocker*, 1 *Salk*, 342; a debtor's discharge, *R.* v. *Fawcett*, 2 *East, P. C.* 862; a summons in the common law county court, *R.* v. *Collier*, 5 *C. & P.* 160; a magistrate's order to a gaoler to discharge a prisoner, as upon bail having been given, *R.* v. *Harris*, 1 *Mood. C. C.* 393; 6 *C. & P.* 129; an order of admission to see a prisoner committed for trial, *R.* v. *Barrett*, 130 *C. C. C. Sess. Pap.* 797, *Fulton*, Common Serjeant: a certificate of the master of a ship that the defendant had served on board the ship, and conducted himself in a sober and orderly manner, the production of such certificate being necessary to enable the defendant to undergo the voluntary examination at the Trinity House, as to his ability to act as a master, *R.* v. *Toshack*, 1 *Den.* 492; 4 *Cox*, 38; a certificate of ordination, *R.* v. *Etheridge*, 19 *Cox*, 676; a testimonial as to character in order to obtain an appointment as a schoolmaster, *R.* v. *Sharman, Dears.* 285; 23 *L. J.* (*M. C.*) 51; 6 *Cox*, 312; a recommendation to a situation as a police constable, *R.* v. *Moah, Dears. & B.* 550; 27 *L. J.* (*M. C.*) 204; a railway pass, *R.* v. *Boult*, 2 *C. & K.* 604; and the like: *see* 2 *East, P. C.* 862, and the authorities there cited; 2 *Russ. Cr.* (6th ed.) 617, and *R.* v. *Riley* [1896] 1 *Q. B.* 309.

Falsification of accounts (*ante*, p. 591) is in some, but not all, cases, forgery. *Re Arton* (No. 2) [1896] 1 *Q. B.* 509, 517, *Russell*, L.C.J. Filling up the voting papers of marksmen with their assent has been held not to be forgery at common law. *R.* v. *Hartshorne*, 6 *Cox*, 395. As to the common law offence of uttering forged writings, *see below*. Forgery and uttering have been made felony by statute in very many cases. *See post*, p. 705.

Indictment for Forgery at Common Law.

Surrey, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the 1st day of June, in the year of our Lord ——, unlawfully, knowingly, and falsely did forge and counterfeit a certain writing, purporting to be [*describe the instrument: see* 24 *&* 25 *Vict. c.* 98, *s.* 42, *post*, p. 705], with intent thereby then to defraud; to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. (*2nd Count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, unlawfully, falsely, and deceitfully did utter and publish [as true] a certain other (*see post*, pp. 711, 712) false, forged, and counterfeited writing, purporting to be [*describe the instrument*] with intent thereby then to defraud (he the said J. S. at the said time he so uttered and published the said

last-mentioned false, forged, and counterfeited writing as aforesaid, well knowing the same to be false, forged, and counterfeited); to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. *The indictment must state the instrument alleged to have been forged, R. v. Wilcox, R. & R.* 50. *Intent to defraud a particular person need not be stated in an indictment for common law forgery* (24 & 25 *Vict. c.* 98, *s.* 44, *though it was otherwise at common law except where the document was of a public nature. R. v. Hodgson, Dears. C. B.* 3, *Jervis*, C.J. (*post*, p. 718). *See per Wills*, J., in *R. v. Riley* [1896] 1 *Q. B.* 309). *The words* "as true" *have usually been inserted in the indictment, but seem to be unnecessary. In indictments for forgery at common law it is safer to set out the document verbatim where there is any doubt as to its purport.*

Misdemeanor at common law: punishable by fine or imprisonment without hard labour (*R. v. Hamilton* [1901] 1 *K. B.* 740: 19 *Cox*, 675 (*C. C. R.*)), *or both; see ante*, pp. 238, 239.

Forgery is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126). *See Archbold, Quarter Sessions* (5th ed.), p. 270.

Evidence.

Prove the forgery and uttering as directed, *post*, pp. 712, 719, except that it must be proved that the defendant uttered the instrument as true; merely to prove that he sold or disposed of it will not support the indictment. In *R. v. Boult*, 2 *C. & K.* 604, it was held that the mere uttering as true of a forged instrument, the forgery of which is indictable at common law, was not *per se* indictable, *unless some fraud were actually committed thereby.* But this decision is expressly overruled by *R. v. Sharman, Dears.* 285; 23 *L. J.* (*M. C.*) 51: 6 *Cox*, 312 (*C. C. R.*), where it was laid down that it is an offence at common law to utter a forged document, the forgery of which is an offence at common law. If the forgery be proved, it would seem to be sufficient; for, notwithstanding some ancient authorities to the contrary, it does not appear to be necessary that the fraud contemplated should have been actually effected by the forgery, to render it indictable at common law; the mere intent to defraud seems to be sufficient. *R. v. Ward*, 2 *Str.* 747; 2 *Ld. Raym.* 1461; 2 *East, P. C.* 861, 862.

Where B., the prosecutor, made powders called B.'s Baking Powders, which he sold in packets wrapped up in printed papers, and the defendant caused a great number of wrappers to be printed, so nearly resembling B.'s as to deceive persons of ordinary observation, and make them believe that they were B.'s, in which the defendant inclosed powders of his own, which he fraudulently sold as B.'s powders; this was held not to be forgery, but obtaining money by false pretences. *R. v. Smith, Dears. & B.* 566; 27 *L. J.* (*M. C.*) 225. Frauds of this kind are also punishable under the *Merchandize Marks Act*, 1887 (50 & 51 *Vict. c.* 28) (*post, Part II., chap. v. s.* 3).

Forgery of a signature on a painting is not forgery at common law. *R. v. Closs, Dears. & B.* 460; 27 *L. J.* (*M. C.*) 54; 7 *Cox*, 494. But the offence is a common law cheat if the picture is sold as genuine, or may be the subject of an indictment for obtaining money by false pretences, or may be punished summarily under the *Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68, *ss.* 7, 8).

It has been held not to be forgery at common law for a bank clerk to make false entries in a book of account kept by the bank (*Re Windsor*, 34 *L. J.* (*M. C.*) 163; 6 *B. & S.* 522; 10 *Cox*, 118), nor to forge a medical

diploma, unless there were at the time of forgery an intent to defraud (*R.* v. *Hodgson*, 25 *L. J.* (*M. C.*) 78; *Dears. & B.* 3; 7 *Cox*, 122 (*C. C. R.*); and *post*, p. 718); and it would seem, at all events where the document is not of a public nature, that it is still necessary to prove, though not to allege, the existence of an intent to defraud some person at the time when the false document is made. *Id.*

FORGERY BY STATUTE—GENERAL PROVISIONS.

Statute.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 41—*Venue.*]—If any person shall commit any offence against this Act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law, or by virtue of any Act passed or to be passed, every such offender may be dealt with, indicted, tried, and punished in any county or place in which he shall be apprehended or be in custody, in the same manner in all respects as if his offence had been actually committed in that county or place; and every accessory before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried and punished, in any county or place in which *he shall be apprehended or be in custody*, in the same manner in all respects as if his offence, and the offence of his principal, had been actually committed in such county or place. [*This section in substance re-enacts* 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 24. *A similar provision is made by* 14 & 15 *Vict. c.* 99, *s.* 17, *as to forgeries of documents within the Evidence Act*, 1845 (8 & 9 *Vict. c.* 113), *and the Evidence Act*, 1851 (14 & 15 *Vict. c.* 99).]

Sect. 42—*Form of Indictment.*]—In any indictment for forging, *altering, offering, uttering, disposing, or putting off* any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or facsimile thereof, or otherwise describing the same or the value thereof. [*This section re-enacts* 14 & 15 *Vict. c.* 100, *s.* 5, *with the additions italicized. As to what is an "instrument" see R.* v. *Riley* [1896] 1 *Q. B.* 309. *See also ante*, p. 74.]

Sect. 43.]—In any indictment for engraving or making the whole or any part of any instrument, matter or thing whatsoever, or for using or having the unlawful custody or possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made, or for having the unlawful custody or possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter, or thing by any name or designation by which the same may be usually known, without setting out any copy or facsimile of the whole or any part of such instrument, matter or thing. [*This section re-enacts* 14 & 15 *Vict. c* 100, *s.* 6.]

security, or any deed, bond, or writing obligatory for the payment of money (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money, together with some other purpose), *or any indorsement on or assignment of any such undertaking, warrant, order, authority, request, deed, bond, or writing obligatory*, in whatsoever place or country out of England and Ireland, whether under the dominion of her Majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, *authority, request*, deed, bond, or writing obligatory may be or may purport to be payable, and in whatever language the same respectively or any part thereof may be expressed, and whether such bill, note, undertaking, warrant, order, *authority or request* be or be not under seal, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this Act, and shall be punishable thereby in the same manner as if the money had been payable or had purported to be payable in England or Ireland. [*This section re-enacts* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 30, *with the additions italicized, and gets rid of the doubts expressed under earlier statutes, whether instruments payable abroad came within those statutes. R.* v. *Dick*, 1 *Leach*, 68: *R.* v. *M'Kay*, *R. & R.* 71: *R.* v. *James Kirkwood*, 1 *Mood. C. C.* 311: *and see R.* v. *Roberts*, 7 *Cox*, 422 (*Ir.*).]

Sect. 47—*Other punishments substituted for those of* 5 *Eliz. c.* 14, *where adopted in other Acts.*]—Whosoever shall be convicted of any offence which shall have been subjected by any Act or Acts to the same pains and penalties as are imposed by the Act passed in the fifth year of the reign of Queen Elizabeth, intituled "An Act against Forgers of False Deeds and Writings," for any of the offences first enumerated in the said Act, shall be guilty of felony, and shall, in lieu of such pains and penalties, be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . [*This section re-enacts* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 23. *See post*, p. 755.]

Sect. 48—*Punishment for forgery in general.*]—Where by any Act now in force any person falsely making, forging, counterfeiting, erasing, or altering any matter whatsoever, or uttering, publishing, offering, disposing of, putting away, or making use of any matter whatsoever, knowing the same to have been falsely made, forged, counterfeited, erased or altered, or any person demanding, or endeavouring to receive or have any thing, or to do or cause to be done any Act, upon or by virtue of any matter whatsoever, knowing such matter to have been falsely made, forged, counterfeited, erased or altered, would, according to the provisions contained in any such Act, be guilty of felony, and would, before the passing of the Act of the first year of King William the Fourth, chapter sixty-six (*which, except section* 21, *was rep.* 24 *&* 25 *Vict. c.* 95, *s.* 1), have been liable to suffer death as a felon; or where by any Act now in force any person falsely personating another or falsely acknowledging any thing in the name of another, or falsely representing any other person than the real party to be such real party, or wilfully making a false entry in any book, account, or document, or in any manner wilfully falsifying any part of any book, account, or document, or wilfully making a transfer of any stock, annuity, or fund in the name of any person not being the owner thereof, or knowingly taking any false oath, or knowingly making any false affidavit or false affirmation, or demanding or receiving any money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate shall have been obtained to have been

false or forged, or knowing such probate or letters of administration to have been obtained by means of any false oath or false affirmation, would, according to the provisions contained in any such Act, be guilty of felony, and would, before the passing of the said Act of the first year of King William the Fourth, have been liable to suffer death as a felon; or where by any Act now in force any person making or using, or knowingly having in his custody or possession, any frame, mould, or instrument for the making of paper, with certain words visible in the substance thereof, or any person making such paper, or causing certain words to appear visible in the substance of any paper, would, according to the provisions contained in any such Act, be guilty of felony, and would before the passing of the said Act of the first year of King William the Fourth, have been liable to suffer death as a felon; then, and in each of the several cases aforesaid, if any person shall be convicted of any such felony as is hereinbefore in this section mentioned, or of aiding, abetting, counselling or procuring the commission thereof, and the same shall not be punishable under any of the other provisions of this Act, every such person shall be liable . . . to be kept in penal servitude for life . . . [*This section re-enacts* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 1. *As to the statutes to which it applies, see post*, p. 755.]

Sect. 49—*Accessories, etc.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, . . . and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be proceeded against, indicted, and punished as a principal offender. [*See* 24 *&* 25 *Vict. c.* 94, *ss.* 1-3, *post, Book II., Part IV., s.* 1, *tit.* "*Accessories.*"]

Sect. 50—*Admiralty jurisdiction.*]—All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed on "the high seas."

Provided that nothing herein contained shall alter or affect any of the laws relating to the government of [his] Majesty's land or naval forces [*see ante*, pp. 39-43].

Sect. 51—*Fine and sureties.*]—Whenever any person shall be convicted of a misdemeanor under this Act, it shall be lawful for the court, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, to fine the offender, and to require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in all cases of felonies in this

Act mentioned it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any of the punishments by this Act authorized; provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year (*see ante*, p. 240).

Sect. 54—Costs of prosecution.]—The court before which any indictable misdemeanor against this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony. [*This section was new law in* 1861. *See ante*, p. 246, *et seq.*]

General Form of Indictment for Forgery by Statute (see note, infra).

Surrey, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, feloniously did forge a certain [*describe the instrument forged by any name or designation by which it is usually known*, 24 & 25 *Vict. c.* 98, *s.* 42 (*ante*, p. 705)], to wit a ——, purporting to be [*set out the purport of the instrument*], with intent thereby then to defraud; against the form [*as ante*, p. 465]. (*2nd Count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of, and put off, a certain other forged —— [*as in the first Count*], with intent thereby then to defraud (he, the said J. S. at the time he so offered, uttered, disposed of, and put off the said last-mentioned forged —— as aforesaid well knowing the same to be forged); against the form [*as ante*, p. 465]. *As to an averment that the prisoner is in custody in the county of trial, see post, tit.* "*Bigamy.*"

This indictment is not intended as a general precedent to serve in all cases of forgery; because the form in each particular case must depend upon the statute on which the indictment is framed. But with the assistance of it, and upon an attentive consideration of the operative words in the enactment creating the offence, the pleader can find no difficulty in framing an indictment in any case not particularly mentioned hereafter in this section. Formerly in all indictments for forgery it was necessary to set out the forged instrument verbatim; but by 24 & 25 *Vict. c.* 98, *s.* 42 (*which re-enacts and extends the provisions of* 2 & 3 *W.* 4, *s.* 123), *it is sufficient to describe the instrument by any name or designation by which the same may be usually known without setting forth any copy or facsimile thereof or otherwise describing the same or the value thereof. The purport of the instrument should be set out sufficiently to identify it with that which is the subject of the charge. For other precedents of indictments in the numerous forms of statutory forgery, see post*, pp. 721–766.

It has been usual to describe the instrument in the second count for uttering, etc., as a certain "other" *forged. . . . The reason for this is thus stated by Lord Denman, C.J., in Campbell v. R.,* 11 *Q. B., at* pp. 810, 811, *viz.*, "*The rules of pleading in criminal and civil cases proceed generally on the same principles. In civil actions, no doubt, a declaration containing two counts which necessarily on the face of them are for the same cause of action would be bad for duplicity on special demurrer* (*Slade v. Drake, Hob.* 295). *Therefore it has been usual to insert the word* 'other' *in a second count in order to avoid a demurrer.*"

It is submitted, however, that the instrument uttered can now be safely described in the second count of an indictment for forgery and uttering as "a certain —— to wit, the said —— in the first count of this indictment mentioned," *and it is the practice now to omit the word* "other" *in indictments drawn at the Central Criminal Court.*

Venue.]—*As to the venue in forgery, see ante,* pp. 47, 705. *In an indictment for forgery under* 1 & 2 *W.* 4, c. 123 (*rep.*), *it was held that the forgery might be alleged to have been committed in the county in which the prisoner was in custody, by reason of* 11 *G.* 4. & 1 *W.* 4, c. 66, *s.* 24. *of which provided that that offence might be dealt with, indicted, tried and punished, and laid and charged to have been committed in the county in which the prisoner was in custody. R. v. James,* 7 *C. & P.* 553, *Patteson,* J. 24 & 25 *Vict. c.* 98, *s.* 41 (*ante,* p. 705), *contains a similar provision as to venue, omitting the words* "*laid and charged to have been committed,*" *but adding the words* "*in the same manner in all respects;*" *and it would seem that R. v. James applies to an indictment under the present statute. See Greaves' Crim. Law Cons. Acts* (2nd ed.), p. 301, *and post tit.* "*Bigamy.*" *Although the defendant is not shown ever to have been in custody in the county where the bill is found, until the moment before his trial, when he surrenders in discharge of his bail, that is sufficient to make him triable there. R. v. Smythies,* 1 *Den.* 498; 2 *C. & K.* 878; 19 *L. J.* (*M. C.*) 31.

The offence of forgery is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante,* p. 126).

Description of offence—"*Instrument,*" *etc.*]—*The forgery should, in prudence, be alleged in the words of the statute on which the indictment is framed; but if the indictment contain the operative words of the statute, the insertion of other terms also will not vitiate it. R. v. Brewer,* 6 *C. & P.* 363. *The meaning of the word* "*instrument*" *is fully discussed in R. v. Riley* [1896] 1 *Q. B.* 309 (*C. C. R.*). *Forgery of part of an instrument may be charged as forgery of the whole instrument. R. v. Dawson,* 1 *Str.* 19; 2 *East, P. C.* 978. *If the forgery consists of the alteration of a true instrument the alteration may either be specially alleged* (*and this mode is advisable, at least in one set of counts, even where the word* "*alter*" *is not in the statute. R. v. Elsworth,* 2 *East, P. C.* 986, 988); *or the alteration may be given in evidence under, and will support a count charging the forgery of the entire instrument.* (*See post,* p. 712, *et seq.*)

It is, as already stated (*ante,* p. 705), *unnecessary to set out in detail or facsimile the instrument alleged to have been forged.*

Under the law formerly in force, where an indictment in setting out the forged instrument also set out the attestation at the foot of it as part of the instrument, but it appeared in evidence that when the defendant subscribed the instrument, the attestation was not written upon it, it was held, nevertheless, to be no variance. R. v. Dunn, 2 *East, P. C.* 976. *The indictment must state what the instrument is, in respect of which the forgery was committed. R. v. Wilcox, R. & R.* 50. *And the instrument must be correctly described; for instance, if a bill of exchange be described as a promissory note, the defendant will be acquitted unless the variance be amended. See R. v. Hunter, R. & R.* 511: *R. v. Birkett, Id.* 251. *Where the forged instrument is actually within the meaning of the statute on which you intend framing your indictment, but does not sufficiently appear to be so on the face of it, you must, if the instrument be set out, not only set out a literal copy of it in the indictment, but must also add such averments of extrinsic facts as may be necessary to make it appear upon the face of the record that the forged instrument is one of those intended by and described in the statute. Thus, for*

instance, where by the usage of a public office, the bare signature of a party upon a navy bill operated as a receipt, an indictment for forging such a receipt, setting forth the navy bill and indorsement, and charging the defendant with having forged "a certain receipt for money, to wit, the sum of twenty-five pounds, mentioned and contained in the said paper called a navy bill, which forged receipt was as follows: that is to say,—'William Thornton, William Hunter,'" was held bad, because it did not show, by proper averments, that these signatures imported a receipt. R. v. Hunter, 2 *Leach,* 624; 2 *East, P. C.* 928. *So, where an indictment charged the defendant with forging a receipt in the handwriting of Henry Hargreaves, as thus:—"Received, H. H.," it was held that the indictment was bad, because there was nothing to show what H. H. meant. R. v. Barton,* 1 *Mood. C. C.* 141. *See R. v. Inder,* 1 *Den.* 325; 2 *C. & K.* 635. *But where, upon an indictment for forging a receipt, it appeared that the receipt was written at the foot of an account, and the indictment stated the receipt thus:—"8th March,* 1773. *Received the contents above by me, Stephen Withers," without setting out the account at the foot of which it was written, it was held sufficient. R. v. Testick,* 1 *East,* 181, *n. So the words "Settled Sam. Hughes," written at the foot of a bill of parcels, were held of themselves to import a receipt or acquittance, and that no averment was necessary that the word "settled" meant a receipt or acquittance. R. v. Martin,* 1 *Mood. C. C.* 418; 7 *C. & P.* 549: *overruling R. v. Thompson,* 2 *Leach,* 910. *And see R. v. Houseman,* 8 *C. & P.* 180: *where a forged entry of "paid sadler" was held a receipt: R. v. Vaughan, Id.* 276: *R. v. Boardman,* 2 *M. & Rob.* 147: *R. v. Overton, Dears.* 308; 23 *L. J.* (*M. C.*) 29. *Though it is now unnecessary to set out the instrument, these cases appear to be still applicable if the instrument be set out. See R. v. Rogers,* 9 *C. & P.* 41. *And if the instrument be set out, it seems that a misdescription of it in the indictment will be immaterial, at least if any of the terms used to describe it be applicable. See R. v. Williams,* 2 *Den.* 61; 20 *L. J.* (*M. C.*) 106.

Where several forged receipts were uttered in one bundle at the same time, it was held that they could be included in one count. R. v. Thomas, 2 *East, P. C.* 934, *Le Blanc,* J.; *see ante, p.* 82.

Intent.]—*The intent to defraud is described as an ingredient of the offence in all the statutes upon the subject of forgery, and must consequently be charged in the indictment: but it is sufficient to allege generally an intent to defraud, without alleging the intent to be to defraud any particular person:* 24 & 25 *Vict. c.* 98, *s.* 44 (*ante,* p. 706).

As to the second count, for knowingly uttering the forged instrument, it is usual and prudent to add it in every case, lest the prosecutor should fail in proof of the actual forgery. But the forgery is of itself an offence, although the forged instrument was never uttered, if the intent to defraud be proved. See R. v. Crocker, 2 *Leach,* 987; *R. & R.* 97. *It is not necessary to aver to whom the instrument was disposed of. R. v. Holden, R. & R.* 154; 2 *Taunt.* 334; 2 *Leach,* 1019; 11 *R. R.* 600.

Some other points relating to the indictment will be found under the following head of "Evidence."

Evidence.

Forge, etc.]—The statutes do not define forgery. Forgery at common law is "the fraudulent making or alteration of a writing to the prejudice of another man's right." 4 *Bl. Com.* 247: *and see R. v. White,* 1 *Den.* 208, *and ante,* pp. 702, 703. It is forgery to make a deed fraudulently with a false date, when the date is a material part of the deed, although the deed is in fact made and executed by and between the persons by and between

whom it purports to be made and executed. *R.* v. *Ritson, L. R.* 1 *C. C. R.* 200; 39 *L. J.* (*M. C.*) 10; 11 *Cox*, 352; *and see* 1 *Hawk*, c. 70, *s.* 2. Proof of the altering of a part of a genuine instrument will support an indictment charging the defendant with having forged the instrument itself, though the statute on which the indictment was framed contain the word "alter" as well as the word "forge." *R.* v. *Teague, R. & R.* 33; 2 *East, P. C.* 979. *See R.* v. *Atkinson*, 7 *C. & P.* 669, where alteration of the due date of a bill was held forgery. It is more usual, however, and perhaps more prudent, at least in one set of counts, to charge it as an alteration merely, and to allege the alteration specially. But there is no doubt that any, the slightest alteration of a genuine instrument in a material part, whereby a new operation is given to it, is a forgery; as, for instance, making a lease of the manor of *Dale* appear to be a lease of the manor of *Sale*, by changing the *D* to *S*; 1 *Hawk*, c. 70, *s.* 2; making a bill of exchange for eight pounds appear to be eighty pounds, by adding a cipher to the 8; *R.* v. *Elsworth*, 2 *East, P. C.* 986, 988; altering a banker's one-pound note by substituting the word ten for the word one; *R.* v. *Post, R. & R.* 101; even altering the notes of a country banker, as to the place at which they were made payable in London. *R.* v. *Treble, R. & R.* 164; 3 *Taunt.* 328; 1 *Leach*, 1040. And expunging an indorsement of part payment on a bill has been held forgery. *R.* v. *Bigg*, 3 *P. Wms.* 419; 2 *East, P. C.* 855, 882. Counterfeiting the signature of one of several parties to a bond is forgery, though the other signatures are genuine. *R.* v. *Richards*, 1 *Cox*, 62. So is altering a document already forged by the person who makes the alteration. *R.* v. *Kinder*, 2 *East, P. C.* 855.

But where the forgery is of a mere addition to the instrument, and which has not the effect of altering it, but is merely collateral to it; as, for instance, a forged acceptance or indorsement to a genuine bill of exchange; proof of the forgery of the addition will not support an indictment charging the forgery of the entire instrument: the forgery of such addition must be specially alleged, and must be proved as laid. *See R.* v. *Birkett, R. & R.* 251. Forging the signature of the drawer of a bill of exchange, however, is the same precisely as forging the entire bill, and may be laid as such. Where an illiterate woman of the name of Dunn represented herself to the prosecutor as the widow of a deceased seaman of the name of Wallace, and obtained from him a loan of money upon her promissory note; the note was written by the prosecutor, and upon his asking her what name he should put to it, she answered "Mary Wallace;" he thereupon subscribed the name "Mary Wallace" to the note; and she affixed her mark in the usual place, between the christian and surname: the judges held this to be a forgery of the note. *R.* v. *Dunn*, 2 *East, P. C.* 962, 976; 1 *Leach*, 57. And whether the name forged be that of a merely fictitious person, who never existed, or of a person actually existing, is wholly immaterial: it is as much a forgery in the one case as in the other; *R.* v. *Lewis, Fost.* 116: *R.* v. *Wilks*, 2 *East, P. C.* 957: *R.* v. *Bolland, Id.* 958; 1 *Leach*, 83; *R.* v. *Lockett, Id.* 94: *R.* v. *Parkes*, 2 *Leach*, 775; 2 *East, P. C.* 963, 965: *R.* v. *Froud*, 1 *B. & B.* 300; *R. & R.* 389: *R.* v. *Sheppard*, 1 *Leach*, 226: *R.* v. *Francis, R. & R.* 209: *R.* v. *Peacock, Id.* 278: *and see R.* v. *Webb*, 3 *B. & B.* 228; *R. & R.* 405: *R.* v. *Watts, R. & R.* 436: *R.* v. *Michell*, 1 *Den.* 282, *n.*; provided the fictitious name be assumed for the purpose of fraud, in the particular instance in question. *R.* v. *Bontien, R. & R.* 260. So, also, the signing of a bill of exchange in the name of a non-existing firm, or in the defendant's own name to represent a fictitious firm with intent to defraud, is forgery. *R.* v. *Rogers*, 8 *C. & P.* 629. But the mere assuming and signing a fictitious

name, without any intention to defraud by the use of such fictitious name, although the transaction may be fraudulent in other respects, does not amount to forgery. *R.* v. *Martin*, 5 *Q. B. D.* 34; 49 *L. J.* (*M. C.*) 11; 14 *Cox*, 375; *and cf. R.* v. *Whyte*, 5 *Cox*, 290. So, where the prisoner, Robert M., in payment for goods bought by him from the prosecutor, drew a cheque in the name of William M. in the presence of the prosecutor upon a bank at which the prisoner had no account, and gave it to the prosecutor as his own cheque drawn in his own name, the prisoner knowing at the time he drew the cheque that it would be dishonoured, and the prosecutor, who well knew the prisoner and his real name, receiving the cheque in the belief that it was drawn in the prisoner's own name, it was held that the prisoner was not guilty of the offence of forgery. *Id.* It is not forgery fraudulently to induce a person to execute an instrument, on a misrepresentation of its contents; *R.* v. *Collins*, 2 *M. & Rob.* 461; or to procure his signature to a document the contents of which have been altered without his knowledge. *R.* v. *Chadwick*, *Id.* 545. This is, however, now an offence under *s.* 90 of the *Larceny Act*, 1861 (*ante*, p. 594).

Even where a man, upon obtaining discount of a bill, indorsed it in a fictitious name, when he might have obtained the money as readily by indorsing it in his own name, it was held to be a forgery. *R.* v. *Taft*, 1 *Leach*, 172; *and see R.* v. *Taylor*, 1 *Leach*, 214: *R.* v. *Marshall*, *R. & R.* 75: *R.* v. *Whiley*, *R. & R.* 90: *R.* v. *Francis*, *R. & R.* 209: *R.* v. *Parke*, 1 *Cox*, 4. But it is not forgery for a man who has been long known by a fictitious name to draw a bill in that name. *See R.* v. *Aickles*, 2 *East*, *P. C.* 968; 1 *Leach*, 438: *R.* v. *Bontien*, *R. & R.* 260. Nor for a man to pass himself off as the indorser of a bill, when in fact he is not so, but the indorsement is genuine, is not, even although it be done for the purposes of fraud, and in concert with the real indorser. *R.* v. *Hevey*, 1 *Leach*, 229; 2 *East*, *P. C.* 856. Nor where the party, falsely alleging an authority from J. S. to indorse, indorses "per procuration of J. S.," signing thereto his own name; *R.* v. *White*, 1 *Den.* 208; 2 *C. & K.* 404; but such a fraud, although not forgery at common law, is now punishable under 24 *& 25 Vict. c.* 98, *s.* 24 (*post*, p. 731). Where a man drew a bill on Williams & Co., bankers, 3 Birchin-lane, London, and at the time he paid away the bill he was asked if the drawees were Williams, Burgess & Co., the London bankers, and he answered in the affirmative; the bill was presented, not to Williams, Burgess & Co., who lived at No. 20 in the same street, but at a counting-house, No. 3, where the words, "*Williams & Co.*" were on a brass plate on the door, and it was there accepted in the name of "*Williams & Co.*"; proof was given at the trial that the acceptance was not that of Williams, Burgess & Co., and that there were no other London bankers of that name: the prisoner was convicted; but, upon the point being afterwards argued before the judges, ten of them held that it was not a forgery. *R.* v. *Watts*, 3 *B. & B.* 197; *R. & R.* 486. But if a bill, payable to J. S. or order, get into the hands of another person of the same name, and he indorse it, it will be a forgery. *Mead* v. *Young*, 4 *T. R.* 28; 2 *R. R.* 314. It is forgery for a person, having authority to fill up a blank acceptance or a cheque for a certain sum, to fill up the bill or cheque for a larger sum (*R.* v. *Minter Hart*, 1 *Mood. C. C.* 486; 7 *C. & P.* 652: *R.* v. *Bateman*, 1 *Cox*, 186: *R.* v. *Wilson*, 1 *Den.* 284; 2 *C. & K.* 527; 17 *L. J.* (*M. C.*) 82: *see R.* v. *Richardson*, 8 *Cox*, 448: 2 *F. & F.* 343); or to fill in the sum on a cheque signed in blank. *Flower* v. *Shaw*, 2 *C. & K.* 703. And if a party put the name of another to a bill of exchange, without his authority, it is equally a forgery, although the party expected to be able to meet it when due. *R.* v. *Forbes*, 7 *C. & P.*

224. *See R.* v. *Parish*, 8 *C. & P.* 94: *R.* v. *Beard*, *Id.* 143: *R.* v. *Hill*, *Id.* 274; 2 *Mood. C. C.* 30: *R.* v. *Cooke*, 8 *C. & P.* 582.

If several combine to forge an instrument, and each execute by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals. *R.* v. *Bingley*, *R. & R.* 446. As, if B. make the paper, C. engrave the plate, and D. fill up the instrument, each without knowing that the others are employed for that purpose, they are all principals. *R.* v. *Dade*, 1 *Mood. C. C.* 307: *R.* v. *Robert Kirkwood*, *Id.* 304. So, if several concur in employing an innocent agent to make a forged instrument, of which they know the nature, they are all guilty of the forgery. *R.* v. *Mazeau*, 9 *C. & P.* 676. "I think if a man has an instrument in his possession without an indorsement or other writing the subject of the alleged forgery, and half an hour afterwards is found with the instrument indorsed, there is some evidence of forgery to go to the jury. . . . Although the prisoner might not be able to write himself, yet if he got any one to write the name he is as much guilty of forgery as if wrote it himself." *R.* v. *James*, 4 *Cox*, 90, *per Erle*, J.

Handwriting.]—That the signature or other part of the instrument alleged to be forged is not of the handwriting of the party may be proved by any person acquainted with his handwriting, either from having seen him write, or from being in the habit of corresponding with him. (*Ante*, p. 383.) It is sufficient, *primâ facie*, to disprove his handwriting, and he need not be called to disprove an authority to others to use his name; circumstances showing guilty knowledge are enough. *R.* v. *Hurley*, 2 *M. & Rob.* 473. The forgery may be proved by the person whose name is forged: or by other witnesses who are acquainted with his handwriting, without calling him as a witness. His testimony as to the fact of forgery is not deemed the best evidence, and that of other persons merely secondary. *R.* v. *Hughes*, 2 *East*, *P. C.* 1002: *R.* v. *Macguire*, *Id.*; *Bank Prosecutions*, *R. & R.* 378. And by *Denmans Act* (28 & 29 *Vict. c.* 18), *s.* 8, "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." *See R.* v. *Harvey*, 11 *Cox*, 546, *and ante*, p. 232).

Evidence of experts in handwriting.]—"There is no decision which requires that the evidence of a man who is skilled in comparing handwriting, and who has formed a reliable opinion from past experience, should be excluded because his experience has not been gained in the way of his business." *R.* v. *Silverlock* [1894] 2 *Q. B.* at p. 771, *per Lord Russell of Killowen*, C.J., and the *admissibility* of evidence of professional experts in handwriting which formerly seems to have been doubtful (*Goodtitle* v. *Braham*, 4 *T. R.* 497: *Carey* v. *Pitt*, *Peake*, *Add. Cas.* 130; 4 *R. R.* 895: *R.* v. *Cator*, 4 *Esp.* 117; *Gurney* v. *Langlands*, 5 *B. & Ald.* 330: *and see ante*, p. 382), has been recognized of recent years, the *weight* of such evidence being for the jury. On an indictment for uttering a forged will, which, it was alleged, had been written over pencil-marks that had been rubbed out, it was held that the evidence of engravers, who had examined the paper with a mirror, and traced the pencil-marks, was admissible for the prosecution. *R.* v. *Williams*, 8 *C. & P.* 434.

Identity of person whose writing is forged.]—Evidence must also be

given of the identity of the party whose handwriting is alleged to be forged; that is, it must be proved expressly or from circumstances, that the alleged forgery was intended to represent the handwriting of the person whose handwriting it is proved not to be; or that it was attempted to be uttered as the handwriting of a person who never existed. (*Ante*, p. 713.) *See R.* v. *Sponsonby*, 1 *Leach*, 332; 2 *East, P. C.* 996, 997: *R.* v. *Downes*, *Id.* 997, 999. Where the defendant uttered a forged note, and said that it was drawn by W. H. of the Bull's Head, it was held to be sufficient to prove that it was not of the handwriting of that W. H., although it appeared that there was another W. H. living in the neighbourhood. *R.* v. *Hampton*, 1 *Mood. C. C.* 255. Where the prisoner obtained money from B. for a cheque on Jones, Loyd & Co., purporting to be drawn by G. Andrews in favour of —— Newman, Esq., or bearer, telling him that it was for Mr. Newman, of Soho Square, in whose service he was for three months, and that Mr. Newman had put his name on the back; and it appeared upon an indictment for forging and uttering the cheque, that no person of the name of G. Andrews kept an account with Jones, Loyd & Co., that Mr. Newman of Soho Square did not write his name on the back of the cheque, and that the prisoner was never in that gentleman's service: *Parke*, J. (after consulting *Gaselee*, J.), held this to be sufficient *primâ facie* evidence that G. Andrews was a fictitious person, and told the jury that if G. Andrews really drew the cheque, the prisoner might produce him, or give some evidence upon the subject: the prisoner was convicted. *R.* v. *Backler*, 5 *C. & P.* 118. Upon an indictment for forging and uttering a bill of exchange, purporting to be drawn by T. W. of Nottingham, and to be accepted by T. K., Market Place, Birmingham, which was passed to the prosecutor by the prisoner, who represented his name to be King, of King Square, which he said was chiefly his property: the prosecutor proved that he made inquiry for T. W. of Nottingham, and could not find him: that he had been twice to Birmingham after T. K., but could find no such person, and that he had made inquiries at King Square for the prisoner, but could hear of no such person; but he admitted that he was a stranger at these places, and no person acquainted with them was called: *Parke*, J., after consulting the judges present, held this sufficient evidence to go to the jury of the bill being a fictitious one, although he told them that it was not very satisfactory, and not the usual evidence upon such occasions. *R.* v. *King*, 5 *C. & P.* 123. In *R.* v. *Ashby*, 2 *F. & F.* 560, on an indictment for forging a cheque dated A. and purporting to be drawn by B. C., evidence that no person named B. C. lived at A. who would be likely to have a banker's account was held evidence to prove that B. C. was a fictitious person. Where the prisoner was indicted for forging and uttering a cheque on Greenwood & Co., army agents and bankers, purporting to be drawn by J. Weston, and a clerk in the army department was called to prove that J. Weston kept no account with his employers; he also admitted that he did not know the names of all the customers, but added that he knew of no customer named J. Weston, and that, upon inquiry of the other clerks, he found that there was no such person: *Parke*, J., with the concurrence of *Patteson*, J., and *Gurney*, B., held this to be *primâ facie* evidence sufficient to call upon the prisoner to show who J. Weston really was. *R.* v. *Brannan*, 6 *C. & P.* 326. Instruments made or purporting to be made payable abroad may be the subjects of forgery within the *Forgery Act*, 1861. *See* 24 & 25 *Vict. c.* 98, *s.* 40 (*ante*, p. 707, *and note*).

Description of the forged instrument.]—The instrument need not be set

out in facsimile in the indictment. 24 & 25 *Vict. c.* 98, *s.* 42 (*ante*, p. 705). If it is it should, when given in evidence, correspond exactly with that set out in the indictment, and until 1851 (*ante*, p. 52) the slightest variance was fatal unless it were merely literal, *i.e.*, where the omission or addition of a letter does not alter or change a word, so as to make it another word (2 *Salk.* 661; 1 *Cowp.* 229); as, for instance, "receivd" for "received" (*R.* v. *Hart*, 1 *Leach*, 145; 2 *East, P. C.* 977); "undertood" for "understood" (*R.* v. *Beach*, 1 *Cowp.* 229); "Messes" for "Messrs." (*R.* v. *Oldfield*, 2 *Russ. Cr.* (6th ed.) 650), or the like (*ante*, p. 302).

Sewing to the parchment on which the indictment is written, impressions of forged notes taken from engraved plates, is not a legal mode of setting out the notes in the indictment. *R.* v. *Harris*, 7 *C. & P.* 416, 430: *R.* v. *Moses*, *Id.* 416, 423, 430: *R.* v. *Balls*, *Id.* 416, 426, 430: *R.* v. *Warshaner*, 1 *Mood. C. C.* 466. If the instrument forged be in a foreign language, it must be set out (if at all) in that language, and a complete and accurate translation must also be set out. *See R.* v. *Szudurskie*, 1 *Mood. C. C.* 429: *R.* v. *Warshaner*, *Id.* 466: *R.* v. *Harris*, *ubi supra*: *R.* v. *Goldstein*, *R. & R.* 473; 3 *B. & B.* 201; 10 *Price*, 88. But counts under 2 & 3 *W.* 4, *c.* 123, *s.* 3 (*rep.*), stating the plates to have engraved on them, in the Polish language, a promissory note for the payment of money, to wit, for the payment of five florins, purporting to be a promissory note for the payment of money of a certain foreign prince, without stating the value, were held good after verdict, by virtue of 7 *G.* 4, *c.* 64, *s.* 21 (*ante*, p. 51). *R.* v. *Warshaner*, *R.* v. *Harris*, *ubi supra*.

The instrument must appear upon the face of it to have been made to resemble a true instrument of the denomination mentioned in the indictment, and in the statute upon which it is framed: not necessarily an exact resemblance, but such as to be capable of deceiving persons using ordinary observation, according to their means of knowledge (*see R.* v. *Collicott*, *R. & R.* 212, 229; 2 *Leach*, 1048; 4 *Taunt.* 300: *R.* v. *Jones*, 1 *Leach*, 204: *R.* v. *Mahoney*, 6 *Cox*, 487), although not, perhaps, those scientifically acquainted with such instruments. *See R.* v. *Hoost*, 2 *East, P. C.* 950. Even where upon an indictment for forging a bank-note, there appeared to be no water-mark in the forged note, and the word "pounds" was omitted in the body of it, the defendant being convicted, the judges held the conviction to be right. *R.* v. *Elliott*, 1 *Leach*, 175; 2 *East, P. C.* 951. But if, on the other hand, the instrument do not appear to be such as probably might be imposed upon persons to whom it was likely to be uttered as a true instrument of the denomination mentioned in the indictment, the defendant must be acquitted. Where the defendant was indicted for forging a will of lands, and the will produced was attested before the passing of the *Wills Act*, 1837 (7 *W.* 4 & 1 *Vict. c.* 36) by two witnesses only, the judges held that the defendant could not be convicted, although it did not appear, either in evidence or upon the face of the will, whether the lands were freehold or not; for they must be presumed to be freehold, unless the contrary appeared. *R.* v. *Wall*, 2 *East, P. C.* 953. So a man may be indicted for forging an instrument, which, if genuine, could not be made available, by reason of some circumstance not appearing upon the face of the instrument, but to be made out by extrinsic evidence. *See R.* v. *M'Intosh*, 2 *Leach*, 883; 2 *East P. C.* 942. Thus, a man may be indicted for forging a deed, though not made in pursuance of the provisions of particular statutes requiring it to be in a particular form (*R.* v. *Lyon*, *R. & R.* 255: *R.* v. *Froud*, *Id.* 389; 1 *B. & B.* 300); or for forging a cheque, though it be post-dated. *R.* v. *Taylor*, 1 *C. & K.* 213.

The forged document must be produced at the trial if possible (*R.* v. *Hall*, 12 *Cox*, 159); but secondary evidence can be given if it is in the

prisoner's possession and is not produced on a proper notice to produce. *R.* v. *Hunter*, 4 *C. & P.* 128: *R.* v. *Haworth*, *Id.* 254: *R.* v. *Fitzsimons*, 18 *W. R.* 763; *Ir. Rep.* 4 *C. L.* 1. *See further*, *ante*, pp. 315, 316, and p. 401, *tit.* '*Privilege.*' Possession of the document in cases within 24 & 25 *Vict. c.* 98, *s.* 46 (*ante*, p. 706), may be obtained by search warrant. As to proof of handwriting, *see ante*, pp. 382, 715.

With intent to defraud.]—It is sufficient to prove generally an intent to defraud without proving intent to defraud a particular person. 24 & 25 *Vict. c.* 98, *s.* 44 (*ante*, p. 706). At common law it was necessary to allege and prove a particular intent, unless the document forged was of a public nature. *R.* v. *Hodgson*, *Dears. & B.* 3; 25 *L. J.* (*M. C.*) 78; 7 *Cox*, 122. It is not necessary to prove that any person was actually defrauded by the forgery (*R.* v. *Crooke*, 2 *Str.* 901: *R.* v. *Goate*, 1 *Ld. Raym.* 737), if, from circumstances, the jury can infer that it was the defendant's intention to defraud; for where the intent to defraud exists in the mind of the defendant, it is sufficient, though, from circumstances of which he is not apprised, he could not, in fact, defraud the prosecutor (*R.* v. *Holden*, *R. & R.* 154; 11 *R. R.* 600: *R.* v. *Hoatson*, 2 *C. & K.* 777); or though the party to whom the forged instrument is uttered believes that the defendant did not intend to defraud him (*R.* v. *Sheppard*, *R. & R.* 169; *see R.* v. *Harvey*, 2 *St. Tr. N. S.* 1; 2 *B. & C.* 261; 26 *R. R.* 237); nay, even, as it seems, though in fact *no person* could have been defrauded by the forged instrument. *See R.* v. *Nash*, 2 *Den.* 493, 503; 21 *L. J.* (*M. C.*) 147, 149, *Maule*, J.; but *cf. R.* v. *Marcus*, 2 *C. & K.* 356, where *Cresswell*, J., held that there must be a possibility of some person being defrauded. Where a forged bill of exchange, payable to the order of the defendant, was given as a pledge only, but to obtain credit, it was held to be a fraudulent intent within the meaning of the statute. *R.* v. *Birkett*, *R. & R.* 86. The jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was general, to defraud whoever might take the instrument, and the intention of defrauding in particular the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation. *R.* v. *Mazagora*, *R. & R.* 291; *see R.* v. *Trenfield*, 1 *F. & F.* 43. A forged cheque drawn on the Worcester Old Bank was presented by the prisoner to Rufford's Bank at Stourbridge, and refused; and upon an indictment for forging and uttering the cheque with the intent to defraud the Messrs. Rufford, it was objected, that, as it was not drawn upon them, it could not defraud them: but *Bosanquet*, J., held, that as it was presented at their bank for payment, it was evidence of an intent to defraud them. *R.* v. *Crowther*, 5 *C. & P.* 316.

The fact that the prisoner intended to provide for the payment of a bill which he uttered knowing it to be forged does not negative the intent to defraud. *R.* v. *Hill*, 2 *Mood. C. C.* 30; 8 *C. & P.* 274: *R.* v. *Cooke*, *Id.* 582; nor does the fact that he had a legal or *bonâ fide* claim to the extent of the money obtained by the forged instrument. *R.* v. *Wilson*, 1 *Den.* 284; 2 *C. & K.* 527. The fact that the prisoner has given guarantees to his bankers, to whom he paid a forged note, to a larger amount than the note, does not so completely negative an intent to defraud them as to withdraw the case from the consideration of the jury. *R.* v. *James*, 7 *C. & P.* 553. *See R.* v. *Cooke*, 8 *C. & P.* 582: *R.* v. *Geach*, 9 *C. & P.* 499.

Evidence that the prisoner uttered other forged documents similar to that charged in the indictment may be admissible to prove guilty

knowledge. *R.* v. *Whiley*, *R. & R.* 90; 2 *Leach*, 983. *See ante*, pp. 308, 311.

On the trial of an indictment for forgery with intent to defraud A. B., "one of the public officers" of a banking company established under the *Country Bankers Act*, 1826 (7 *G.* 4, *c.* 46), A. B. stated that he was a public officer: and an examined copy of the return forwarded to the stamp-office under that Act, in which also he was stated to be so, was put in: but this copy had not the affidavit at the close of the return, which is directed by schedule (A.) of that statute, and the date was left blank. The judges held that A. B. was sufficiently proved to be the public officer. *R.* v. *Carter*, 1 *Den.* 65; 1 *C. & K.* 741. *See Edwards* v. *Buchanan*, 3 *B. & Ad.* 788.

Second Count.

Offer, utter, dispose of, and put off, etc.]—To *offer* and to *utter* mean nothing more than that the party tendered, or attempted to pass or make use of the forged instrument, with the intent charged in the indictment: these words do not import that the person to whom the forged instrument was tendered, actually accepted it with intention to retain it, or was defrauded by it. Accordingly we find that the Legislature, wherever they intended that the offence should not be complete without an acceptance on the one part and a relinquishment on the other, have described the offence in words of a different and appropriate meaning, such as "pay and put off" or the like. *See* 1 *East, P. C.* 179. But in the *Forgery Act*, 1861 (24 *& 25 Vict. c.* 98), the offence of uttering, etc., is described by the words "offer, utter, dispose of, or put off," which include attempts to make use of a forged instrument, as well as cases where the defendant has actually succeeded in making use of it. As to the distinction between uttering forged paper and false pretences, *see R.* v. *Inder*, 1 *Den.* 325; 2 *C. & K.* 635, and *ante*, p. 605. Where, on an indictment upon 13 *G.* 3, *c.* 79 (*rep.*), which contained the words "utter or publish," it appeared that the defendant merely showed a forged instrument to a person, though with intent to raise a false idea of his substance, and afterwards left the instrument under cover, in the custody of that person, as he pretended, for safe custody, it was held not to be an uttering or publishing within these words. *R.* v. *Shukard*, *R. & R.* 200. But the showing of a forged *receipt* to a person with whom the defendant is claiming credit for it, was held to be an offering or uttering within the statute then in force (1 *W.* 4, *c.* 66, *s.* 10), though the defendant refused to part with the possession of it. *R.* v. *Radford*, 1 *Den.* 59; 1 *C. & K.* 707. Where a pawnbroker, upon the hearing of an application against him under 39 *&* 40, *G.* 3, *c.* 99, *s.* 14 (*rep.*), to compel him to deliver up goods which had been pledged with him (the money advanced, with interest, having been repaid), produced and delivered to the magistrates, through the hand of his attorney, a forged duplicate as the genuine one, which he had given when the goods were pledged, and which he had received back when the money was repaid: this was held to amount to an uttering by the pawnbroker of an accountable receipt within 24 *& 25 Vict. c.* 98, *s.* 23 (*post*, p. 731). *R.* v. *Fitchie*, *Dears. & B.* 175; 26 *L. J.* (*M. C.*) 90; 7 *Cox*, 257. And where the defendant placed a forged receipt for poor-rates in the hands of the prosecutor, for the purpose of inspection only, in order, by representing himself as a person who had paid his poor-rates, fraudulently to induce the prosecutor to advance money to a third person, for whom the defendant proposed to become a surety for its repayment: this was held to be an offering, etc., within the statute. *R.* v. *Ion*, 2 *Den.* 475; 21 *L. J.* (*M. C.*) 166. And the rule there laid down by the court is, that a

using of the forged instrument in some way, in order to get money or credit upon it, or by means of it, is sufficient to constitute the offence described in the statute. On an indictment for uttering forged bonds in this country, it was held that such uttering here was sufficiently proved by evidence of the bonds having been posted in England to a firm at Brussels for negotiation. *R.* v. *Finkelstein*, 16 *Cox*, 107, Common Serjeant, after consulting *Stephen*, J. The uttering of the bill of A., an existing person, as that of a fictitious person of the same name, has been held felonious. *R.* v. *Nisbett*, 6 *Cox*, 320; *and see ante*, p. 12).

Questions have arisen upon the subject of uttering, as to the quality of the offences of different parties, viz., whether they were indictable as principals or accessories. It has been decided that the giving of a forged note to an innocent agent, or to an accomplice, that he may utter it, is a disposing of and putting away of the note. *R.* v. *Palmer*, 1 *B. & P.* (*N. R.*) 96; *R. & R.* 72; 2 *Leach*, 978: *R.* v. *Giles*, 1 *Mood. C. C*, 166; *and see Brooks* v. *Warwick*, 2 *Stark.* (*N. P.*) 389; 20 *R. R.* 697. But where several, by concert, are privy to the uttering of a forged note, which is uttered by one only in the absence of the others (*see ante*, p. 13), he only who utters it is a principal, but the others are accessories before the fact. *R.* v. *Soares*, *R. & R.* 25: *R.* v. *Badcock*, *Id.* 249: *R.* v. *Stewart*, *Id.* 363: *R.* v. *Davis*, *Id.* 113. *See R.* v. *Morris*, *Id.* 270; 2 *Leach*, 1096: *R.* v. *Harris*, 7 *C. & P.* 416.

To maintain this count, it will be sufficient to prove that the defendant sold or disposed of the forged instrument without proving that he uttered it as genuine. The words of 24 & 25 *Vict. c.* 98, *s.* 12 (*post*, p. 723), are "offer, utter, dispose of, or put off," and the words of 24 & 25 *Vict. c.* 98, *s.* 13 (*post*, p. 749), applicable to the buyer, are "purchase or receive." Under some earlier Acts it was necessary to prove the instrument to have been uttered "as true."

A *conditional* uttering is as much a crime as any other. Where the defendant gave a forged acceptance, knowing it to be so, to the manager of a bank where he kept an account, saying that he hoped this bill would satisfy the bank as a security for the money he owed them, and the manager replied that that would depend on the result of inquiries as to the acceptors: this was held a sufficient guilty uttering. *R.* v. *Cooke*, 8 *C. & P.* 782.

A certain other false, etc.]—This must be proved as on the first count. (*See ante*, p. 712.)

With intent to defraud.]—This is also proved as on the count for forgery. If the jury are satisfied that the prisoner uttered the instrument as true, meaning it to be taken as such, and that he knew it to be forged, they are bound to infer the intent to defraud. (*And see ante*, p. 718.)

Well knowing the same to be forged.]—This is not capable of direct proof. It is nearly in all cases, therefore, proved by evidence of facts from which the jury may presume it (*vide ante*, pp. 303, 311, 340). Upon an indictment for disposing of and putting away a forged bank-note, knowing it to be forged, proof that the defendant has passed other forged notes, if proved by legitimate evidence, *R.* v. *Millard*, *R. & R.* 245 (*see R.* v. *Moore*, 1 *F. & F.* 73), raises a probable presumption that he knew the note, for the passing of which he is now indicted, to be forged; *R.* v. *Wylie*, 1 *B. & P.* (*N. R.*) 92; *S. C. sub-nom. R.* v. *Whiley*; 2 *Leach*, 983; *R. & R.* 90: *R.* v. *Tattersal*, *Id.* 98, *n.* (*ante*, p. 311): *and see R.* v. *Ball*, 1 *Camp.* 324;

R. & R. 132; 10 *R. R.* 695: *R.* v. *Hough, R. & R.* 120: *R.* v. *Green,* 3 *C. & K.* 209: *R.* v. *Salt,* 3 *F. & F.* 834: *R.* v. *Francis, L. R.* 2 *C. C. R.* 128; 12 *Cox,* 612: *R.* v. *Colclough,* 15 *Cox,* 92; 10 *L. R.* (*Ir.*) 241 (*C. C. R. Ir.*); and if, in addition to this, it be proved that the defendant, when he passed these notes, gave a false name or address, it amounts to a violent presumption of his guilty knowledge. (*See ante,* p. 340.) It has been ruled, however, that if a subsequent uttering be made the subject of a distinct indictment, it cannot be given in evidence to show a guilty knowledge in a former uttering. *R.* v. *Smith,* 2 *C. & P.* 633: *and R.* v. *Smith,* 4 *C. & P.* 411, 413 (*a*). But this distinction seems to be now exploded; and in *R.* v. *Lewis, Carnarvon Sum. Ass.,* 1840, Lord *Denman,* C.J., said, that "he could not conceive how the relevancy of the fact to this charge could be affected by its being the subject of another charge;" and offered to admit the evidence, although the above cases were cited. And in another case, *Alderson,* B., admitted such evidence. *R.* v. *Aston,* 2 *Russ. Cr.* (6th ed.) 678. *See also R.* v. *Forster, Dears.* 456; 24 *L. J.* (*M. C.*) 134. In *Griffiths* v. *Payne,* 11 *A. & E.* 131, it is said by *Tindal,* C.J., that such evidence would not be admissible on an indictment for forgery. On an indictment under 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 19 (*repealed,* but re-enacted in 24 & 25 *Vict. c.* 98, *s.* 19, *post,* p. 765), for engraving or uttering notes of a foreign prince, evidence of a recent engraving or uttering of notes of another foreign prince was held admissible in proof of a guilty knowledge. *R.* v. *Balls,* 1 *Mood. C. C.* 470; 7 *C. & P.* 429. *See also ante,* pp. 308, 312, 340.

The defendant's statements as to other instruments of the same kind, supposed to have been the subject of a guilty uttering by him, seem not to be admissible in evidence. *R.* v. *Cooke,* 8 *C. & P.* 582; but see the remarks of *Crompton,* J., on this case in *R.* v. *Brown,* 2 *F. & F.* 559.

COUNTERFEITING SEALS OF STATE.

Statute.

24 & 25 *Vict. c.* 98 (*Forgery Act,* 1861), *s.* 1.]—Whosoever shall forge or counterfeit, or shall utter, knowing the same to be forged or counterfeited, the great seal of the United Kingdom, her Majesty's privy seal, any privy signet of her Majesty, her Majesty's royal sign manual, any of her Majesty's seals appointed by the twenty-fourth article of the union between England and Scotland to be kept, used, and continued in Scotland, the great seal of Ireland, or the privy seal of Ireland, *or shall forge or counterfeit the stamp or impression of any of the seals aforesaid, or shall utter any document or instrument whatsoever, having thereon or affixed thereto the stamp or impression of any such forged or counterfeited seal, knowing the same to be the stamp or impression of such forged or counterfeited seal, or any forged or counterfeited stamp or impression made or apparently intended to resemble the stamp or impression of any of the seals aforesaid, knowing the same to be forged or counterfeited, or shall forge or alter, or utter, knowing the same to be forged or altered, any document or instrument having any of the said stamps or impression thereon or affixed thereto,* shall be guilty of felony, and, being convicted thereof, shall be liable . . . to be kept in penal servitude for life. . . . [*The part in italics was new law in* 1861. *The rest of the section is framed on* 11 *G.* 4 & 1 *W.* 4, *c.* 66, *s.* 1, *and* 2 & 3 *W.* 4, *c.* 123, *and* 7 *W.* 4 & 1 *Vict. c.* 84, *ss.* 2, 3, *reducing the offence from treason to felony.*]

Indictment.

An indictment for this offence may readily be framed from the precedent for forgery by statute (*ante*, p. 710), adding the words "and counterfeit" after "forge."

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour.—24 & 25 *Vict. c.* 98, *s.* 1; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 98, *s.* 51 (*ante*, p. 709).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

To support the first count, produce the instrument to which the forged seal is appended, and prove by witnesses conversant with the genuine seal that the seal produced is counterfeited; then prove that the prisoner counterfeited the seal, either by direct evidence or by circumstances from which the jury may infer it.

To support the second count, prove the seal to be forged as above, and the uttering as directed, *ante*, p. 719.

This statute (which for the first time reduced this offence from *treason* to *felony*) applies to a forging of the impression of the seal, as well as to a counterfeiting of the seal itself. Where the prisoner forged the draft of a patent, and counterfeited the privy signet to it, and so obtained the great seal to the patent, and being indicted for counterfeiting the privy signet, it appeared that he had purposely introduced some things and words into the counterfeit signet which were not in the original, and had omitted others; the court held it to be treason. *Robinson's case*, 2 *Rolle, Rep.* 50; 1 *Hale*, 184. The mere misuser of the great seal was not treason; 1 *Hale*, 183; 3 *Co. Inst.* 15; as, for instance, the taking of the great seal from an original patent and appending it to a pretended patent. *Bro. Abr. Treason, pl.* 3; 1 *Hale*, 182: *Leak's case*, 12 *Co. Rep.* 15. Nor was the alteration of the instrument, to which the real seal is appended, treason within the meaning of the statutes. 3 *Co. Inst.* 15; 1 *Hale*, 183.

FORGING AND UTTERING TREASURY BILLS, ETC.

Statutes.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 8.]—Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any exchequer bill, or exchequer bond or exchequer debenture, or any indorsement on or assignment of any exchequer bill or exchequer bond or exchequer debenture, or any receipt or certificate for interest accruing thereon, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section was framed on* 1 *W.* 4, *c.* 66, *s.* 3, *and* 16 & 17 *Vict. c.* 28, *s.* 41. *For ss.* 9, 10, 11, *see post*, pp. 664, 670.]

29 & 30 *Vict. c.* 25 (*Exchequer Bills and Bonds Act*, 1866), *s.* 15.]—If any person or persons shall forge or counterfeit any such exchequer bill, or coupon for interest (*as in that Act mentioned*), or any indorsement or writing thereupon or therein, or tender in payment any such forged

or counterfeited bill, or any exchequer bill with such counterfeit indorsement or writing thereon, or shall demand to have such counterfeit bill, or any exchequer bill with such counterfeit indorsement or writing thereupon or therein, exchanged for ready money or for another exchequer bill, by any person or persons, body or bodies politic or corporate, who shall be obliged or required to exchange the same, or by any other person or persons whatsoever, knowing the bill so tendered in payment, or demanded to be exchanged, or the indorsement or writing thereupon or therein, to be forged or counterfeited, and with intent to defraud [her] Majesty, . . . or the persons to be appointed to pay off the same, or any of them, or to pay any interest thereupon, or the person or persons, body or bodies politic or corporate, who shall contract or circulate or exchange the same, or any of them, or any other person or persons, body or bodies politic or corporate, then every such person or persons so offending, being thereof lawfully convicted, shall be adjudged a felon, and shall suffer accordingly. [*By 29 & 30 Vict. c. 25, s. 25, this section is applied and extended to all exchequer bills made out and issued under former Acts and outstanding at the commencement of the Act.*]

40 & 41 *Vict. c.* 2 (*Treasury Bills Act*, 1877), *s.* 10.]—*Sects.* 8 (*supra*), 9, 10 and 11 (*post*, pp. 664, 670) of the *Forgery Act*, 1861 (24 & 25 *Vict. c.* 98) (which sections relate to the forgery of, and other frauds relating to exchequer bills), shall apply to treasury bills, and shall have effect as if "exchequer bill" in those sections included "treasury bill."

46 & 47 *Vict. c.* 27 (*Metropolitan Board of Works* (*Money Act*), 1885), *s.* 21.]—*Sects.* 8, 9, 10 and 11 of the *Forgery Act*, 1861 (24 & 25 *Vict. c.* 98), which sections relate to the forgery of, and other frauds relating to exchequer bills, shall apply to the metropolitan bills, and shall have effect as if "exchequer bill" in these sections included "metropolitan bill."

[*The London County Council has taken the place of the Metropolitan Board of Works. The above clause is annually extended and applied by the London County Money Act to London County bills. See Hunt, London Govt. vol. ii., p.* 1013.]

FORGING AND UTTERING BANK-NOTES.

Statute.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 12.]—Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any note or bill of exchange of the Bank of England or of the Bank of Ireland, *or of any other body corporate, company or person carrying on the business of bankers*, commonly called a bank-note, a bank bill of exchange, or a bank post-bill, or any indorsement on or assignment of any bank-note, bank bill of exchange, or bank post-bill, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section was taken from* 1 *W.* 4, *c.* 66, *s.* 3, *and* 16 & 17 *Vict. c*, 23, *s.* 41, *with the addition of the words in italics, which get rid of the decision in R.* v. *Wilcock*, 2 *Russ. Cr.* (6th ed.), 705 (*d*), 905.]

Indictment for Forging and Uttering a Bank-note.

Commencement as ante, p. 710]—feloniously did forge ("*forge or alter*") a certain note of the Bank of England, commonly called a bank-note, for the payment of 10*l.* ("*any note or bill of exchange of the Bank of England, or of the Bank of Ireland, or of any other body corporate, company or person carrying on the business of bankers, commonly called a bank-note, a bank bill of exchange, or a bank post-bill, or any indorsement on or assignment of any bank-note, bank bill of exchange or bank post-bill*"), with intent thereby then to defraud; against the form [*as ante*, p. 465. (*2nd Count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of and put off a certain other forged note of the Bank of England, commonly called a bank-note, for the payment of 10*l.*, with intent thereby then to defraud (he the said J. S. at the time he so offered, uttered, disposed of and put off the said last-mentioned forged note as aforesaid, then and there well knowing the same to be forged); against the form [*as ante*, p. 465]. *As to the insertion of the word "other," see ante*, p. 711. *It is unnecessary to set out the forged instrument: it is sufficient to describe it by any name or designation by which it is usually known, or by its purport*, 24 & 25 *Vict. c.* 98, *s.* 42 (*ante*, p. 705). *In the counts for offering and disposing of the note, it is not necessary to allege to whom it was so offered, etc. R.* v. *Holden*, 2 *Taunt.* 334; *R. & R.* 154; 11 *R. R.* 600. *The* "intent to defraud" *may be laid generally*, 24 & 25 *Vict. c.* 98, *s.* 44 (*ante*, p. 706).

Felony.]—24 & 25 *Vict. c.* 98, *s.* 12. *See the last precedent* (*ante*, p. 722). *This offence is not triable at quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the forgery as directed (*ante*, p. 712, *et seq.*). Under the counts for uttering (*ante*, p. 719), you may give in evidence that the defendant offered or tendered the note in payment, or that he actually passed it, or otherwise disposed of it to another person. Where it appeared that the defendant sold a forged note to an agent employed by the bank to procure it from him, the judges held this to be within the Act, although it was objected that the prisoner had been solicited to commit the act proved against him, by the bank themselves, by means of their agents. *R.* v. *Holden*, 2 *Taunt.* 334; *R. & R.* 154; 11 *R. R.* 600. So, where A. gave B. a forged note to pass for him, and upon B.'s tendering it in payment of some goods, it was stopped: the majority of the judges held that A., by giving the note to B., was guilty of disposing of and putting away the note, within the meaning of the Act. *R.* v. *Palmer*, 1 *B. & P.* (*N. R.*) 96; 2 *Leach*, 978; *R. & R.* 72: *R.* v. *Giles*, 1 *Mood. C. C.* 166 (*ante*, p. 12). As to evidence that the prisoner knew the note to be forged at the time he disposed of it, and as to the other evidence necessary to support these counts, *see ante*, p. 718.

By 16 & 17 *Vict. c.* 2, *s.* 1, the Bank of England may cause the name of their cashier or other officer appointed to sign, to be impressed by machinery upon their bank-notes, bank post-bills, and bank bills of exchange, and all bank-notes, etc., on which the name of the authorized officer is so impressed, shall be as good and valid to all intents and purposes as if such notes had been subscribed in the proper handwriting of such officer, and shall be deemed and taken to be bank-notes, and may be described as such in all indictments, and other criminal and civil proceedings whatsoever.

FORGING AND UTTERING WILLS.

Statute.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 21.]—Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any will, testament, codicil, or testamentary instrument, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 1 *W.* 4, *c.* 66, *s.* 3.]

Indictment.

Commencement as ante, p. 710]—feloniously did forge a certain will and testament ("*any will, testament, codicil, or testamentary instrument*") purporting to be the last will and testament of one A. B., with intent thereby then to defraud; against the form [*as ante*, p. 465]. (*2nd Count.*) *That he* "did offer, utter, dispose of, and put off," *as in the precedent* (*ante*, p. 710). *The judges were equally divided upon the question, whether, in the absence of the existence of some person who could have been defrauded by the forged will, a count for forging it with intent to defraud a person or persons unknown could be supported. R.* v. *Tylney*, 1 *Den.* 819. *But on this case see Greaves' Crim. Law Cons. Acts* (2nd ed.), 303, 306. *Where, by this or any other Act, any person is liable to punishment for forging, etc., any instrument or writing, designated in such Act by any special name or description, he may be indicted and punished under this Act, if the instrument, however designated, is in law a will, testament, codicil, or testamentary writing.* 24 & 25 *Vict. c.* 98, *s.* 39 (*ante*, p. 707).

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour. 24 & 25 *Vict. c.* 98, *s.* 21; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 98, *s.* 51 (*ante*, p. 709).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Forgery may be committed by the false making of the will of a living person: *R.* v. *Murphy*, 2 *East, P. C.* 949: *R.* v. *Sterling*, 1 *Leach*, 99; 2 *East, P. C.* 950: *R.* v. *Coogan*, 1 *Leach*, 448; 2 *East, P. C.* 1001; or of a non-existing person, *R.* v. *Avery*, 8 *C. & P.* 596. And where the defendant was indicted for forging the will of "*Peter* Perry," and the will produced in evidence commenced "I *Peter* Perry," but was subscribed "*John* Perry, his mark;" but it was also stated in evidence that upon this repugnancy being remarked to the prisoner, he said that he had by mistake written "*John*" instead of "*Peter*," and that the mark was that of Peter Perry; the defendant was convicted. *R.* v. *Fitzgerald*, 1 *Leach*, 20. *See R.* v. *Wall*, 2 *East, P. C.* 953 (*ante*, p. 717). Proof that the will has been proved and that the probate is unrevoked is not conclusive evidence to bar an indictment for forging a will. *R.* v. *Buttery*, *R. & R.* 342.

Prove the forgery and uttering, as directed (*ante*, pp. 712, 719), and the intent to defraud (*ante*, pp. 303, 311, 340). *See R.* v. *Tylney* (*ubi supra*).

On an indictment for uttering a forged will, which, together with

writings in support of it, it was suggested had been written over pencil marks that had been rubbed out, it was held that the evidence of an engraver, who had examined the paper with a mirror, and traced the pencil marks, was admissible on the part of the prosecution. *R.* v. *T. Williams*, 8 *C. & P.* 434.

As to the privilege of solicitors with respect to the production of wills alleged to be forged, *see ante*, p. 401.

FORGING AND UTTERING DEEDS, BONDS, ETC.

Statute.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 20.]—Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, or any bond or writing obligatory, *or any assignment at law or in equity of any such bond or writing obligatory, or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness attesting the execution of any deed, bond, or writing obligatory, or shall offer, utter, dispose of, or put off any deed, bond, or writing obligatory having thereon any such forged name, handwriting, or signature, knowing the same to be forged*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 1 *W.* 4, *c.* 66, *s.* 10, *with the addition of the new offences italicized. As to punishment, see precedent, ante*, p. 725.]

Sect. 26—*Forging debentures.*]—*See post*, p. 749.

38 & 39 *Vict. c.* 83 (*Local Loans Act*, 1875), *s.* 32—*Forging securities under.*]—*See post*, p. 742.

Indictment for Forging a Bond.

Commencement as ante, p. 710]—a certain bond ("*any deed or any bond or writing obligatory, or any assignment at law or in equity of any such bond or writing obligatory, or any name, handwriting, or signature, purporting to be the name, etc., of a witness attesting the execution of any deed, bond, or writing obligatory*"), purporting to be (*describe the purport of the instrument* [*as ante*, pp. 75, 302]), with intent thereby then to defraud; against the form [*as ante*, p. 465]. (*2nd Count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the day and year last aforesaid, feloniously did offer, utter, dispose of, and put off a certain other forged bond and writing obligatory, purporting to be (*as in first count*) with intent thereby then to defraud, he the said J. S. at the time he so offered, uttered, disposed of, and put off the said last-mentioned forged bond and writing obligatory as aforesaid, well knowing the same to be forged; against the form [*as ante*, p. 465]. *It is not necessary, but is not bad, to use the expression "bond and writing obligatory." R.* v. *Dunnett*, 2 *Leach*, 581; 2 *East, P. C.* 985. *It is not necessary to set out the deed or bond verbatim.* 24 & 25 *Vict. c.* 98, *s.* 42 (*ante*, p. 705).

Felony: penal servitude for life or for not less than three years, or imprisonment for not more than two years, with or without hard labour. 24 &

25 *Vict. c.* 98, *s.* 20; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 98, *s.* 51 (*ante*, p. 709).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the forging and uttering, as directed *ante*, pp. 712, 719. Under the second count, you may give in evidence a disposing of the bond as a forgery, or the making use of it, or attempting to make use of it, as a genuine instrument.

The forging of a deed, which is directed to be in a particular form by particular statutes, which had not been complied with, was held within 2 *G.* 2, *c.* 25 (*rep.*). *R.* v. *Lyon*, *R.* & *R.* 255. So was a power of attorney to transfer government stock, signed, sealed, and delivered. *R.* v. *Fauntleroy*, 1 *Mood. C. C.* 52; 2 *Bing.* 413; 1 *C.* & *P.* 421; *and see R.* v. *Pringle*, *C.* & *P.* 408; 2 *Mood. C. C.* 127. The forging of such a power of attorney is now within 24 & 25 *Vict. c.* 98, *s.* 2 (*post*, p. 741). A letter of orders, a document under the hand and seal of a bishop, testifying that he has admitted the person named therein into holy orders, is not a deed within 24 & 25 *Vict. c.* 98, *s.* 20. *R.* v. *Morton*, *L. R.*, 2 *C. C. R.* 22; 42 *L. J.* (*M. C.*) 58; but it is forgery at common law to fabricate such a document. *R.* v. *Etheridge*, 19 *Cox*, 676. The giving of an administration bond to the ordinary in a false name is a forgery. *R.* v. *Barber*, 1 *C.* & *K.* 434. A man may be guilty of forgery by making a deed in his own name, but containing a false date: *R.* v. *Ritson*, *L. R.*, 1 *C. C. R.* 200; 39 *L. J.* (*M. C.*) 10; 11 *Cox*, 352 (*ante*, p. 713); or of another person bearing the same name. *Re Cooper*, 20 *Ch. D.* 611, 634; 51 *L. J.* (*Ch.*) 862, *Lindley*, L.J.

FORGING AND UTTERING BILLS OF EXCHANGE AND PROMISSORY NOTES.

Statute.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 22.]—Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any acceptance, indorsement, or assignment of any bill of exchange, or any promissory note for the payment of money, or any indorsement or assignment of any such promissory note, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 1 *W.* 4, *c.* 66, *s.* 3.]

Indictment for Forging a Bill of Exchange.

Commencement as ante, p. 710]—a certain bill of exchange ("*any bill of exchange, or any promissory note for the payment of money*"), purporting to be (*set out purport of instrument*), with intent thereby then to defraud; against the form [*as ante*, p. 465]. (*2nd Count.*) *That the defendant* "did offer, utter, dispose of, and put off a certain other," *etc., etc., as in the precedent* (*ante*, p. 710). *If the acceptance be also forged, add counts for it in this form:* (*3rd Count.*) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on

the year and day last aforesaid, having in his custody and possession a certain other bill of exchange,* feloniously did forge thereon an acceptance ("*any acceptance, indorsement, or assignment of any bill of exchange or any indorsement or assignment of any such promissory note*") of the said last-mentioned bill of exchange, which said forged acceptance is as follows: that is to say, "Accepted, payable at the bank of Messrs. Coutts & Co., John Giles" [*or as the acceptance may be*], with intent thereby then to defraud; against the form [*as ante*, p. 465].

(*4th Count.*) *Same as the last as to the,** *and then as follows:* on which said last-mentioned bill of exchange was then written a forged acceptance of the said last-mentioned bill of exchange, which said forged acceptance of the said last-mentioned bill of exchange is as follows: that is to say [*here set out the acceptance as in the last count*], feloniously did offer, utter, dispose of, and put off the said forged acceptance of the said last-mentioned bill of exchange, with intent thereby then to defraud, he the said J. S., at the time he so offered, uttered, disposed of, and put off the said forged acceptance of the said last-mentioned bill of exchange, well knowing the said acceptance to be forged (*see R. v. Horwell*, 6 *C. & P.* 148); against the form [*as ante*, p. 465].

If an indorsement be also forged, add counts for it in this form: (*5th Count.*) And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S. afterwards, to wit, on the day and year last aforesaid, having in his custody and possession a certain other bill of exchange,† feloniously did forge on the back of the said last-mentioned bill of exchange a certain indorsement of the said bill of exchange, which said forged indorsement is as follows: that is to say, "James Sykes & Co.," with intent thereby then to defraud; against the form [*as ante*, p. 465].

(*6th Count.*) *Same as the last to the,*† *and then as follows:* on the back of which said last-mentioned bill of exchange was then written a certain forged indorsement of the said last-mentioned bill of exchange, which said last-mentioned forged indorsement is as follows: that is to say, "James Sykes & Co.," feloniously did offer, utter, dispose of, and put off the said last-mentioned forged indorsement of the said last-mentioned bill of exchange, with intent thereby then to defraud, he the said J. S., at the time he so offered, uttered, disposed of, and put off the said last-mentioned forged indorsement of the said last-mentioned bill of exchange, well knowing the said indorsement to be forged; against the form [*as ante*, p. 465]. *As to the insertion of the word* "other," *see ante*, p. 711. *It is submitted that the third and following counts may be framed on the following lines:* "did forge an acceptance of a certain bill of exchange, to wit, an acceptance of the said bill of exchange, in the next preceding count of this indictment mentioned, which said forged acceptance," etc. *From the above precedent an indictment may readily be framed for forging and uttering a promissory note, merely substituting for the words* "bill of exchange" *the words* "promissory note for the payment of money," *and omitting, of course, the counts as to the acceptance. An indictment under* 24 & 25 *Vict. c.* 98, *s.* 40 (*ante*, p. 707), *for uttering a forged foreign bill or note, need not allege it to be payable out of England. R. v. Lee*, 2 *M. & Rob.* 281.

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour, 24 & 25 *Vict. c.* 98, *s.* 22; 54 & 55 *Vict. c.* 69, *s.* 9, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 98, *s.* 51 (*ante*, p. 709).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38 *s.* 1 (*ante*, p. 126).

Evidence.

"A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer." 45 & 46 *Vict. c.* 61, *s.* 3 (1). "A cheque is a bill of exchange drawn on a banker payable on demand." *Id., s.* 73. "A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer." *Id., s.* 83 (1): *see* 1 *Leach*, 180; 2 *East, P. C.* 923; 2 *Russ. Cr.* (6th ed.), 905. It has been held that a document in the ordinary form of a bill of exchange, but requiring the drawee to pay to *his own* order, and purporting to be indorsed by the drawer, and accepted by the drawer, cannot, in an indictment for forgery or uttering, be treated as a bill of exchange. *R.* v. *Bartlett*, 2 *M. & Rob.* 362. But such a bill is now valid as a promissory note. 45 & 46 *Vict. c.* 61, *s.* 5. An instrument payable to the order of A., and directed "*At* Messrs. P. & Co., Bankers," was held to be properly described as a bill of exchange. *R.* v. *Sidney Smith*, 2 *Mood. C. C.* 295: *see Gray* v. *Milner*, 8 *Taunt.* 739; 21 *R. R.* 525. To bring the case within this section the bill or note must be complete in form, and not merely inchoate: *R.* v. *Harper*, 7 *Q. B. D.* 78, *infra*, though it might be a "security for the payment of money" within *s.* 75 (*rep.*) of the *Larceny Act*, 1861. *See R.* v. *Bowerman* [1891] 1 *Q. B.* 112; 60 *L. J.* (*M. C.*) 13 (*ante*, p. 501).

Produce the bill of exchange in evidence, and prove the forgery and uttering, as directed, *ante*, pp. 712, 719.

A bill payable ten days after sight, purporting to have been drawn upon the commissioners of the navy, by a lieutenant, for the amount of certain pay due to him, was held to be a bill of exchange within 2 *G.* 2, *c.* 25 (*rep.*). *R.* v. *Chisholm*, *R. & R.* 297. So a note promising to pay A. and B., "stewardesses" of a certain benefit society, "or their successors," a certain sum of money on demand, has been held to be a promissory note within the meaning of that Act, although it appeared that the society was not duly enrolled, as directed by Act of Parliament; for, within the meaning of the Act, it was not necessary that the note should be negotiable. *R.* v. *Box*, 6 *Taunt.* 325; *R. & R.* 300. *See R.* v. *M'Keay*, 1 *Mood. C. C.* 130. An instrument drawn by A. on B., requiring him to pay to the administrators of C. a certain sum at a certain time "without acceptance," is a bill of exchange, and may be so described in the indictment. *R.* v. *Kinnear*, 2 *M. & Rob.* 117. So, though there be no person named as drawee, the defendant may be indicted for uttering a forged acceptance on a bill of exchange: *R.* v. *Hawkes*, 2 *Mood. C. C.* 60; for the act of putting the acceptance is a sort of estoppel to say it was not a bill of exchange. But an indictment for forging a *bill of exchange* cannot be sustained in the case of such an instrument. *R.* v. *Curry*, 2 *Mood. C. C.* 218: *R.* v. *Horwell*, 6 *C. & P.* 148; 1 *Mood. C. C.* 405. And it has been held that a person cannot be convicted for forging an acceptance or an indorsement to a bill of exchange which is merely an inchoate instrument, *e.g.*, where, at the time the acceptance was forged, the bill had not been signed by the drawer: *R.* v. *Mopsey*, 11 *Cox*, 143: *R.* v. *Harper*, 7 *Q. B. D.* 78; 50 *L. J.* (*M. C.*) 90; or where there is no payee. *R.* v. *Randall*, *R. & R.* 195. *Semble*, however, that he might under such circumstances be indicted and convicted of the misdemeanor of forgery at common law. *R.* v. *Harper*, *ubi supra*. So it is not forgery to falsify

a bill of exchange or country bank-note which, for want of a signature, is incomplete, or a navy bill payable to —— or order. *R.* v. *Richards*, *R. & R.* 193: *R.* v. *Randall*, *Id.* 195: *R.* v. *Pateman*, *R. & R.* 455; *R.* v. *Butterwick*, 2 *M. & Rob.* 196: *see R.* v. *Burke*, *R. & R.* 496: *R.* v. *Turpin*, 2 *C & K.* 820. But a man may be indicted for forging and uttering a bill of exchange, although the name of the payee was not indorsed on it. *R.* v. *Wickes*, *R. & R.* 149. A bill of exchange for three guineas, not attested as required by 17 *G.* 3, *c.* 30, *s.* 1 (*rep.*), was held by the judges not to be the subject of an indictment for forgery, as a bill of exchange; because if it were a genuine instrument, it would be absolutely void for want of the attestation. *R.* v. *Moffatt*, 1 *Leach*, 431; 2 *East*, *P. C.* 954. The restrictions enforced by that Act and 7 *G.* 4, *c.* 6, on the issue of bills and notes for a sum under 5*l.* are repealed by 26 *& 27 Vict. c.* 105, *s.* 1 (temporary, but annually continued). Forgery may be committed on unstamped paper of a bill which by law requires a stamp. *R.* v. *Hawkeswood*, 1 *Leach*, 257; 2 *T. R.* 606, *n.*: *R.* v. *Morton*, 2 *East*, *P. C.* 955: *R.* v. *Reculist*, *Id.* 956; 2 *Leach*, 703: *and see* 54 *& 55 Vict. c.* 39, *s.* 14, *sub-s.* 4 (*ante*, p. 383). A seaman's advance note, purporting to be signed by the master and owner, and in the following form—"Ten days after the ship C. sails from the port of L. the undersigned hereby promise and agree to pay to any person who shall advance 4*l.* to H. on this agreement the sum of 4*l.*, provided that the said H. shall sail in the said ship from the said port of L."—is not a promissory note. *R.* v. *Howie*, 11 *Cox*, 320 (*post*, p. 737).

The adding of a false address to the name of the drawee of a bill, while the bill is in the course of completion, in order to make the acceptance appear to be that of a different existing person, is a forgery. *R.* v. *Blenkinsop*, 1 *Den.* 276; 2 *C. & K.* 531; 17 *L. J.* (*M. C.*) 62. So is the adding of an address to a bill so as to make it appear that the acceptance though really written by a person of the same name is that of a different person—whether such person existed or not. *R.* v. *Epps*, 4 *F. & F.* at p. 85, *Willes*, J. Putting off the bill of A., an existing person, as the bill of A., a fictitious person, has been held forgery. *R.* v. *Nisbett*, 6 *Cox*, 320, 324, *n.* As to what is a fictitious party to a bill of exchange, *see Vagliano's case* [1891] *App. Cas.* 107; *Clutton* v. *Attenborough* [1895] 2 *Q. B.* 707; [1897] *App. Cas.* 90.

Where the charge in the indictment was for forging "a certain indorsement *of*" a bill of exchange, "which said forged indorsement was and is as follows:—'Magdalen Isherwood';" and the bill, as set out in some of the counts of the indictment, and as proved in evidence, was payable to the order of four persons, of whom Magdalene Isherwood was one, as joint executrices; the indictment was held by all the judges to be sufficient, and the charge to be proved. *R.* v. *Winterbottom*, 1 *Den.* 41; 2 *C. & K.* 37.

An indorsement "per procuration, J. S.," signed in the defendant's own name, was held, on 11 *G.* 4 *& 1 W.* 4, *c.* 66, *s.* 3 (*rep.*), not to be a forgery, though the defendant falsely alleged that he had authority from J. S. to indorse. *R.* v. *White*, 1 *Den.* 208; 2 *C. & K.* 404; 2 *Cox*, 210. But this case is now provided for by 24 *& 25 Vict. c.* 98, *s.* 24, *infra.*

DEMANDING PROPERTY ON FORGED INSTRUMENTS.

For statute, see 24 *& 25 Vict. c.* 98, *s.* 38 (*ante*, 706).

FORGING AND UTTERING ORDERS, RECEIPTS, ETC., FOR MONEY, GOODS, ETC.

Statute.

24 & 25 *Vict.* c. 98 (*Forgery Act*, 1861), *s.* 23—*Forging orders, receipts, etc.*]—Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order, *authority*, or *request* for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit, *or any indorsement on or assignment of any such undertaking, warrant, order, authority, or request*, or any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, *or any indorsement on or assignment of any such accountable receipt*, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 1 *W.* 4, *c.* 66, *ss.* 3, 10, *with the addition of the words in italics. The word "request" was added to get rid of R.* v. *Thorn, C. & Mar.* 206; 2 *Mood. C. C.* 210; *and like cases. For indictments, see post*, pp. 732, 737, *et seq.*]

Sect. 24—*Drawing, etc., bills, etc., in name of another, with intent to defraud.*]—Whosoever, with intent to defraud, shall draw, make, sign, accept, or indorse any bill of exchange or promissory note, or any undertaking, warrant, order, authority, or request, for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note, or other security for money, by procuration or otherwise, for, in the name, or on the account of any other person, without lawful authority or excuse, or shall offer, utter, dispose of, or put off any such bill, note, undertaking, warrant, order, authority, or request so drawn, made, signed, accepted, or indorsed, by procuration or otherwise, without lawful authority or excuse as aforesaid, knowing the same to have been so drawn, made, signed, accepted, or indorsed as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . [*This section was new law in* 1861, *and was framed to cover cases where documents were fraudulently made, accepted, or indorsed by procuration, which were not within prior statutes. R.* v. *Maddock*, 2 *Russ. Cr.* (6th ed.) 641, 762: *R.* v. *White*, 1 *Den.* 208; 2 *C. & K* 404: *R.* v. *Cooke*, 8 *C. & P.* 582.]

Sect. 25—*Altering, etc., crossings on cheques.*]—Whenever any cheque or draft on any banker shall be crossed with the name of a banker, or with two transverse lines with the words "and company," or any abbreviation thereof, whosoever shall obliterate, add to, or alter any such crossing, or shall offer, utter, dispose of, or put off any cheque or draft whereon any such obliteration, addition, or alteration has been made, knowing the same to have been made with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 21 & 22 *Vict. c.* 79, *s.* 3.]

38 & 39 *Vict. c.* 83, *s.* 32—*Crossed coupons of local loan debenture stock.*]—*See post*, p. 742.

46 & 47 *Vict. c.* 55 (*Revenue Act*, 1883), *s.* 17—*Extension of s.* 25 *of* 24 & 25 *Vict. c.* 98.]—Sects. 76 to 82, both inclusive, of the *Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), and section 25 of the *Forgery Act*, 1861 (24 & 25 *Vict. c.* 98), shall extend to any document issued by a customer of any banker, and intended to enable any person or body corporate to obtain payment from such banker of the sum mentioned in such document, and shall so extend in like manner as if the said document were a cheque. Provided that nothing in this Act shall be deemed to render any such document a negotiable instrument. For the purpose of this section [his] Majesty's paymaster-general and the [King's] and lord treasurer's remembrancer in Scotland shall be deemed to be bankers, and the public officers drawing on them shall be deemed customers.

43 & 44 *Vict. c.* 33 (*Post Office* (*Money Orders*) *Act*, 1880), *s.* 3—*Altering, etc., crossings on postal orders.*]—Any person who, with intent to defraud, obliterates, adds to, or alters any such lines or words on an order issued under this Act, as would in the case of a cheque, be a crossing of that cheque, or knowingly offers, utters, or disposes of any order with such fraudulent obliteration, addition, or alteration, shall be guilty of felony, and be liable to the like punishment as if such order were a cheque: [*Proviso protecting bankers who have collected money from the Post Office under the order.*]

Sect. 4, *sub-sect.* 4.]—*Money order to be valuable security within* 24 & 25 *Vict. c.* 98, *and other statutes* (*ante*, p. 432).

Indictment for Forging a Warrant or Order for the Payment of Money (24 & 25 *Vict. c.* 98, *s.* 28, *ante, p.* 731).

Commencement as ante, p. 710]—a certain warrant for the payment of money ("*any undertaking, warrant, order, authority, or request, for the payment of money*") with intent thereby then to defraud; against the form [*as ante*, p. 465]. *2nd Count* [*as ante*, p. 710], *for offering, uttering, disposing of, and putting off* "a certain other forged warrant for the payment of money." *Where the correct description of the instrument is doubtful or may be disputed, add separate counts describing the document as an "order," as an "authority," and as a "request" for the payment of money. If the charge in the indictment be for forging a warrant* and *order, it has been ruled that proof of a document which is a warrant, but not an order for the payment of money, will not sustain the indictment. R.* v. *Williams*, 2 *C. & K.* 51. *Sed quære; see R.* v. *Williams*, 2 *Den.* 61; 29 *L. J.* (*M. C.*) 106: *R.* v. *Gilchrist*, 2 *Mood. C. C.* 233; *C. & Mar.* 224 (*post*, p. 735), *and ante*, p. 71, "*Surplusage.*"

Felony. See the last precedent. 24 & 25 *Vict. c.* 98, *s.* 23.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126.

Evidence.

Prove the forgery and uttering, etc., as directed, *ante*, pp. 712, 719. It only remains here to show what warrants, orders, etc., are within the meaning of the Act.

It is not necessary, in order to constitute a document a "warrant," "authority," or "request" for the payment of money, that it should appear to be so on its face. It is sufficient if the party to whom it is addressed has been in the habit of treating similar documents as warrants, etc., for the payment of money. And therefore a document, in form a

mere receipt given by a depositor to a building society that received money on deposit, may properly be described in an indictment as a "warrant," "authority," or "request" for the payment of money, if, by the custom of the society, such receipts are in fact treated as warrants, authorities, and requests for the payment of money. *R.* v. *Kay*, *L. R.*, 1 *C. C. R.* 257; 39 *L. J.* (*M. C.*) 118; 11 *Cox*, 529.

Undertaking, warrant, order, authority, or request for the payment on delivery, etc.]—Many of the following cases were decided before it was made felony to forge an authority or request for the payment of money by 24 & 25 *Vict. c.* 98, *s.* 23 (*ante*, p. 731). But they are retained as being still of some use as a guide in construing that section. A cheque upon a banker is a bill of exchange (45 & 46 *Vict. c.* 61, *s.* 73); but it is also (even if post-dated, *R.* v. *Taylor*, 1 *C. & K.* 213) a warrant and order for the payment of money, within the statute: *R.* v. *Willoughby*, 2 *East, P. C.* 944; as is any other form of bill of exchange. *R.* v. *Sheppard*, *Id.* 944; 1 *Leach*, 226 (*a*): *R.* v. *Smith*, 1 *Den.* 79; 1 *C. & K.* 700. So an order to pay "all my prize money due to me for my services on board his Majesty's ship 'Leander,'" without specifying any particular sum, was held to be within 7 *G.* 2, *c.* 22 (*rep.*). *R.* v. *M'Intosh*, 2 *East, P. C.* 942; 2 *Leach*, 883. So is a letter of credit. *R.* v. *Raake*, 8 *C. & P.* 626; 2 *Mood. C. C.* 66. A writing in the form of a bill of exchange, but without any drawee's name, cannot be charged as an order for the payment of money; at least, unless shown by averments to be such. *R.* v. *Curry*, 2 *Mood. C. C.* 218. So, where the instrument is in any other respect incomplete, and therefore not operative; as where the practice was for a majority of the officers of a parish to draw cheques on the treasurer of a union; and one of their blank cheques, filled up for 1*l.* 3*s.* 6*d.*, had a note at the bottom, "Unless this cheque is signed by a majority of the parish officers, it will not be cashed;" this cheque was signed by one of the officers while it was for 1*l.* 3*s.* 6*d.*; it was then altered to 3*l.* 3*s.* 6*d.*, and when cashed by the treasurer had the signatures of a majority of the officers to it; it was held, that if the cheque was fraudulently altered when it had only one signature to it, this was no forgery. *R.* v. *Turpin*, 2 *C. & K.* 820. In *R.* v. *Lee*, 3 *Cox*, 80, it was held forgery to counterfeit the signatures of the chairman and committee of a society to a cheque (requiring their signatures and that of the clerk) with the object and result of obtaining the genuine signature of the clerk. A mere transposition of the words in a cheque has been held not to make it invalid. *R.* v. *Boreham*, 2 *Cox*, 189. On an indictment for forging and uttering a "warrant and order for the payment of money, to wit, a warrant and order for the payment of 85*l.*," and for forging an acquittance and receipt for money, to wit, for 85*l.*, it was proved that J. M. had paid 85*l.* into a country bank, and had taken an accountable receipt for that amount, and that the course of dealing at the bank was to treat such receipt with the depositor's name thereon, as an order for the payment of the money deposited, and interest. The defendant took the receipt to the bank, and having written the name of "J. M." thereon, delivered it to the bankers, who paid him 87*l.* 17*s.* 6*d.*, for principal and interest. He was held to have been rightly convicted. *R.* v. *Atkinson*, 2 *Mood. C. C.* 215; *C. & Mar.* 325. Where the instrument was an order to pay the prisoner, or order, the sum of four pounds five shillings, being a month's advance on an intended voyage to Quebec, in the ship "Mary Ann," as per agreement with G. M., master: and the prisoner had written in the margin of the order, "On receiving this cheque I agree to sail, and to be on board within sixteen days from the date of this cheque;" it was held a good order for the payment of money

within 1 *W.* 4, *c.* 66, *s.* 3 (*rep.*). *R.* v. *Bamfield*, 1 *Mood. C. C.* 416. *And see R.* v. *Anderson*, 2 *M. & Rob.* 469; *and R.* v. *Howie*, 11 *Cox*, 320 (*post*, p. 737). So, a foreign letter, requesting a correspondent in England to advance money, it being proved that such letters are in the course of business treated as orders, was held to support a charge of forging an order for the payment of money. *R.* v. *Raake*, 2 *Mood. C. C.* 66; 8 *C. & P.* 626. *A dividend warrant* of a railway company, signed by the secretary and addressed to a banker, requiring him to pay the sum named in the warrant to a certain shareholder, and to charge the same to the company's revenue account, was held to be properly described as a warrant and an order for the payment of money. *R.* v. *Autey*, *Dears. & B.* 294; 26 *L. J.* (*M. C.*) 190; 7 *Cox*, 329. And the document containing a statement that the shareholder's name must be indorsed on the back, without which indorsement it was proved that the money would not be paid even to him, a forgery of such indorsement was held to be a forgery of the entire document. *Id.* A writing purporting to authorize the bearer to receive money deposited in a bank by a friendly society on accountable receipts and purporting to be signed by the principal officers of the society (the bank having received the money on terms of repayment to the order of the society), was held to be well described as a warrant for the payment of money, and it was held no objection that the defendant was himself a member of the society. *R.* v. *Harris*, 2 *Mood. C. C.* 267; 1 *C. & K.* 179. Where the forged paper was as follows: "This is to certify that R. R. has swept the flues and cleaned the bilges, and repaired four bridges of the 'Princess Victoria,' J. N. 4*l.* 0*s.* 10*d.*:" and it was proved that, by the course of dealing between the parties, this voucher, if genuine, would have authorized L. & Co. to pay the 4*l.* 0*s.* 10*d.*; this was held sufficient to support an indictment charging it as a warrant for the payment of money. *R.* v. *Rogers*, 9 *C. & P.* 41. But a paper in the following terms:—"I hereby certify that the within-named W. M. is gaining his living by hawking;" the production of which was necessary in order that the defendant might obtain payment of a sum of money,—was held not to be either an undertaking, a warrant, or an order for the payment of money, and to be the subject only of forgery at common law. *R.* v. *Mitchell*, 2 *F. & F.* 44. But *semble* that it would be an "*authority*" within 24 *& 25 Vict. c.* 98, *s.* 23. A forged document, purporting to be a bill for goods sold to the prosecutor, with a request for its payment, was held to be both a warrant and an order within this section. *R.* v. *Dawson*, 2 *Den.* 75; 20 *L. J.* (*M. C.*) 102. A letter written to a wholesale house in London, in the name of a customer in the country, in the following terms:—"I shall feel obliged by your paying Mr. B. the sum of 2*l.* 7*s.* 8*d.*, and debiting me with the same; you will please have a receipt, and add the amount to invoice of order on hand:" was held not to be either an undertaking, a warrant, or an order for the payment of money; but a request. *R.* v. *Thorn*, 2 *Mood. C. C.* 210; *C. & Mar.* 206. *See also R.* v. *Roberts*, 2 *Mood. C. C.* 258; *C. & Mar.* 652. The forgery of a "request" for the payment of money is now an indictable offence under 24 *& 25 Vict. c.* 98, *s.* 23, *ante*, p. 731. Where the defendant, in England, forged on a letter of credit, whereby a bank in Australia was required to "honour the draft" of R. T. for 50*l.*, an indorsement of R. T.'s name: this was held not to be the forgery of an order for the payment of money, payment of the money on such simple indorsement not being within the original mandate. *R.* v. *Wilton*, 1 *F. & F.* 391. It seems, however, that though the instrument be called in the indictment "a warrant, order, *and* request," when it is but one of these, if it be set out *in hæc verba*, so as to enable the court to judge of its purport, the misdescription (if it be

one) is immaterial. *R.* v. *Williams*, 2 *Den.* 61; 20 *L. J.* (*M. C.*) 106. It may therefore be prudent, in the case of an instrument of this nature, either to describe it, in several counts, as a "warrant," an "order," and a "request" for the payment of money or delivery of goods, or to set it out *in hæc verba*, notwithstanding 24 & 25 *Vict. c.* 98, *ss.* 42, 43 (*ante*, pp. 704, 705).

A "warrant or order" for the payment of money must purport, or must be shown by evidence, to be made by some person who might command the payment of the money, and to be made upon a person who was compellable to obey it. *See R.* v. *Clinch*, 2 *East*, *P. C.* 938, 940. Thus, an order to a tradesman to let the bearer have certain goods, and which it was optional with the tradesman to obey or not, was held not to be within 45 *G.* 3, *c.* 89 (*rep.*), the words of which were "warrant or order for the delivery of goods." *R.* v. *Williams*, 1 *Leach*, 114; 2 *East*, *P. C.* 938: *R.* v. *Mitchell*, *Fost.* 119: *and see R.* v. *Baker*, 1 *Mood. C. C.* 231: *R.* v. *Newton*, 2 *Mood. C. C.* 59: *R.* v. *Thorn* (*ante*, p. 734), *R.* v. *Mitchell* (*ante*, p. 734), *R.* v. *Ellor*, 1 *Leach*, 323; 2 *East*, *P. C.* 938. So forgery of a justice's order under 17 *G.* 2, *c.* 5 (*rep.*), for a reward for apprehending a vagrant, which appeared upon the face of it to be defective, as not being under seal, or directed to the constable, etc., was held not to be within 7 *G.* 2, *c.* 22 (*rep.*); for, without these requisites, it was nothing more than the order of a mere individual, which the treasurer was not bound to obey. *R.* v. *Rushworth*, *R.* & *R.* 317; 1 *Stark.* (*N. P.*) 396: *cf. R.* v. *Graham*, 2 *East*, *P. C.* 945. But such orders would be "authorities" or "requests" under 24 & 25 *Vict. c.* 98, *s.* 23, *ante*, p. 731. An indictment for forging an order for relief to a discharged prisoner, under 5 *G.* 4, *c.* 85 (*rep.*), being in many places ungrammatical, and at variance from the Act, was held bad. *R.* v. *Donnelly*, 1 *Mood. C. C.* 438. Such an instrument, however, was properly described as an order for the payment of money. *R.* v. *M'Connell*, 2 *Mood. C. C.* 298; 1 *C.* & *K.* 371. *Money orders* issued by the Post Office were held to be warrants and orders for the payment of money within 7 & 8 *G.* 4, *c.* 29, *s.* 5 (*rep.*). *R.* v. *Gilchrist*, 2 *Mood. C. C.* 233; *C.* & *Mar.* 224 (*ante*, p. 732). As to uttering such orders knowing them to be forged, *see R.* v. *Vanderstein*, 10 *Cox*, 177; 16 *Ir. Rep. C. L.* 574. Where a defendant was indicted for forging the order of a justice upon the treasurer of a county made under the *Burial of Drowned Persons Act*, 1808 (48 *G.* 3, *c.* 75), by which a justice may order the treasurer of a county to pay churchwardens, etc., the expenses of burying dead bodies cast on shore, and it did not appear on the order that the person to whom the money was to be paid was an officer within the words of that statute; it was held to be an order within the statute; because it did not appear that the party was *not* such an officer, and the treasurer was bound to conclude that the justice would not make such an order without satisfying himself that the party was such an officer. *R.* v. *Froud*, *R.* & *R.* 389; 1 *B.* & *B.* 300. In *R.* v. *Baker*, 1 *Mood. C. C.* 231, the forged instrument ran thus:—"Mr. Thomas: Sir, you will please pay the bearer, for Richard Power, three pounds, for three weeks, due to him, a country member, and you will oblige yours, etc., J. Beswick." Beswick was secretary to a friendly society, some of whose funds were in the hands of Thomas. The prisoner was convicted; but the judges held this not to be an order upon the face of it, and that the conviction was wrong. The forged instrument, however, in that case would have been an "authority" or "request" under 24 & 25 *Vict. c.* 98, *s.* 23 (*ante*, p. 731). Where the defendant, who was in the employ of a tanner, and paid by the job, was employed also to arrange the accounts for himself and the other men, and made out the account weekly, and brought it to the foreman, stating therein the amount to which he was entitled, and the foreman

looked it over, and if he found it correct, signed it, and then the defendant took it so signed to the cashier, who on seeing the signature paid the amount; and the defendant on one occasion presented to the cashier an account for a larger sum than was due to him, with the name of the foreman forged thereto; this was held not to be a forgery of a warrant for the payment of money, inasmuch as, assuming the document to be genuine, the cashier would have no claim in respect of it on the foreman. *R.* v. *Pilling*, 1 *F.* & *F.* 324. A forged draft on a banker, in a fictitious name, or in the name of a person who never kept cash with the banker, was held to be a warrant or order within the meaning of 7 *G.* 2, *c.* 22 (*rep.*) (*R.* v. *Lockett*, 2 *East*, *P. C.* 940; 1 *Leach*, 94: *R.* v. *Abraham*, 2 *East*, *P. C.* 941), for it imports, upon the face of it, to be an order by a person having authority to make it. So, a forged draft in the name of a person who *does* keep cash with the banker, is an order within the Act, whatever be the state of his account at the time. *R.* v. *Carter*, 1 *Den. C. C.* 65; 1 *C.* & *K.* 741. Where, on the contrary, a man obtains goods or cash upon his own draft on a banker, with whom he does not keep cash, we have seen (*ante*, p. 604) that the proper mode of proceeding against him criminally is by indictment for obtaining by false pretences.

The cases on this subject, some of which it is not easy to reconcile, were all considered by the judges in *R.* v. *Vivian*, 1 *Den.* 35; 1 *C.* & *K.* 719; in which they laid down the principle, that any instrument for the payment of money, under which, if genuine, the payer might recover the amount against the party signing it, might properly be considered as a *warrant* for the payment of money; and that it was equally such whatever were the state of account between the parties, and whether the party apparently signing it had at the time funds in the hands of the party to whom it was addressed or not. In that case the forged instrument was as follows:—"Mr. M. will be pleased to send by the bearer 10*l.* on Mr. H.'s account, as Mr. H. is very bad in bed, and cannot come himself." Signed, "M. R., foreman, St. A. foundry." M. was a clerk of bankers, with whom H. kept an account, and by drafts on whom he paid his workmen. M. R. was H.'s foreman, having authority to pay the workmen, but not to draw for the money. H. being ill in bed, the defendant forged this paper in the name of M. R. and obtained the 10*l.* from M. by means of it. It was held that he was properly convicted under 1 *W.* 4, *c.* 66, *s.* 3 (*rep.*), although M. R. had himself no account with the bankers; because by this instrument, if genuine, M. R. said in effect that he had authority from H., who had an account with them; and as against him, therefore, it was as much a warrant as if he himself had had such account, and would equally have bound him. This decision seems to render the authority of some of those before referred to at least questionable. (*See also R.* v. *Carter*, *ubi supra*: *R.* v. *Ferguson*, 1 *Cox*, 241: *R.* v. *Rouse*, 4 *Cox*, 7: *R.* v. *Turberville*, 4 *Cox*, 13, *Erle*, J.)

In *R.* v. *Clinch*, 2 *East*, *P. C.* 938, on an indictment under 45 *G.* 3, *c.* 89, *s.* 1 (*rep.*), the words of which were "warrant or order," etc., it was laid down that the order must, to satisfy the statute, purport on its face to be directed to the person having possession of the money, and therefore, where an order to deliver to the bearer 8 lbs. of silk did not appear to be directed to any person, it was held not within the statute. But the decision turned on the form of the indictment, and by 2 & 3 *W.* 4, *c.* 123, *s.* 3 (*rep. and now replaced by* 24 & 25 *Vict. c.* 98, *s.* 42, *ante*, p. 705), it was declared sufficient to describe the forged instrument in the indictment in such manner as would sustain an indictment for stealing it. In *R.* v. *Rogers*, 9 *C.* & *P.* 41, *Bosanquet*, J., and *Parke*, B., held that a warrant for the payment of money need not, in order to come within that

statute, be addressed to any particular person: but that it was sufficient if it would, if genuine, have been an authority to a certain person to pay the amount mentioned in it. And in *R.* v. *Snelling*, *Dears.* 219; 23 *L. J.* (*M. C.*) 8, where the forged instrument was thus:—"Sir, please, to pay," etc., it was held that it might be shown by evidence to be an order for the payment of money, and for whom it was intended. These cases appear to overrule contrary decisions on the prior statutes as to "orders," *e.g.*, *R.* v. *Richards*, *R. & R.* 193: *R.* v. *Denny*, 1 *Cox*, 178: *R.* v. *Ravenscroft*, *R. & R.* 161.

It was no offence, under the repealed Acts, to forge an *indorsement* on a warrant or order for the payment of money (*R.* v. *Arscott*, 6 *C. & P.* 408); but the present statute expressly includes "any indorsement on or assignment of any such undertaking, warrant, order, authority, or request." *See R.* v. *Wardell*, 3 *F. & F.* 82; *but see R.* v. *Wilton*, 4 *F. & F.* 391 (*ante*, p. 734).

A written promise to pay a sum specified, or such other sum not exceeding the same, as A. B. may incur by reason of his suretyship, is an *undertaking* for the payment of money within the statute. *R.* v. *Reed*, 2 *Mood. C. C.* 62; 8 *C. & P.* 623; 2 *Lewin*, 185. So is a document purporting to guarantee a master to a certain amount in money against the dishonesty of a clerk. *R.* v. *Joyce*, *L. & C.* 576; 34 *L. J.* (*M. C.*) 168; or any guarantee: *R.* v. *Coelho*, 9 *Cox*, 8. So is an I O U given by a debtor to his creditor, whereby the debtor obtains further time for the payment of the debt, and to which I O U the debtor affixes his own signature, and also forges the signature of a third party as surety. *R.* v. *Chambers*, *L. R.* 1 *C. C. R.* 341; 41 *L. J.* (*M. C.*) 15. So is a sailor's *shipping note* purporting to be signed by the master and in the following form:—"In consideration of F. sailing as steward in the brig K. from the port of L., I undertake to pay to F. or bearer 2*l.* five days after the said brig shall sail from the said port." *R.* v. *Anderson*, 2 *M. & Rob.* 469. But a note, known as a seaman's advance note, purporting to be signed by the owner and master, and in the following form: "Ten days after the ship C. sails from the port of L., the undersigned hereby promise and agree to pay to any person who shall advance 4*l.* to H. on this agreement, the sum of 4*l.*, provided the said H. shall sail in the said ship from the said port of L.," was held not to be an *order* for the payment of money within the statute. *R.* v. *Howie*, 11 *Cox*, 320; *sed contra*, *R.* v. *Lonsdale*, 2 *Cox*, 222. And it seems to be an "undertaking." *See R.* v. *Anderson* (*ubi supra*): *R.* v. *Bamfield*, 1 *Mood. C. C.* 416. And the statute applies as well to a written promise for the payment of money by a third person as by the supposed party to the instrument. *R.* v. *Stone*, 1 *Den.* 181; 2 *C. & K.* 364.

An instrument professing to be a scrip certificate of a railway company is not a receipt acquittance or undertaking within the statute. *R.* v. *West*, 1 *Den.* 258; 2 *C. & K.* 496.

Indictment for Forging a Warrant, Order, Authority, or Request for the Delivery or Transfer of Goods, etc. (24 & 25 *Vict. c.* 98, *s.* 23, *ante*, p. 731.)

The same as the precedent, ante, p. 732, *only substituting the words* "warrant," "order," "authority," *or* "request for the delivery [or 'transfer'] of goods" to —— ("*any undertaking, warrant, order, authority or request for the delivery or transfer of any goods or chattels, or of any note, bill or other security for the payment of money*"), *for the words*, "warrant, etc.,

for the payment of money." *See R.* v. *Robson*, 2 *Mood. C. C.* 182; 9 *C. & P.* 423: *R.* v. *Smith*, 2 *Cox*, 358. *The request need not be set out verbatim. See* 24 *& 25 Vict. c.* 98, *s.* 42 (*ante*, p. 705), *and R.* v. *Williams*, 2 *Den.* 61; 20 *L. J.* (*M. C.*) 106; 4 *Cox*, 358.

Felony. See the precedent, ante, p. 732; 24 *& 25 Vict. c.* 98, *s.* 23.

This offence is not triable at quarter sessions. 5 *& 6 Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the forgery and uttering, etc., as directed, *ante*, pp. 712, 719. An order "to deliver my work to bearer" (and which was explained in evidence to mean an order to Goldsmiths' Hall to deliver certain plate a silversmith had sent there to be marked) was held to be within 7 *G.* 2, c. 22 (*rep.*), although it did not specify any particular articles. *R.* v. *Jones*, 1 *Leach*, 53; 2 *East, P. C.* 941. A pawnbroker's ticket is a warrant for the delivery of goods. *R.* v. *Morrison, Bell*, 158; 28 *L. J.* (*M. C.*) 210. At the London Docks, a person bringing a "tasting order" from a merchant having wine there, is not allowed to taste until the order has across it the signature of a clerk of the company. The defendant uttered a tasting order with the merchant's name forged to it, by presenting it to the company's clerk for his signature across it, which the clerk refused. It was held to be in this state a forged order for the delivery of goods. *R.* v. *Illidge*, 1 *Den. C. C.* 404; 2 *C. & K.* 871. A *request* for the delivery of goods need not be addressed to any one (*R.* v. *Carney*, 1 *Mood. C. C.* 351: *R.* v. *Cullen, Id.* 300; 5 *C. & P.* 116: *R.* v. *James*, 8 *C. & P.* 292: *R.* v. *Pulbrook*, 9 *C. & P.* 37); nor need it be signed by a person who can compel a performance of it, or who has any authority over or interest in the goods. *R.* v. *Thomas*, 2 *Mood. C. C.* 16; 7 *C. & P.* 851. *See R.* v. *Thorn*, 2 *Mood. C. C.* 210; *C. & Mar.* 206 (*ante*, p. 734). Where the prisoner represented that M. C. was dead, and had left him 50*l.* or 60*l.* which was in the hands of A. D., and that he wanted mourning, and brought a forged paper, purporting to be signed by A. D., containing the following: "Please let W. T. have such things as he wants for the purpose; I have got the amount of 27*l.* for M. C. in my keeping these many years"—this was held to be a forged request within the statute. *R.* v. *Thomas, ubi supra.* So a paper in the following form was held to be a request for the delivery of goods, though not addressed to any one:—"Aug. 3, '39. 1 16-in. helmet scoop; one 4 qt. kettle. Jas. Hayward." *R.* v. *Pulbrook*, 9 *C. & P.* 37; *cf. R.* v. *Ellis*, 4 *Cox*, 258. So, also, a paper as follows: "Please let the lad have a hat, and I will answer for the money. E. B." *R.* v. *White*, 9 *C. & P.* 282. And it is not the less a forged request for the delivery of goods, because it may also be a forged undertaking for the payment of money. *Id.* Nor will it make any difference, that the defendant alone was looked to for payment. *R.* v. *Thomas*, 2 *Mood. C. C.* 16; 7 *C. & P.* 851. Where it was the course of dealing between A. and B. that A. should make a list of persons with a sum against each name, on sight of which B. was to furnish the persons in the lists with goods on A.'s credit to the amount against their names, held that the list was a request for the delivery of goods. *R.* v. *Walters*, *C. & Mar.* 588.

Indictment for Forging a Receipt. (24 *& 25 Vict. c.* 98, *s.* 23, *ante*, p. 731.)

Commencement as ante, p. 710]—a certain acquittance and receipt for money ("*any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or*

any indorsement on or assignment of any such accountable receipt"), to wit, a (*set out purport of document*), with intent thereby then to defraud; against the form [*as ante*, p. 465]. (*2nd Count*). And the jurors aforesaid upon their oath aforesaid, do further present that the said J. S. afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of, and put off a certain other forged acquittance and receipt for money, to wit, a (*as in first count*), with intent thereby then to defraud (he the said J. S. at the time he so offered, uttered, disposed of, and put off the said last-mentioned forged acquittance and receipt for money as aforesaid, then and there well knowing the same to be forged); against the form [*as ante*, p. 465]. *If the character of the document is doubtful or likely to be disputed, vary the counts. As to the word "other," see ante*, p. 711.

Felony. See the precedent, ante, p. 732; 24 & 25 *Vict. c.* 98, *s.* 23.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126.

Evidence.

Prove the forging and uttering, etc., as directed, *ante*, pp. 712, *et seq.*, 719, *et seq.* A scrip receipt, in which a blank was left for the subscriber's name, was held not to be a receipt within 2 *G.* 2, *c.* 25, *s.* 1 (*rep.*): *R.* v. *Lyon*, 2 *Leach*, 597; 2 *East, P. C.* 933; *and see* 2 *Leach*, 808; but it would have been otherwise if the blank had been filled up. A memorandum, importing that A. B. had paid to C. D. a sum of money, but importing no acknowledgment from C. D. of his having received it, was held not to be a "receipt" within 2 *G.* 2, *c.* 25, *s.* 1 (*rep.*), which however did not contain the words "accountable receipt." *R.* v. *Harvey, R. & R.* 227. A *scrip certificate* of a railway company was held not to be a receipt, or a receipt *and* acquittance within 1 *W.* 4, *c.* 66 (*rep.*). *R.* v. *West*, 1 *Den.* 258; 2 *C. & K.* 496: *Clarke* v. *Newsam*, 1 *Ex.* 131; 16 *L. J.* (*Ex.*) 296. A pawnbroker's ticket or duplicate, given in the form prescribed by 39 & 40 *G.* 3, *c.* 99, *s.* 6 (*rep.*), was held to be an accountable receipt for goods within this section. *R.* v. *Fitchie, Dears. & B.* 175; 26 *L. J.* (*M. C.*) 90. This decision appears to apply to tickets given under the *Pawnbrokers Act*, 1872 (35 & 36 *Vict. c.* 93), *see ss.* 6, 24, 49. A turnpike toll-gate ticket was held to be a receipt for money within this section. *R.* v. *Fitch, R.* v. *Howley, L. & C.* 159; 9 *Cox*, 160. An ordinary passenger's *railway ticket* is not an acquittance or receipt for money within this section. *R.* v. *Gooden*, 11 *Cox*, 672, *Cleasby*, B. (*but see ante*, p. 703). The following document was held to be an "accountable receipt" for goods:—"By order of R. F. Pries we have this day transferred into the name of Messrs. C. & S. 759 quarters and 4 bushels of wheat on 'August Ferdinand,' Captain Richards, at Neustadt, entered by R. F. Pries, and now lying at our granaries Bermondsey Wall. The wheat is insured against risk of fire by us. B. & Y. Corn Exchange, Oct. 23, 1852." *R.* v. *Pries*, 6 *Cox*, 165; *and cf. R.* v. *Meigh*, 7 *Cox*, 401. A document in the form of an agreement to release claims for a sum containing a receipt or release was held an accountable receipt. *R.* v. *Hill*, 2 *Cox*, 246, *Coleridge*, J. The prisoner was indicted for forging and uttering a receipt on an order for the payment of money, which appeared to be thus:—"Received, for R. Aikman, G. Arscott" (his own name being G. Arscott), written on the back of a bill of exchange payable at a banker's; *Littledale*, J., *Vaughan*, J., and *Bolland*, B., held that the evidence did not support the indictment, and directed an acquittal. *R.* v. *Arscott*, 6 *C. & P.* 408. Where it was shown to be the custom of bankers to give receipts on the deposit of money in the following form:—"Received of A. B. 85*l.* to his credit. This receipt not transferable;" and to repay the same, with interest, on

the return of the receipt with a name written on it; it was held that the forging the name of A. B., and receiving the money due, on its return, was a forging and uttering of an acquittance for the 85*l.* and interest. *R.* v. *Atkinson*, 2 *Mood. C. C.* 215; *C. & Mar.* 325. A receipt given by bankers to poor-rate collectors for moneys paid to the account of the guardians was held an accountable receipt. *R.* v. *Johnston*, 5 *Cox*, 133 (*C. C. R. Ir.*). A receipt signed by the captain of a detachment, on the authority of which money is received from an army agent, on account of the monthly subsistence of such detachment, was held to be properly described as a receipt for money, although it appeared that such instruments were frequently cashed upon indorsement by tradesmen in the neighbourhood of the place where the regiment was stationed, and the amount afterwards received by them of the army agent. *R.* v. *Rice*, 6 *C. & P.* 634: *R.* v. *Hope*, 1 *Mood. C. C.* 414. Where a high constable had issued his precept for the payment of a county rate for a certain amount, and, having received it, wrote a receipt at the foot, and the prisoner, who had collected the rate, afterwards fraudulently altered the precept, by adding a figure in the amount (viz., changing 5*s.* to 15*s.*), and claimed to be allowed that larger amount in the account, this was held to be a forgery of the receipt. *R.* v. *Vaughan*, 8 *C. & P.* 276. *And see R.* v. *Griffiths*, *Dears. & B.* 548; 27 *L. J.* (*M. C.*) 205; 7 *Cox*, 501. Whether an addition by the prisoner of words to the receipt is an alteration is a matter for the jury. *R.* v. *Milton*, 10 *Cox*, 364: *cf. Upfold* v. *Leit*, 5 *Esp.* 100. The prisoner, who was a rate-collector, received money from the prosecutor on account of a rate for which he gave a receipt. After he had ceased to be a collector he called on the prosecutor for the balance, which the prosecutor paid to him, and for a receipt the prisoner altered the figures in the former receipt, which then appeared as a receipt for the entire rate. *Pigott*, B., and *Martin*, B., doubted whether these facts amounted to a forgery of a receipt. *R.* v. *Sargent*, 10 *Cox*, 161. It was the practice of the treasurer of the county of S., when an order had been made on him for the payment of the expenses of a prosecution, to pay the whole amount to the attorney for the prosecution or his clerk, and to require the signature of every person named in the order to be written on the back of it, and opposite to each name the sum ordered to be paid to each person respectively: it was held, that such a signature was not a receipt the forging of which is an offence against the statute, but was merely an authority to the treasurer to pay the amount. *R.* v. *Cooper*, 2 *C. & K.* 586: *R.* v. *Parker*, 2 *Cox*, 274, *Erle*, J. A friendly society had branches in various towns. A member belonging to one branch could not be received in another branch as a clearance member without a document called a "clearance," certifying that he had paid all the demands of the branch to which he originally belonged, and authorizing the other branch to receive him. The prisoner was secretary of the society, and had received from a member all the fees due to his branch, and the member thereupon became entitled to a clearance. The prisoner ought to have paid the money over to the treasurer of the society, but did not do so, and sent, nevertheless, a clearance to the member. To this clearance the prisoner forged the signatures of two of the officers of the society, without whose signatures the clearance would not have been accepted. It was held that this clearance was not an acquittance or receipt for money. *R.* v. *French*, *L. R.* 1 *C. C. R.* 217; 39 *L. J.* (*M. C.*) 58. If a person, with intent to defraud and to cause it to be supposed, contrary to the fact, that he has paid a certain sum into a bank, made in a book, purporting to be a pass-book of the bank, a false entry, which denotes that the bank has received the sum, he is guilty of forging an accountable receipt for money. *R.* v.

Moody, L. & C. 173; 31 *L. J.* (*M. C.*) 156: *R.* v. *Smith, L. & C.* 168; 13 *L. J.* (*M. C.*) 154; 9 *Cox*, 162: *and see R.* v. *Hunter*, 2 *East, P. C.* 928, 977.

FORGING, ETC., TRANSFERS OF STOCK, POWERS OF ATTORNEY, ETC.

Statutes.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 2—*Forging transfers of stock.*]—Whosoever shall forge or alter, or shall *offer*, utter, *dispose of, or put off*, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland, or of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter, or by, *under, or by virtue of* any Act of Parliament, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, or to receive any dividend or money payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest transferred, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section was framed from* 1 *W.* 4, *c.* 66, *s.* 6; 2 & 3 *W.* 4, *c.* 123; 7 *W.* 4 & 1 *Vict. c.* 84, *ss.* 1, 3. *The words "under or by virtue of" were intended to include such companies as those established* under *the Companies Acts, and not* by *special Acts* (*see Greaves, Crim. Law Cons. Acts* (2nd ed.) 277). *For indictment, see post*, p. 743.]

33 & 34 *Vict. c.* 58, *s.* 3—*Forging stock certificates.*]—*See post*, p. 748.

24 & 25 *Vict c.* 98, *s.* 4—*Forging attestation to a power of attorney, etc.*]—Whosoever shall forge any name, handwriting, or signature, purporting to be the name, handwriting, or signature of a witness attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, as is in either of the last two preceding sections mentioned, or to receive any dividend *or money* payable in respect of any such share or interest, or shall *offer*, utter, *dispose of, or put off* any such power of attorney or other authority, with any such forged name, handwriting, or signature thereon, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . . [*This section re-enacts* 1 *W.* 4, *c.* 66, *s.* 8, *with additions italicized, the substitution of general words at the beginning for the name or handwriting of any person, or as purporting to be a witness. For indictment, see post*, p. 745.]

Sect. 7—*Forging East India stock, etc.*]—Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bond commonly called an East India bond, or any bond, debenture, or security issued or made under the authority of any Act

passed or to be passed relating to the East Indies, or any indorsements on or assignment of any such bond, debenture, or security, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section was taken from* 1 *W.* 4, *c.* 66, *s.* 3.]

25 *&* 26 *Vict. c.* 7 (*India Stocks Transfer Act*, 1892), *s.* 1.]—In this Act the expression "India stock" means stock created, or to be created, for the raising of money in the United Kingdom on the credit of the revenues of India, but does not include the stock commonly known by the name of East India stock.

Sect. 14—*Forging East India stock certificates.*]—If any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or shall willingly act or assist in the forging or counterfeiting, any certificate or duplicate certificate required by this Act (*for a transfer from the Bank of England to the Bank of Ireland, or vice versâ*), or shall alter any number, figure, or word therein, or shall utter or publish as true any such false, forged, counterfeited, or altered certificate with intent to defraud the Bank of England or Bank of Ireland, or any body politic or corporate, or any person or persons whomsoever, every such person or persons so forging or counterfeiting, or causing or procuring to be forged or counterfeited, or altering, uttering, or publishing as aforesaid, being convicted thereof in due form of law, shall be adjudged guilty of felony. [*As to punishment, see ante*, p. 234.]

26 *&* 27 *Vict. c.* 73 (*India Stock Certificate Act*, 1863).]—*Post*, p. 748.

32 *&* 33 *Vict. c.* 102 (*Metropolitan Board of Works Loans Act*, 1869), *s.* 19.]—For the purposes of the *Forgery Act*, 1861 (24 *&* 25 *Vict. c.* 98), all consolidated stock (*i.e., all consolidated stock created by the Metropolitan Board of Works, s.* 4) shall be deemed to be capital stock of a body corporate within the meaning of that Act. [51 *&* 52 *Vict. c.* 41, *s.* 40, *substituted the London County Council for the Metropolitan Board of Works, and see note, ante*, p. 723.]

32 *&* 33 *Vict. c.* 106 (*East India Loan Act*, 1869), *s.* 13.]—All provisions now in force in anywise relating to the offence of forging, or altering, or offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any East Indian bond, with intent to defraud, shall extend and be applicable to, and in respect of, any debenture issued under the authority of this Act, as well as to and in respect of any bond issued under the same authority. [*This enactment is repeated almost* iisdem verbis *in the subsequent East India Loan Acts of* 1873 (36 *&* 37 *Vict. c.* 32, *s.* 13); 1874 (37 *&* 38 *Vict. c.* 3, *s.* 13); 1877 (40 *&* 41 *Vict. c.* 51, *s.* 15); 1879 (42 *&* 43 *Vict. c.* 60, *s.* 14); 1880 (43 *Vict. c.* 10, *s.* 12); 1885 (48 *&* 49 *Vict. c.* 28, *s.* 12); 1893 (56 *&* 57 *Vict. c.* 70, *s.* 17); 1898 (61 *&* 62 *Vict. c.* 13, *s.* 8); *and* 1901 (1 *E.* 7, *c.* 25, *s.* 7).]

38 *&* 39 *Vict. c.* 83 (*Local Loans Act*, 1875), *s.* 32.]—For the purposes of the *Forgery Act*, 1861 (24 *&* 25 *Vict. c.* 98), debenture stock under this Act shall be deemed to be capital stock of a body corporate, and

Any other security issued in pursuance of this Act shall be considered to be a writing obligatory, and

Any coupon bearing across its face an addition in written, printed, or stamped letters of the name of any banker, or of the words "and

company" in full or abbreviated, between two transverse lines, shall be deemed to be a cheque or draft on a banker.

40 & 41 *Vict. c.* 59 (*Colonial Stock Act*, 1877), *s.* 21.]—For the purposes of the *Forgery Act*, 1861 (24 & 25 *Vict. c.* 98), colonial stock to which this Act applies shall be deemed to be capital stock of a body corporate. . . . [*For the rest of this section, see post*, p. 748.]

Indictment for Forging and Uttering a Transfer of Stock. (24 & 25 *Vict. c.* 98, *s.* 2, *ante*, p. 741.)

Commencement as ante, p. 710]—feloniously did forge a transfer of a certain share and interest in certain stock and annuities ("*stock, annuity, or other public fund*"), to wit, —— [*state the amount and description of stock*], which said stock and annuities were then transferable at the Bank of England, and which said transfer then purported to be made by one J. N., with intent thereby then to defraud; against the form [*as ante*, p. 465]. (*2nd Count*)—did offer, utter, dispose of, and put off a certain other forged transfer of a certain share and interest of and in certain other stock and annuities, to wit, ——, which said last-mentioned stock and annuities were then transferable at the Bank of England, and which said last-mentioned transfer then purported to be made by one J. N., with intent thereby then to defraud, he the said J. S., at the time he so uttered the said last-mentioned forged transfer of the said share and annuity, well knowing the same to be forged; against the form [*as ante*, p. 465]. *As to insertion of the word "other," see ante*, p. 711.

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour. 24 & 25 *Vict. c.* 98, *s.* 2; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find surities for keeping the peace*, 24 & 25 *Vict. c.* 98, *s.* 51 (*ante*, p. 709).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Produce the transfer, and prove it to be forged; prove that the prisoner forged it, and the intent, as *ante*, p. 712, *et seq.*

It appears to be unnecessary to prove that the transfer was in order according to the rules of the Bank. *R.* v. *Gade*, 2 *Leach*, 732; 2 *East, P. C.* 874.

To support the second count, prove the uttering of the forged transfer, the intent, and the criminal knowledge, as *ante*, p. 719, *et seq.*

Indictment for Forging a Transfer of Shares in a Joint-stock Company. (24 & 25 *Vict. c.* 98, *s.* 2, *ante*, p. 741.)

Commencement as ante, p. 710]—feloniously did forge a certain transfer of a share and interest of and in the capital stock of a certain company established under and by virtue of the *Companies Acts*, 1862 to 1900, to wit, a transfer of —— shares in the capital stock of The *A Company, Limited, numbered ——*, with intent thereby then to defraud [*as ante*, p. 465]. (*2nd Count*)—feloniously did offer, utter, dispose of, and put off a certain other forged transfer of a share and interest in the capital stock

of (*describe as* * *in Count* 1), with intent thereby then to defraud, he the said B., at the time when he so offered, uttered, disposed of, and put off the said last-mentioned forged transfer as aforesaid, then well knowing the same to be forged [*as ante*, p. 465].

Indictment for Forging and Uttering a Power of Attorney to sell out Stock, etc. (24 & 25 *Vict. c.* 98, *s.* 2, *ante*, p. 741.)

Commencement as ante, p. 710]—feloniously did forge a certain power of attorney to transfer a certain share and interest in certain stock and annuities which then were transferable at the Bank of England ("*stock, annuity, or other public fund, transferable at the Bank of England, or at the Bank of Ireland*," or "*capital stock of any body corporate, company, or society established by charter or Act of Parliament*"), purporting to be a power of attorney to transfer a certain share and interest of the said J. N. in certain stock and annuities which then were transferable at the Bank of England, to wit, ——, with intent thereby then to defraud; against the form [*as ante*, p. 465].

(*2nd Count*)—feloniously did offer, utter, dispose of, and put off a certain other forged power of attorney, to wit, —— [*as in first count*], with intent thereby then to defraud, he the said J. S., at the time when he so offered, uttered, disposed of, and put off the said last-mentioned power of attorney as aforesaid, then well knowing the same to be forged; against the form [*as ante*, p. 465].

(*3rd Count*)—feloniously did demand and endeavour to have a certain share and interest of the said J. N. in certain stock and annuities, which were then transferable at the Bank of England, to wit, ——, transferred ("*to have any such share or interest transferred, or to receive any dividend or money payable in respect thereof*") in the books of the said Bank of England, by virtue of a certain other forged power of attorney, purporting to be a power of attorney to transfer the said share and interest of the said J. N. in the said stock and annuities so transferable as aforesaid, with intent thereby then to defraud, he the said J. S., at the time he so demanded and endeavoured to have the said share and interest transferred as aforesaid, well knowing the said last-mentioned power of attorney to be forged; against the form [*as ante*, p. 465].

Such a power of attorney was held to be a "deed" *within* 2 *G.* 2, *c.* 25, *s.* 1 (*rep.*). *R. v. Fauntleroy*, 1 *Mood. C. C.* 52; 2 *Bing.* 413.

Felony: 24 & 25 *Vict. c.* 98, *s.* 2. *See the precedent, ante*, p. 743.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

1*st Count.*—Produce the power of attorney; prove it to be forged by the prisoner; show the stock to be transferable, and give evidence of the intent, as *ante*, p. 712.

2*nd Count.*—Prove the power of attorney to have been forged, the transferable nature of the stock, the uttering, the guilty knowledge, and the intent as stated in the indictment, *as ante*, p. 719.

3*rd Count.*—Prove the power of attorney to have been forged, the transferable nature of the stock, the guilty knowledge, the attempt or endeavour by the prisoner as stated in the indictment, and the intent.

Indictment for Forging Attestation to Power of Attorney. (24 & 25 *Vict. c.* 98, *s.* 4, *ante*, p. 741.)

Commencement as ante, p. 710]—feloniously did forge a certain name, handwriting, and signature, purporting to be the name, handwriting, and signature of one ——, purporting to be a witness attesting the execution of a certain power of attorney to transfer a certain share and interest of one J. N. in certain stock and annuities which were then transferable at the Bank of England, to wit, —— [*here state the amount and nature of the stock*]; against the form [*as ante*, p. 465]. (*2nd Count, for uttering*)—did utter, dispose of, and put off a certain other forged power of attorney to transfer a certain share and interest of the said J. N. in certain stock and annuities which were then transferable at the Bank of England, to wit, ——, with the name, handwriting, and signature of the said —— forged on the said last-mentioned power of attorney, as an attesting witness to the execution thereof, he the said J. S., at the time he so offered, uttered, disposed of, and put off the same, well knowing the said name and handwriting, purporting to be the name and handwriting of the said —— thereon, as attesting witness thereof, as aforesaid, to be forged; against the form [*as ante*, p. 465].

Felony: penal servitude for not more than seven nor less than three years, or imprisonment not exceeding two years, with or without hard labour. 24 & 25 *Vict. c.* 98, *s.* 4; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 98, *s.* 51 (*ante*, p. 709).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

To support the first count, produce the power of attorney, and prove it to be forged, and prove the transferable nature of the stock mentioned in the indictment.

To support the second count, produce the power of attorney, and prove it to have been forged; prove the uttering, as *ante*, p. 719, and the guilty knowledge, *as ante*, p. 718.

MAKING FALSE ENTRIES OF STOCK, ETC.

Statutes.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 5.]—Whosoever shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account kept by the Bank of England, or the Bank of Ireland, in which books the accounts of the owners of any stock, annuities, or other public funds which now are or hereafter may be transferable at the Bank of England or at the Bank of Ireland shall be entered and kept, or shall in any manner wilfully falsify any of the accounts of any of such owners in any of the said books, with intent, in any of the cases aforesaid, to defraud; or shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland in the name of any person not being the true and lawful owner of such share or interest with intent to defraud, shall be guilty of felony, and

being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 1 *W.* 4, *c.* 66, *s.* 5.]

32 *&* 33 *Vict. c.* 102 (*Metropolitan Board of Works Loans Act*, 1869), *s.* 20.]—Any person who, with intent to defraud, makes any false entry in, or alters any word or figure in, any of the said books for transfers (*of consolidated stock created by the Metropolitan Board of Works, or by the London County Council*), or in any manner falsifies any of the said books, or makes any transfer of any consolidated stock, in the name of any person who is not the true owner thereof, shall be guilty of felony, and on conviction shall be liable to penal servitude for any term not exceeding fourteen years . . . [*See ante*, pp. 723, 742.]

Indictment for wilfully altering words and figures within 24 *&* 25 *Vict. c.* 98, *s.* 5.

Commencement as ante, p. 710]—feloniously did wilfully alter certain words and figures ("*any word or figure*"), that is to say [*here set out the words and figures as they were before the alteration*] in a certain book of account kept by the Bank of England, called a —— book, in which said book the accounts of the owners of certain stock, annuities, and other public funds, to wit, the [*state the stock*], which were then transferable at the Bank of England, were then kept and entered, by [*set out the alteration, and the state of the account or item when so altered*], with intent thereby then to defraud; against the form [*as ante*, p. 465].

Felony. See the precedent, ante, p. 745: 24 *&* 25 *Vict. c.* 98, *s.* 5.

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 98, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the alteration, as stated in the indictment, and the intent, *as ante*, p. 718.

Indictment for making a Transfer of Stock in the name of a Person not the Owner. (24 *&* 25 *Vict. c.* 98, *s.* 5, *ante*, p. 745.)

Commencement as ante, p. 710]—feloniously did wilfully make a transfer of a certain share and interest of and in certain stock and annuities ("*stock, annuity, or other public fund*") which were then transferable at the Bank of England, to wit, the share and interest of —— in the —— [*state the amount and nature of the stock*] in the name of one C. D., he the said C. D. not being then the true and lawful owner of the said share and interest of and in the said stock and annuities, or any part thereof, with intent thereby then to defraud; against the form [*as ante*, p. 465].

Felony. 24 *&* 25 *Vict. c.* 98, *s.* 5. *See the precedent, ante*, p. 745.

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the transfer as stated in the indictment, of transferable stock; prove that the person in whose name it was made was not the true owner, and prove the intent, *as ante*, p. 718.

CLERKS TO THE BANK, ETC., MAKING OUT FALSE DIVIDEND WARRANTS.

Statutes.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 6.]—Whosoever, being a clerk, officer, or servant of, or other person employed or intrusted by the Bank of England, or the Bank of Ireland, shall knowingly make out or deliver any dividend warrant, *or warrant for payment of any annuity, interest or money*, payable at the Bank of England or Ireland, for a greater or less amount than the person on whose behalf such warrant shall be made out is entitled to, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . . [*This section is taken from* 1 *W.* 4, *c.* 66, *s.* 9, *with the additions in italics.*]

32 & 33 *Vict. c.* 102 (*Metropolitan Board of Works Loans Act*, 1869), *s.* 21.]—Any person who, being a clerk, officer, or servant of, or employed by the board (*i.e., the Metropolitan Board of Works, now the London County Council*), or the persons or body corporate, who keep the books for transfer of consolidated stock (*created by the Metropolitan Board of Works or London County Council*), does, with intent to defraud, make out or deliver any stock certificate, dividend warrant, or document for the payment of money in relation to any consolidated stock (*created by the Metropolitan Board of Works or London County Council*), for a greater or less amount than the person on whose behalf such certificate, warrant, or document is made out is entitled to, shall be guilty of felony, and shall be liable, on conviction, to be kept in penal servitude for any term not exceeding seven years. . . . . [*And see ante*, pp. 723, 742, 746.]

Indictment. (24 & 25 *Vict. c.* 98, *s.* 6.)

Commencement as ante, p. 710]—then being a clerk ("*clerk, officer, or servant*") of the Bank of England [*or* being employed and intrusted by the Bank of England], feloniously did knowingly make out and deliver to one J. N. a certain dividend warrant for a greater ("*greater or less*") amount than the said J. N. was then entitled to, to wit, for the sum of five hundred pounds: whereas, in truth and in fact the said J. N. was then entitled to the sum of one hundred pounds only: with intent thereby then to defraud; against the form [*as ante*, p. 465].

Felony: Penal servitude for not more than seven nor less than three years, or imprisonment with or without hard labour for not more than two years. 24 & 25 *Vict. c.* 98, *s.* 6; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, *p.* 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 98, *s.* 51 (*ante*, p. 709).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that J. S. was a clerk or servant of the Bank of England (*see ante*, p. 344); produce the warrant, and prove it to be the prisoner's handwriting; show the amount of stock to which J N. was entitled, and prove the intent, as directed *ante*, p. 718.

FORGING, ETC., STOCK CERTIFICATES OR COUPONS.

Statutes.

26 & 27 *Vict.* c. 73 (*India Stock Certificate Act*, 1863), s. 13.]—Whosoever shall forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any India stock certificate or coupon, or any document purporting to be any India stock certificate or coupon, issued in pursuance of this Act, or shall demand or endeavour to obtain or receive any share or interest of or in India stock, or to receive any dividend or money payable in respect thereof by virtue of any such forged or altered certificate or coupon, or document purporting as aforesaid, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*And see ante*, p. 741.]

33 & 34 *Vict.* c. 58 (*Forgery Act*, 1870), s. 3—*Forgery of stock certificates, etc.*]—If any person forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any stock certificate or coupon, or any document purporting to be a stock certificate or coupon, issued in pursuance of Part V. of *The National Debt Act*, 1870 [33 & 34 *Vict.* c. 71] or of any former Act, or demands or endeavours to obtain or receive any share or interest of or in any stock as defined in *The National Debt Act*, 1870, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered certificate or coupon, or document purporting as aforesaid, knowing the same to be forged or altered,—with intent in any of the cases aforesaid to defraud, he shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .

Sect. 6—*Forgery of certificates of transfer of stock from England to Ireland, etc.*]—If any person forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any certificate or duplicate certificate required by Part VI. of *The National Debt Act*, 1870 [33 & 34 *Vict.* c. 71], or by any former like enactment, with intent in any of the cases aforesaid to defraud, he shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .

40 & 41 *Vict.* c. 59 (*Colonial Stock Act*, 1877), s. 21.] . . . *The Forgery Act*, 1870, shall apply to a stock certificate and a coupon issued in pursuance of this Act, and to colonial stock to which this Act applies, in like manner as if the same were a stock certificate, coupon or stock mentioned in that Act. [*For the rest of this section, see ante*, p. 743.]

54 & 55 *Vict.* c. 69, s. 1—*Minimum term of penal servitude and term of imprisonment.*]—*Ante*, p. 235.

5 & 6 *Vict.* c. 38, s. 1—*Offence not triable at quarter sessions.*]—*See ante*, p. 126.

Indictment, etc.

Indictments under these sections can be framed on the precedents, ante, pp. 743–745.

FORGERY OF DEBENTURES.

Statute.

24 & 25 *Vict.* c. 98 (*Forgery Act*, 1861), s. 26.]—Whosoever shall fraudulently forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any debenture issued under any lawful authority whatsoever, either within her Majesty's dominions or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . [*As to origin and form of this section, see Greaves, Crim. Law Cons. Acts* (2nd ed.), 287. *An indictment can be framed from the precedent, ante*, p. 726.]

54 & 55 *Vict.* c. 69, s. 1—*Minimum term of penal servitude and term of imprisonment.*]—*Ante*, p. 235.

FORGERY OF SHARE WARRANTS, ETC.

Statute.

30 & 31 *Vict.* c. 131 (*Companies Act*, 1867), s. 34.]—Whosoever forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any share warrant or coupon, or any document purporting to be a share warrant or coupon, issued in pursuance of this Act, or demands or endeavours to obtain or receive any share or interest of or in any company under the principal Act (*Companies Act*, 1862, 25 & 26 *Vict.* c. 89), or to receive any dividend or money payable in respect thereof by virtue of any such forged or altered share warrant, coupon, or document purporting as aforesaid, knowing the same to be forged or altered with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*An indictment can be framed from the precedent, ante*, p. 743.]

Sect. 35—*Personation.*]—*See post*, p. 771.

Sect. 36—*Engraving or possessing plates for forgery, etc.*]—*See post*, p. 765.

5 & 6 *Vict.* c. 38, s. 1—*Offence not triable at quarter sessions.*]—*See ante*, p. 126.

54 & 55 *Vict.* c. 69, s. 1—*Minimum term of penal servitude and term of imprisonment.*]—*Ante*, p. 235.

PURCHASING OR RECEIVING, ETC., FORGED BANK-NOTES, ETC.

Statute.

24 & 25 *Vict* c. 98 (*Forgery Act*, 1861), s. 13.]—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party

accused), shall purchase or receive from any other person, or have in his custody or possession any forged bank-note, bank bill of exchange, or bank post-bill, or blank bank-note, blank bank bill of exchange, or blank bank post-bill, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . [*This section re-enacts* 1 *W.* 4, *c.* 66, *s.* 12.]

Indictment.

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord —— (in the parish of ——, in the county of ——), and within the jurisdiction of the said court, feloniously, and without lawful authority or excuse, had in his custody and possession ("*purchase or receive from any person or have in his custody or possession*") five forged bank-notes ("*any forged bank-note, bank bill of exchange, or bank post-bill, or blank bank-note, blank bank bill of exchange, or blank bank post-bill*") for the payment of ten pounds each, the said J. S. then well knowing the said several bank-notes and every of them to be forged; against the form [*as ante*, p. 465].

Felony: penal servitude for not more than fourteen and not less than three years, or imprisonment, with or without hard labour, not exceeding two years. 24 *&* 25 *Vict. c.* 98, *s.* 13; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 *&* 25 *Vict. c.* 98, *s.* 51 (*ante*, p. 709).

Evidence.

Prove that the defendant had in his possession the bank-notes set out in the indictment, or one of them; and prove the notes to be forgeries, as directed *ante*, pp. 712, *et seq.* The Act says, "in his possession or custody;" which, by a subsequent section (45, *ante*, p. 706), is interpreted to mean, in his personal custody or possession, or knowingly and wilfully in the actual custody and possession of any other person, or knowingly and wilfully in any dwelling-house or other building, lodging, apartment, field, or other place, open or enclosed, whether belonging to or occupied by himself or not, and whether it be had for his own use or for the use or benefit of another. *See R.* v. *Rowley, R. & R.* 110: *Brooks* v. *Warwick*, 2 *Stark.* (*N. P.*) 389; 20 *R. R.* 697. These several species of custody or possession are by the statute to be deemed and taken to be his custody and possession within the meaning of the Act: and therefore it is unnecessary to describe the custody and possession otherwise than as in the above precedent. As to the defendant's knowledge that the notes found upon him were bad, it can be proved by circumstantial evidence only. (*See ante*, pp. 303, 308, 340.) After proof that the defendant had in his possession forged notes, the proof of lawful authority or excuse lies upon the defendant. 24 *&* 25 *Vict. c.* 98, *s.* 13. As to the meaning of lawful authority or excuse, *see Dickins* v. *Gill* [1896] 2 *Q. B.* 310; 18 *Cox*, 384: *R.* v. *Harvey, L. R.* 1 *C. C. R.* 284; 40 *L. J.* (*M. C.*) 63; 11 *Cox*, 662.

FORGING MARRIAGE LICENCES.

Statute.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 35.]—Whosoever shall forge or fraudulently alter any licence of or certificate for marriage, or shall offer, utter, dispose of, or put off any such licence or certificate, knowing the same to be forged or altered, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . . [*An indictment can be framed on the precedents, post*, pp. 753, 754.]

54 & 55 *Vict. c.* 69, *s.* 1—*Minimum term of penal servitude and term of imprisonment.*]—*Ante*, p. 235.

5 & 6 *Vict. c.* 38, *s.* 1—*Offence not triable at quarter sessions.*]—*See ante*, p. 126.

FORGING, ETC., REGISTERS OF BIRTHS, MARRIAGES, DEATHS, ETC.

Statutes.

6 & 7 *W.* 4, *c.* 86 (*Births and Deaths Registration Act*, 1836), *s.* 41—*False information as to marriage.*]—Every person who shall wilfully make or cause to be made for the purpose of being inserted in any register of . . . marriage any false statement touching any of the particulars herein required to be known and registered, shall be subject to the same fines and penalties as if he were guilty of forgery [(*see post*, p. 753). *So much of this section as related to births and deaths was repealed by* 37 & 38 *Vict. c.* 88, *s.* 54. *As to the evidence necessary to prove an offence, see R.* v. *Brown*, 1 *Den.* 291; 2 *C. & K.* 504; 17 *L. J.* (*M. C.*) 145: *R.* v. *Mason*, 2 *C. & K.* 622: *R.* v. *Lord Dunboyne*, 3 *C. & K.* 1.]

3 & 4 *Vict. c.* 92 (*Non-Parochial Registers Act*, 1840), *s.* 8.]—Every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any register or record of birth or baptism, naming or dedication, death or burial, or marriage, which shall be deposited with the registrar-general, by virtue of this Act, or any part thereof, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of such register or record, or shall wilfully insert, or cause to be inserted, in any of such registers or records, any false entry of any birth or baptism, naming or dedication, death or burial, or marriage, or shall wilfully give any false certificate, or shall certify any writing to be an abstract from any register or record, knowing the same register or record to be false in any part thereof, or shall forge or counterfeit the seal of the said office, shall be guilty of felony. [*This section was extended by* 21 & 22 *Vict. c.* 25, *s.* 3, *to non-parochial registers transferred under that Act to the custody of the registrar-general.*]

20 & 21 *Vict. c.* 81 (*Burials Act*, 1857), *s.* 15—*Destruction or forgery of burial registers.*]—Every person who shall wilfully destroy or injure, or

cause to be destroyed or injured, any register book of burials kept according to the provisions of this Act, or any part or certified copy of any part of such register, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of any such register or certified copy thereof, or shall wilfully insert, or cause to be inserted, in any registry book or copy thereof any false entry of any burial, or shall wilfully give any false certificate, or shall certify any writing to be a copy or extract of any such register book, knowing the same to be false in any part thereof, or shall forge or counterfeit the seal of any burial board, shall be guilty of felony. [*For punishment, see ante*, p. 234.]

37 & 38 *Vict. c.* 88 (*Births and Deaths Registration Act*, 1874), *s.* 40—*Penalty for false statements, etc.*]—Any person who commits any of the following offences; that is to say,

(1) Wilfully makes any false answer to any question put to him by a registrar relating to the particulars required to be registered concerning any birth or death, or wilfully gives to a registrar any false information concerning any birth or death, or the cause of any death; or,

(2) Wilfully makes any false certificate or declaration under or for the purposes of this Act, or forges or falsifies any such certificate or declaration, or any order under this Act, or knowing any such certificate, declaration, or order to be false or forged, uses the same as true, or gives or sends the same as true to any person; or,

(3) Wilfully makes, gives, or uses any false statement or representation as to a child born alive having been still-born, or as to the body of a deceased person or a still-born child in any coffin, or falsely pretends that any child born alive was still-born; or,

(4) Makes any false statement with intent to have the same entered in any register of births or deaths; shall for each offence be liable on summary conviction to a penalty not exceeding ten pounds, and on conviction on indictment to a fine or . . . to penal servitude for a term not exceeding seven years. [*By s.* 45, "*where the court of summary jurisdiction before whom a person is charged summarily with an offence against this Act, which is also punishable on indictment, think that proceedings ought to be taken against such person by indictment, they may adjourn the case to enable such proceedings to be taken.*" *By s.* 46, "*a prosecution on indictment for an offence under the Act shall be commenced within three years after the commission of such offence.*" *And see ante*, p. 96.]

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 36—*Destruction or forgery of registers of births, etc.*]—Whosoever shall *unlawfully* destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any register of births, baptisms, marriages, deaths, or burials which now is or hereafter shall be by law authorized or required to be kept in England or Ireland, or any part of any such register, or any certified copy of any such register, or any part thereof, or shall forge or fraudulently alter in any such register any entry relating to any birth, baptism, marriage, death, or burial, or any part of any such register, or any certified copy of such register, or of any part thereof, or shall knowingly and *unlawfully* insert, or cause or permit to be inserted, in any such register, or in any certified copy thereof, any false entry of any matter relating to any birth, baptism, marriage, death, or burial, or shall knowingly and *unlawfully* give any false certificate relating to any birth, baptism, marriage, death, or burial, or shall certify any writing to be a copy or extract from any such register, knowing *such writing*, or the part

of such register whereof such copy or extract shall be so given, to be false in any material particular, or shall forge or counterfeit the seal of or belonging to any register office or burial board, or shall offer, utter, dispose of, or put off any such register, entry, certified copy, certificate, or seal, knowing the same to be false, forged, or altered, or shall offer, utter, dispose of, or put off any copy of any entry in any such register, knowing such entry to be false, forged, or altered, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section was framed from* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 20; 6 *&* 7 *W.* 4, *c.* 86, *s.* 43; *and* 20 *&* 21 *Vict. c.* 81, *s.* 15, *with the substitution of "unlawfully" for "wilfully." The proviso in favour of officiating ministers making corrections of accidental errors in registers, which was enacted by* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 21, *remains in force.*]

Sect. 37—*Making false entries in copies of registers sent to registrar.*]—Whosoever shall knowingly and wilfully insert, or cause or permit to be inserted, in any copy of any register directed or required by law to be transmitted to any registrar or other officer any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any copy of any register so directed or required to be transmitted as aforesaid, or shall knowingly and wilfully sign or verify any copy of any register so directed or required to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, or *shall unlawfully destroy, deface, or injure, or shall for any fraudulent purpose take from its place of deposit, or conceal any such copy of any register*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 22, *with the addition of the words in italics, made in consequence of R.* v. *Bowen*, 1 *Den.* 22; 1 *C. & K.* 501.]

61 *&* 62 *Vict. c.* 58 (*Marriage Act*, 1898), *s.* 7.]—*Provision of register books, and for celebration of nonconformist marriages in absence of registrar.*

Indictment for making a false entry in a Marriage Register. (24 *&* 25 *Vict. c.* 98, *s.* 36, *ante*, p. 752.)

Commencement as ante, p. 710]—feloniously, knowingly, and unlawfully did insert ("*insert, or cause or permit to be inserted*") in a certain register of marriages, which was then by law authorized to be kept in England ("*any register of births, baptisms, marriages, deaths, or burials, which now is or hereafter shall be by law authorized or required to be kept, etc., or any certified copy thereof*"), to wit, in (*describe the register*), a certain false entry of a matter relating to a supposed marriage, and which said false entry is as follows: that is to say [*set it out verbatim, with innuendoes if necessary to explain it*]; whereas in truth and in fact the said A. B. was not married to the said C. D. at the said church on the said —— day of ——, as in the said entry is falsely alleged and stated; and whereas in truth and in fact the said A. B. was not married to the said C. D., at the said church or elsewhere, at the time in the said entry mentioned, or at any other time whatsoever; against the form [*as ante*, p. 465]. (*2nd Count, for uttering*)—feloniously did offer, utter, dispose of, and put off a copy of a certain [other] false entry relating to a certain supposed marriage, which

said last-mentioned false entry was before then inserted in a certain register of marriages by law authorized to be kept in England, and which said last-mentioned false entry is as follows: that is to say [*set it out*]: whereas in truth and in fact [*as above*]. And the jurors aforesaid, upon their oath aforesaid, do say that the said J. S., at the time he so offered, uttered, disposed of, and put off the said copy of the said last-mentioned false entry, well knew the said last-mentioned false entry to be false; against the form [*as ante*, p. 465]. *See R.* v. *Sharpe*, 8 *C. & P.* 436. *As to the word* other, *see ante*, p. 711; *and see note to next precedent.*

A count (*under* 11 *G.* 4 *&* 1 *W.* 4, *c.* 66, *s.* 20 (*rep.*)) *charging that the defendant "feloniously and wilfully did destroy, deface, and injure a parish register," is not bad for duplicity; and it is not necessary to allege a scienter as to such a charge. R.* v. *Bowen*, 1 *Den.* 22; 1 *C. & K.* 501.

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour. 24 *&* 25 *Vict. c.* 98, *s.* 36; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 *&* 25 *Vict. c.* 98, *s.* 51 (*ante*, p. 709).

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Indictment against A. B. for giving a false Certificate of Death. (24 *&* 25 *Vict. c.* 98, *s.* 36, *ante*, p. 752.)

Commencement as ante, p. 710]—feloniously did knowingly and unlawfully give a certain false certificate relating to a certain death, to wit, a certain false certificate relating to the death of C. D., which said certificate was false in that [*the said A. B. therein falsely described himself as a licentiate of the Royal College of Physicians in England*]; against the form [*as ante*, p. 465].

It is submitted that the above form is sufficient. See note to indictment under the Falsification of Accounts Act, 1875 (*ante*, p. 591). *It is further to be observed, however, that the terms of s.* 36 *do not expressly come within the words of ss.* 42 *&* 43 (*as to setting out the purport only of instruments; ante*, pp. 705, 710).

Felony: see the last precedent.

Evidence.

To prove the indictment for making a false entry in a register, produce the register, prove it to be kept as stated in the indictment, and prove the forgery or uttering, *as ante*, pp. 712, 719, according as the fact is alleged in the indictment. Upon an indictment for making a false entry in a marriage register, it is not necessary that the entry should be made with intent to defraud: and it is no defence that the marriage, being bigamous, was void. If a person, knowing his name to be A., signs another name as a witness to a marriage in the register, he is guilty of inserting a false entry in the register although he so signs as a third witness, and the *Marriage Act* only requires two witnesses. *R.* v. *Asplin*, 12 *Cox*, 391, *Martin*, B. The court will take judicial notice that a parish in the county of Stafford, or any other English county, is in England, and the indictment need not aver that fact. *R.* v. *Sharpe*, 8 *C. & P.* 436.

It is not the less a "destroying, defacing, or injuring" of a register, within the meaning of the statute, because the register, when produced in evidence, has the torn part pasted in, and is as legible as before. *R.* v.

Bowen, 1 *Den.* 22; 1 *Cox*, 88. As to the uttering, *see R.* v. *Heywood*, 2 *C. & K.* 352.

Where a false entry had been actually made in a register of births, etc., on the information of the defendant, he was held to be thereby guilty of the felony mentioned in 6 *& 7 W.* 4, *c.* 86, *s.* 43 (re-enacted in 24 *& 25 Vict. c.* 98, *s.* 36), and not merely of the misdemeanor of making a false statement for the same purpose, within the 41st section of that Act. *R.* v. *Mason*, 2 *C. & K.* 622: *R.* v. *Dewitt*, *Id.* 905; 4 *Cox*, 49.

Indictments for Forgery in other Cases.

With the assistance of the precedents already given, which are those most generally required in practice, indictments may readily be framed upon any of the statutes on the subject of forgery, attention being paid to the operative words in the statute creating the offence.

The following is, it is believed, a tolerably full list of the statutes relating to forgery and indictable offences connected therewith, which have not already been mentioned under the foregoing precedents, and do not find a place in other parts of this work. For completer list *see Official Index to Statutes* (ed. 1904), *tit.* "*Forgery*." All these statutes, with very few exceptions, make the uttering of these forged instruments respectively, knowing them to be forged, equally penal with forging them. It is necessary to premise that, by 24 *& 25 Vict. c.* 98, *s.* 48 (*ante*, p. 708), in all cases of forgery, etc., in which, by any Act in force on Nov. 1, 1861, the punishment of death might, before the passing of 11 *G.* 4 *& 1 W.* 4, *c.* 66, have been inflicted, and which are not punishable under any of the other provisions of 24 *& 25 Vict. c.* 98, the offender shall be liable to penal servitude for life. By *s.* 47 of the same Act (*ante*, p. 708), whosoever shall be convicted of any offence which shall have been subjected by any Act to the same penalties as are imposed by 5 *Eliz. c.* 14 (for any of the offences first enumerated in that statute), shall be guilty of felony, punishable with penal servitude for any term not exceeding fourteen years. By the *Penal Servitude Act*, 1891 (54 *& 55 Vict. c.* 69), *s.* 1 (1) where under any enactment in force when that section comes into operation, a court has power to award a sentence of penal servitude, the sentence may, at the discretion of the court, be for any period not less than three years, and not exceeding either five years, or any greater period authorized by the enactment; and (2) where under any Act then in force or under any future Act a court is empowered or required to award a sentence of penal servitude, the court may in its discretion, unless such future Act otherwise provides, award imprisonment for any term not exceeding two years, with or without hard labour (*and see ante*, p. 235). By 24 *& 25 Vict. c.* 98, *s.* 39 (*ante*, p. 707) where by that or *any other* Act any person is, or *shall hereafter be*, made punishable for forging, etc., any instrument or writing designated by a special name or description, which, however designated, is in law a will, testament, codicil, or testamentary writing, or a deed or bond, or a bill of exchange or promissory note for the payment of money, or an indorsement or assignment of a bill or note, or an acceptance of a bill of exchange, or an undertaking, warrant, order, authority, or request for the payment of money, within the meaning of that Act, such person may be indicted under that Act and punished accordingly. With these observations, it has been thought best, in order to avoid repetition, to enumerate the more important of the existing statutes, with the punishments in the terms of the statutes respectively.

The venue as to all the following offences appears to be regulated by 24 & 25 *Vict. c.* 98, *s.* 41 (*ante*, p. 705).

1. *As to records and proceedings of courts of justice, proclamations, etc.*]—Forging any record, writ, return, panel, process, rule, order, warrant, interrogatory, deposition, affidavit, affirmation, recognizance, cognovit actionem, or warrant of attorney, or any original document whatsoever of or belonging to any court of record, or any bill, petition, process, notice, rule, answer, pleading, interrogatory, deposition, affidavit, affirmation, report, order, or decree, or any original document whatsoever of or belonging to any court of equity or court of admiralty in England or Ireland, or any document or writing, or any copy of any document or writing, used or intended to be used as evidence in any court in this section mentioned; felony, penal servitude for not exceeding seven years. 24 & 25 *Vict. c.* 98. *s.* 27. Forging the signature of a registrar, district registrar or commissioner of oaths; or forging or counterfeiting a seal of the Court of Probate, or knowingly using or concurring in the use of such forged or counterfeit signature or seal; or tendering in evidence documents with false seal or signature; felony, penal servitude for life. 20 & 21 *Vict. c.* 77, *s.* 28. The clerk of any court, or other officer having the custody of the records of any court, or being the deputy of any such clerk or officer, uttering any false copy or certificate of any record, knowing the same to be false; and any other person signing or certifying any copy or certificate of any record as such clerk, officer, or deputy, or forging any copy or certificate of any record, or uttering any copy or certificate of any record having thereon any false or forged name, handwriting, or signature, knowing the same to be false or forged; or forging the seal of any court of record, or forging or fraudulently altering any process of any court other than such courts as in the last preceding section mentioned; or serving or enforcing any forged process of any court whatsoever, knowing the same to be forged; or delivering to any person any paper falsely purporting to be any such process, or a copy thereof, or to be any judgment, decree, or order of any court of law or equity, or a copy thereof, knowing the same to be false; or acting or professing to act under any such false process, knowing the same to be false; felony, penal servitude for not exceeding seven years. 24 & 25 *Vict. c.* 98, *s.* 28. An indictment for forgery under *s.* 28 must allege an intent to defraud. *R.* v. *Powner*, 12 *Cox*, 235, *Quain*, J. An affiliation order is "process" within the meaning of that section. *Id.* A certificate of letters of ordination is not a record within *s.* 28. *R.* v. *Etheridge*, 19 *Cox*, 676; 65 *J. P.* 761, *Kennedy*, J. Forging any instrument, whether written or printed, or partly written and partly printed, which is or shall be made evidence by any Act passed or to be passed, and for which offence no punishment is herein provided; felony, penal servitude for not exceeding seven years. *Id. s.* 29. Forging court rolls or copies thereof, relating to any copyhold or customary estate; felony, penal servitude for life. *Id. s.* 30. Forging any memorial, affidavit, affirmation, entry, certificate, indorsement, document, or writing, made or issued under the provisions of any Act passed or hereafter to be passed for or relating to the registry of deeds; or forging or counterfeiting the seal of any office for the registry of deeds, or any stamp or impression of any such seal; or forging the signature of any person to any such memorial, etc., which shall be required or directed to be signed by or by virtue of any Act passed or to be passed; felony, penal servitude not exceeding fourteen years. *Id. s.* 31. Forging any summons, conviction, order, or warrant of any justice of the peace, or any recognizance

purporting to have been entered into before any justice of the peace, or other officer authorized to take the same, or any examination, deposition, affidavit, affirmation, or solemn declaration, taken or made before any justice of the peace; felony, penal servitude. 24 & 25 *Vict. c.* 98, *s.* 32.

Uttering a false certificate of a previous conviction; felony, penal servitude, or imprisonment. 7 & 8 *G.* 4, *c.* 28, *s.* 11; *cf.* 14 & 15 *Vict. c.* 99, *s.* 17. Forging or uttering a forged certificate, etc., of a chief justice, clerk of assize, or clerk of the peace given under the *Crown Cases Act* (11 & 12 *Vict. c.* 78); felony, penal servitude for any term not exceeding ten years. *Id. s.* 6 (*ante*, p. 275). Forging the seal, stamp, or signature of any document in the *Evidence Act*, 1851 (14 & 15 *Vict. c.* 99), mentioned or referred to (*i.e.*, foreign and colonial acts of state and judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or British colony, and affidavits, pleadings, and other legal documents filed or deposited in any such court, *s.* 7; apothecaries' certificates, *s.* 8; registers of British vessels, and certificates of registry, *s.* 12; certified copies of records of a previous conviction or acquittal, *s.* 13; examined or certified copies of public documents admissible in evidence on production from the proper custody, *s.* 14); felony, penal servitude not exceeding seven years. Venue: where the accused is apprehended or in custody. 14 & 15 *Vict. c.* 99, *s.* 17 (*and see ante*, p. 705). Forging the seal or any process of an inferior court having civil jurisdiction by custom or charter, or serving or enforcing forged process, or causing to be delivered, etc.; felony. 7 & 8 *Vict. c.* 19, *s.* 5. On an indictment charging A. with feloniously causing to be delivered to B. a certain paper falsely purporting to be a copy of a certain process of an inferior court within the meaning of 7 & 8 *Vict. c.* 19, *s.* 5, knowing the same to be false, and (2nd count) feloniously acting and professing to act under and by the authority of the said process, knowing, etc., it was held that no intent to defraud need be proved. *R.* v. *Rippier*, *Norfolk Sum. Ass.* [1897] *Mathew*, J., 32 *L. J. Newsp.* 350. Forging the seal or any process of the county court, or serving or enforcing any such forged process, knowing it to be forged, or delivering or causing to be delivered to any person any paper falsely purporting to be a copy of any summons or other process of the said court, knowing the same to be false, or acting or professing to act under any false colour or pretence of the process or authority of the said court; felony. 51 & 52 *Vict. c.* 43, *s.* 180: *cf.* 24 & 25 *Vict. c.* 98, *s.* 28 (*ante*, p. 756); *and see R.* v. *Evans*, *Dears. & B.* 236; 26 *L. J.* (*M. C.*) 92: *R.* v. *Richmond*, *Bell*, 142; 28 *L. J.* (*M. C.*) 188. Mere verbal "professing to act" is insufficient. There must be some "instrument." *R.* v. *Myott*, 6 *Cox*, 406. As to intent to defraud, *see R.* v. *Powner*, 12 *Cox*, 235 (*ante*, p. 756); and *R.* v. *Rippier*, *ubi supra*. A notice to produce was held not to be process within the corresponding provision in 9 & 10 *Vict. c.* 95, *s.* 57 (*rep.*). *R.* v. *Castle*, *Dears. & B.* 363; 27 *L. J.* (*M. C.*) 70. Forging, counterfeiting, or fraudulently altering the seal or signature of any person authorized by or under the *Commissioners for Oaths Act*, 1889, to administer an oath, or tendering in evidence, or otherwise using, any affidavit having any seal or signature so forged or counterfeited or fraudulently altered, knowing the same to be forged, counterfeited or fraudulently altered; felony, penal servitude not exceeding seven years, or imprisonment. 52 & 53 *Vict. c.* 10, *s.* 8. As to venue, *see ante*, pp. 47, 705. Forging the signature of a master in lunacy, or forging or counterfeiting the seal of the master's office, or knowingly concurring in using any such forged or counterfeited signature or seal, or tendering in evidence any document with a false or counterfeit signature of a master, or with a false or counterfeit seal,

knowing the same signature or seal to be false or counterfeit; felony, penal servitude not exceeding seven years, or imprisonment not exceeding three years. 53 & 54 *Vict. c.* 5 (*Lunacy Act*, 1890), *s.* 147: but *see* 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

2. *As to public documents and proceedings of corporations and companies.*] —Forging the seal, stamp, or signature of any certificate, official or public document, or document or proceeding of any corporation, or joint-stock or other company, or of any certified copy of any document, bye-law, entry in any register or other book, or other proceeding, receivable in evidence under the Act, or tendering in evidence any such certificate, etc., with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false and counterfeit; or forging the signature of any judge [of any of the superior courts of equity or common law] to any order, decree, certificate, or other judicial or official document, or tendering in evidence any order, etc., with a false or counterfeit signature of any such judge thereto, knowing the same to be false or counterfeit; or printing any copy of any private Act, or of the journals of either house of parliament, which shall falsely purport to have been printed by the printers to the Crown or to either house of parliament, or tendering in evidence any such copy, knowing that the same was not printed by the person by whom it purports to have been printed; felony, penal servitude for not exceeding seven years. 8 & 9 *Vict. c.* 113, *s.* 4. Venue: where the accused is apprehended or in custody. 14 & 15 *Vict. c.* 99, *s.* 17. (*See ante*, p. 705). Printing any copy of any proclamation, order, or regulation which falsely purports to have been printed by the government printer, or to be printed under the authority of the legislature of any British colony or possession, or tendering in evidence any copy of any proclamation, order, or regulation which falsely purports to have been printed as aforesaid, knowing that the same was not so printed; or forging or tendering in evidence, knowing the same to have been forged, any certificate by the *Documentary Evidence Act*, 1868 (31 & 32 *Vict. c.* 37), authorized to be annexed to a copy of or extract from any proclamation, order, or regulation; felony, penal servitude, or imprisonment (*s.* 4). (*See ante*, p. 348, *et seq.*) Printing any copy of any Act, proclamation, order, regulation, royal warrant, circular, list, gazette, or document which falsely purports to have been printed under the superintendence or authority of his Majesty's stationery office, or tendering in evidence any copy which falsely purports to have been printed as aforesaid, knowing that the same was not so printed; felony, penal servitude not exceeding seven years, or imprisonment. 45 & 46 *Vict. c.* 9, *s.* 3. (*See ante*, p. 346, *et seq.*) Officer certifying as true any false copy of or extract from any of the records in the public record office, or any person forging the signature of the assistant keeper of the records or seal of record office; felony, penal servitude for life. 1 & 2 *Vict. c.* 94, *ss.* 19, 20.

Forging the seal or signature affixed or subscribed to a bye-law made under the *Municipal Corporations Act*, 1882, or the signature subscribed to any minute of proceedings of the council, or tendering in evidence any such document with a false or counterfeit seal or signature, knowing it to be false or counterfeit; misdemeanor, imprisonment with hard labour not exceeding two years. 45 & 46 *Vict. c.* 50, *s.* 235.

3. *As to the public revenue, etc.*]—Forging certificates, receipts, etc., under the *Income Tax Act*; felony, penal servitude for fourteen years. 5 & 6 *Vict. c.* 35, *s.* 181. Knowingly and wilfully forging or counterfeiting, or causing or procuring to be forged or counterfeited, or knowingly and

wilfully acting or assisting in forging or counterfeiting, the name or handwriting of any commissioner of customs, or of any accountant and comptroller-general of the customs, or of any person acting for them respectively, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England on account of the commissioners of customs, or forging or counterfeiting, or causing or procuring to be forged or counterfeited, or knowingly and wilfully acting or assisting in the forging or counterfeiting, any draft, instrument, or writing in form of a draft made by such accountant and comptroller-general or person as aforesaid, or uttering or publishing the same knowing it to be forged or counterfeited, with intent to defraud any person whomsoever; felony. 39 & 40 *Vict. c.* 36, *s.* 28. As to false declarations under the Act, *see s.* 168. Forging excise paper; felony. 2 & 3 *W.* 4, *c.* 16, *s.* 3; 11 & 12 *Vict. c.* 121, *s.* 18. Forging excise permits or certificates; misdemeanor, penal servitude for not more than seven years, or fine. 2 & 3 *W.* 4, *c.* 16, *s.* 4; 11 & 12 *Vict. c.* 121, *s.* 18. Forging request notes; fine, 500*l*. 2 & 3 *W.* 4, *c.* 16, *s.* 13. Forging or counterfeiting the plates or types for excise certificates, or the certificates or paper used for them. 11 & 12 *Vict. c.* 121, *s.* 18; *and see* 54 & 55 *Vict. c.* 38, *ss.* 14–16; 61 & 62 *Vict. c.* 46, *s.* 12 (*post*, p. 766).

Forging declarations, warrants, orders, instruments, affidavits, or affirmations required under the Act, or by the commissioners for the reduction of the national debt; felony, penal servitude for life. 2 & 3 *W.* 4, *c.* 59, *s.* 19; 7 *W.* 4 & 1 *Vict. c.* 84, *s.* 1.

Forging registers, certificates, transfers of annuities, etc, granted by the commissioners for the reduction of the national debt; felony, penal servitude for life, or imprisonment. 10 *G.* 4, *c.* 24, *s.* 41; 16 & 17 *Vict. c.* 45, *s.* 31; 24 & 25 *Vict. c.* 98, *s.* 48 (*ante*, p. 708). As to the minimum term of penal servitude and the term of imprisonment for these offences, *see* 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, pp. 235, 755).

Stamps, etc.]—Offences relating to the forgery, etc., of stamps denoting duties chargeable by law as stamp duties, and of stamps denoting the payment of fees, are provided for by the *Stamp Duties Management Act*, 1891 (54 & 55 *Vict. c.* 38, *s.* 13), which enacts, that every person who does, or causes or procures to be done, or knowingly aids, abets, or assists in doing any of the acts following, that is to say,—1. Forges a die or stamp; 2. Prints or makes an impression upon any material with a forged die; 3. Fraudulently prints or makes an impression upon any material from a genuine die; 4. Fraudulently cuts, tears, or in any way removes from any material any stamp, with intent that any use should be made of such stamp or of any part thereof (*see R.* v. *Smith*, 5 *C. & P.* 107; 1 *Mood. C. C.* 314: *R.* v. *Field*, 1 *Leach*, 383: *R.* v. *Allday*, 8 *C. & P.* 136); 5. Fraudulently mutilates any stamp, with intent that any use should be made of any part of such stamp; 6. Fraudulently fixes or places upon any material or upon any stamp, any stamp or part of a stamp which, whether fraudulently or not, has been cut, torn, or in any way removed from any other material, or out of or from any other stamp; 7. Fraudulently erases or otherwise either really or apparently removes from any stamped material any name, sum, date, or other matter or thing whatsoever thereon written, with the intent that any use should be made of the stamp upon such material; 8. Knowingly sells or exposes for sale or utters or uses any forged stamp or any stamp which has been fraudulently printed or impressed from a genuine die; 9. Knowingly, and without lawful excuse (the proof whereof shall lie on the person accused), has in his possession any forged die or stamp or any

stamp which has been fraudulently printed or impressed from a genuine die, or any stamp or part of a stamp which has been fraudulently cut, torn, or otherwise removed from any material, or any stamp which has been fraudulently mutilated, or any stamped material out of which any name, sum, date, or other matter or thing has been fraudulently erased or otherwise either really or apparently removed, shall be guilty of felony; penal servitude not exceeding fourteen years, or imprisonment with or without hard labour, not exceeding two years. And by *s.* 18 of the same statute, if any forged stamps are found in the possession of any person appointed to sell and distribute stamps, or being or having been licensed to deal in stamps, that person shall be deemed and taken, unless the contrary is satisfactorily proved, to have had the same in his possession knowing them to be forged, and with intent to sell, use, or utter them, and shall be liable to punishment imposed by law upon a person selling, using, uttering, or having in possession forged stamps knowing the same to be forged. The commissioners of inland revenue may, under *s.* 18 (2), issue search warrants for forged stamps. The enactments providing for the punishment of offences relating to stamp duties apply to the poundage under the *Post Office* (*Money Orders*) *Act*, 1880, as if such poundage were a stamp duty. 43 *&* 44 *Vict. c.* 33, *s.* 4, *sub.-s.* 1. *Sects.* 19, 22, 23, 26, 29 *&* 30 of the *Post Office Duties Act*, 1840 (3 *&* 4 *Vict. c.* 96), which relate to dies and paper, and to plates and instruments, and to moulds, frames, instruments, and machinery for the making of paper, and to the punishing of fraud, apply as if re-enacted in the *Post Office* (*Money Orders*) *Act*, 1880, with the substitution of poundage under the last-mentioned Act for the duties mentioned in the first-mentioned Act, and of orders under the last-mentioned Act for the envelopes mentioned in the first-mentioned Act. 43 *&* 44 *Vict. c.* 33, *s.* 4, *sub-s.* 2. The sections thus incorporated were all repealed by the *Stamp Duties Management Act*, 1891 (54 *&* 55 *Vict. c.* 38), *s.* 28. As to the effect of this repeal on the incorporating Act, *see* 52 *&* 53 *Vict. c.* 63, *s.* 38, *sub-s.* 1. Postal orders under the Act are treated as valuable securities and orders for the payment of money within the *Forgery Act*, 1861. 43 *&* 44 *Vict. c.* 33, *s.* 4, *sub-s.* 4, *ante*, p. 432.

Forgery, etc., of stamps for fines and fees issued by local authorities is felony. 32 *&* 33 *Vict. c.* 49, *s.* 8. The offence of uttering a forged stamp is complete although at the time of uttering parts of it are concealed. *R.* v. *Collicott*, *R. & R.* 212; 2 *Leach*, 1048. As to the description of the stamp, *see that case.* As to making, knowingly uttering, dealing in, or selling fictitious postage stamps of any colony or foreign country, *see* 47 *&* 48 *Vict. c.* 76, *s.* 7; *and Dickins* v. *Gill* [1896] 2 *Q. B.* 310.

4. *As to public offices.*]—Forging any certificate, etc., made, or purporting or appearing to be made by the accountant-general, or any other officer of the Court of Chancery in England or Ireland, or by any judge or officer of the Landed Estates Court in Ireland, or by any officer of any court in England or Ireland, or by any cashier or other officer or clerk of the Bank of England or Ireland, or the name, handwriting, or signature of any such accountant-general, judge, cashier, officer, or clerk as aforesaid; felony, penal servitude not exceeding fourteen years. 24 *&* 25 *Vict. c.* 98, *s.* 33. The office of accountant-general of the Court of Chancery in England is abolished, and its duties are performed by the paymaster-general. 35 *&* 36 *Vict. c.* 44, *s.* 4. By *s.* 12 of that statute the provisions of 24 *&* 25 *Vict. c.* 98, *s.* 33 (*supra*), which have reference to the forging or altering of any instrument made or purporting to be made by the accountant-general of the Court of Chancery, shall apply to every instrument made, signed, or countersigned, or purporting to be made, signed,

or countersigned by the paymaster-general, or any deputy, clerk, or officer of the paymaster-general, and to the forgery and alteration of any signature or counter signature of such paymaster-general, deputy, clerk, or officer. 35 & 36 *Vict.* c. 44, s. 12. Forging the name or handwriting of the lords of the Treasury, or Commissioners of Woods and Forests to any power of attorney for the sale of stock, draft, etc.; felony. 10 *G.* 4, c. 50, s. 124. Forging any contracts, certificates, receipts, etc., relating to the redemption of the land tax; felony. 52 *G.* 3, c. 143, s. 6. Forging any declaration, warrant, order, or other instrument, or any affidavit or affirmation required to be made by the commissioners for the reduction of the national debt, or any certificate or order of their officers, etc.; felony. 2 & 3 *W.* 4, c. 59, s. 19. As to the minimum term of penal servitude and term of imprisonment for all the above offences, *see* 7 & 8 *G.* 4, c. 28, s. 8 (*ante*, p. 234), 54 & 55 *Vict.* c. 69, s. 1 (*ante*, pp. 235, 755). Forgery of the signature of a sea fishery officer to a document drawn up under schedule 1 of the *Sea Fisheries Act*, 1883, or use of such document, knowing it to be forged; punishable summarily or on indictment, in the latter case by imprisonment, with or without hard labour, for a term not exceeding two years. 46 & 47 *Vict.* 22, s. 17.

5. *As to the navy and army.*]—Forging certificates of naval service or protections; misdemeanor. 5 & 6 *W.* 4, c. 24, s. 3. Any person, in order to sustain any claim to any pay, wages, allotment, prize money, bounty money, grant, or other allowance in the nature thereof, half-pay, pension, or allowance from the compassionate fund of the navy, or other money payable by the Admiralty, or to any effects or money in charge of the Admiralty,—or in order to procure any person to be admitted a pensioner as the widow of an officer of the navy,—doing any of the following things, namely,—offering or uttering to any person in the service of the Crown or of the Admiralty any false affidavit, knowing the same to be false, or making, or subscribing, or offering, or uttering as aforesaid any false written petition, application, statement, answer, certificate, or voucher, or other false writing, knowing the same to be false; misdemeanor, penal servitude for any term not exceeding five years. 28 & 29 *Vict.* c. 124, s. 6. (These offences are also punishable on summary conviction before a justice by imprisonment for any term not exceeding six months, with or without hard labour, *Id. Sects.* 40 to 42 and 50 to 53 of the *Forgery Act*, 1861 (24 & 25 *Vict.* c. 98), are incorporated with 28 & 29 *Vict.* c. 124, by s. 7 of the last-mentioned Act.) Forging the name or handwriting of any officer, soldier, etc., in the army, or of any officer or sergeant at Chelsea Hospital, as to the payment of pensions, wages, pay, etc., or any letter of attorney, bill, ticket, order, certificate, voucher, receipt, will, etc., concerning the payment or obtaining of any pension, etc.; felony, penal servitude for life. 7 *G.* 4, c. 16, s. 38; 54 & 55 *Vict.* c. 69, s. 1 (*ante*, p. 235). *See R.* v. *Pringle*, 2 *Mood. C. C.* 127; 9 *C. & P.* 408. Forging the names of officers, etc., of the army entitled to prize-money, etc.; felony, penal servitude for life. 2 & 3 *W.* 4, c. 53, s. 49. Forging or counterfeiting minutes, assignments of pension, superannuation allowance order, etc., relating to army and navy pensions; felony. 2 & 3 *Vict.* c. 51, s. 9. As to punishment, *see* 7 & 8 *G.* 4, c. 28, s. 8 (*ante*, p. 234); 54 & 55 *Vict.* c. 69, s. 1 (*ante*, pp. 235, 755). As to forgery of documents in connection with pensions, etc., from the seamen's fund, *see* 14 & 15 *Vict.* c. 102, s. 55.

6. *As to public trade.*]—Forgery of trade marks is dealt with by 50 & 51 *Vict.* c. 28. *See post, Book II. Part II. ch. v. s.* 2. There are very many statutes with respect to forgeries upon particular companies, to which it

is unnecessary to refer, inasmuch as it will be found that all such forgeries are punishable under some section or sections of the *Forgery Act* (24 & 25 *Vict. c.* 98). Every person who forges or counterfeits any licence, certificate, document, or plan granted or required in pursuance of or for the purposes of the *Explosives Act*, 1875, or gives or signs any such document or plan which is to his knowledge false in any material particular, or wilfully makes use of any such forged, counterfeit, or false licence, etc., shall be liable to imprisonment, with or without hard labour, for a term not exceeding two years. 38 & 39 *Vict. c.* 17, *s.* 81. The offence may be prosecuted summarily or on indictment, and the accused, if summarily prosecuted, may elect to be indicted. 38 & 39 *Vict. c.* 17, *ss.* 91, 92; *cf.* 42 & 43 *Vict. c.* 49, *s.* 17 (*ante*, p. 6). Every person who commits any of the following offences; that is to say, (1) forges or counterfeits, or knowingly makes any false statement in any certificate of competency under the *Coal Mines Regulation Act*, 1887, or in any certificate of service granted under that Act, or any Act repealed by that Act, or any official copy of any such certificate: or (2) knowingly utters or uses any such certificate or copy which has been forged or counterfeited or contains any false statement: or (3) for the purpose of obtaining, for himself or any other person, employment as a certificated manager or under manager, or the grant, renewal, or restoration of any certificate under the before-mentioned Act, or a copy thereof, either (*a*) makes or gives any declaration, representation, statement, or evidence which is false in any particular, or (*b*) knowingly utters, produces, or makes use of any such declaration, representation, statement, or evidence, or any document containing the same,—shall be guilty of a misdemeanor, and be liable on conviction to imprisonment for a term not exceeding two years, with or without hard labour. 50 & 51 *Vict. c.* 58, *s.* 32. Every person, whether principal, broker, or agent, who shall wilfully insert in any contract, agreement, or token of sale and purchase made or entered into for the sale or transfer of any share or shares, or of any stock or other interest, in any joint-stock banking company in the United Kingdom of Great Britain and Ireland, constituted under or regulated by the provisions of any Act of Parliament, royal charter, or letters patent, issuing shares or stock transferable by any deed or written instrument, any false entry of the numbers by which such shares, stock, or other interest are distinguished on the registers or books of such banking company, or any name or names other than that of the person or persons in whose name such shares, stock, or interest shall stand as registered proprietors thereof in the books of such banking company, shall be guilty of a misdemeanor and punishable accordingly. 30 & 31 *Vict. c.* 29, *s.* 1. This enactment does not extend to shares or stock in the Bank of England or the Bank of Ireland. *Id. s.* 3.

Copyright.]—Wilfully making or causing to be made any false entry in the registry book of the Stationers' Company, or wilfully producing or causing to be tendered in evidence any paper falsely purporting to be a copy of any entry in the said book; misdemeanor. 5 & 6 *Vict. c.* 45, *s.* 12.

Hackney carriages.]—Forging, etc., licences or tickets for hackney or stage carriages; misdemeanor. 6 & 7 *Vict. c.* 86, *s.* 20.

Medical profession.]—Any registrar wilfully making or causing to be made any falsification in any matter relating to the register of pharmaceutical chemists and chemists and druggists; misdemeanor, imprisonment not exceeding twelve months. 31 & 32 *Vict. c.* 121, *s.* 14.

Mercantile marine.]—Forging or fraudulently altering, or assisting in

forging or fraudulently altering, or procuring to be forged or fraudulently altered, any register book, builder's certificate, surveyor's certificate, certificate of registry, declaration, bill of sale, instrument of mortgage, or any certificate of mortgage or sale, or entry or indorsement under or required by the first part of the *Merchant Shipping Act*, 1894, to be made in or on any of the above documents; felony. 57 & 58 *Vict.* c. 60, s. 66. Forging a certificate of discharge or report of character of any seaman, etc.; misdemeanor. *Id.* s. 130; *see R.* v. *Wilson*, *Dears. & B.* 558; 27 *L. J.* (*M. C.*) 230. Forging, etc., certificate of competency; misdemeanor. *Id.* s. 104. Forging documents to obtain money in seaman's savings bank; penal servitude not more than five years, or imprisonment, with or without hard labour, not exceeding two years. *Id.* s. 154. Forging documents for purpose of obtaining property of deceased seaman; same punishment. *Id.* s. 184. Forging declarations or certificates of survey, or passenger steamer's certificate; misdemeanor. *Id.* s. 282. Forgery in proceedings as to salvage by King's ships; imprisonment not exceeding two years. *Id.* s. 564. Forgery of seal, stamp, or signature of documents to which *Merchant Shipping Act* applies; felony, penal servitude not exceeding seven years, or imprisonment not exceeding two years, with or without hard labour. *Id.* s. 695 (4). Falsely certifying documents made evidence under the Act; misdemeanor. *Id.* s. 695 (3).

Plate.]—Forging or counterfeiting any die for marking gold or silver wares, or marking such wares with a forged die, or forging the mark of any such die, or transposing or removing the marks, or cutting or severing the marks with intent to affix them on other wares, or affixing any mark cut from other wares, or fraudulently using genuine dies; felony, penal servitude for not more than fourteen years. 7 & 8 *Vict.* c. 22, s. 2. An intention to defraud is not an element in this offence. *R.* v. *Spittle* [1902] 18 *T. L. R.* 436, *Bigham*, J. *Cf. R.* v. *Ogden*, 6 *C. & P.* 631; *R.* v. *Hope*, 1 *Mood. C. C.* 396.

Sale of Food.]—Forging for the purposes of the *Sale of Food and Drugs Act*, 1875, any certificate or any writing purporting to contain a warranty; misdemeanor, imprisonment not exceeding two years with hard labour. 38 & 39 *Vict.* c. 63, s. 27; *and see post, Book II. Part II. ch. v. s.* 4.

Slave trade.]—Forging certificates, etc., mentioned in the *Slave Trade Act*, 1824; felony, penal servitude for not more than fourteen nor less than three years, or imprisonment, with or without hard labour, for not more than five nor less than three years. 5 *G.* 4, *c.* 113, *s.* 10; *but see* 54 & 55 *Vict.* c. 69, *s.* 1 (*ante*, pp. 235, 236, 755).

Trade unions.]—With intent to mislead or defraud, giving to any member of a trade union registered under 34 & 35 *Vict.* c. 31 (*Trade Union Act*, 1871), or to any person intending or applying to become a member of such trade union, a copy of any rules, or of any alterations or amendments of the same, other than those respectively which exist for the time being, on the pretence that the same are the existing rules of such trade union, or that there are no other rules of such trade union, or with the intent aforesaid, giving a copy of any rules to any person on the pretence that such rules are the rules of a trade union registered under the above-mentioned Act which is not so registered; misdemeanor. 34 & 35 *Vict.* c. 31, s. 18.

7. *Forgeries at parliamentary, municipal, and other elections.*]—*See* 35

& 36 Vict. c. 33, s. 3, post, tits. "Corrupt Practices at Parliamentary Elections;" "Corrupt Practices at Municipal Elections."

8. *Telegrams.*]—"Every person who forges or wilfully and without due authority alters a telegram or utters a telegram, knowing the same to be forged, or wilfully and without due authority altered (*sic*), or who transmits by telegraph as a telegram, or utters as a telegram, any message or communication which he knows to be not a telegram, shall, whether he had or had not an intent to defraud, be guilty of a misdemeanor, and shall be liable, on summary conviction, to a fine not exceeding ten pounds, and, on conviction on indictment, to imprisonment, with or without hard labour, for a period not exceeding twelve months. . . . For the purposes of this section the expression 'telegram' means a written or printed message or communication sent to or delivered at a post office, or the office of a telegraph company, for transmission by telegraph, or delivered by the post office or a telegraph company as a message or communication transmitted by telegraph. The expression 'telegraph company' means any company, corporation, or persons carrying on the business of sending telegrams for the public, under whatever authority or in whatever manner such company, corporation, or persons may act or be constituted. The expression 'telegraph' has the same meaning as in the *Telegraph Act*, 1869, and the Acts amending the same." 47 & 48 *Vict. c.* 76, *s.* 11. Obtaining money by means of forged telegrams can also be dealt with under 24 & 25 *Vict. c.* 98, *s.* 38 (*ante*, p. 706); *R. v. Riley* [1896] 1 *Q. B.* 309; 65 *L. J.* (*M. C.*) 74; 18 *Cox*, 285: *and see Ex parte Wickham*, 10 *Times L. R.* 266.

9. *As to the instruments of forging.*]—The following acts, if done without lawful authority or excuse, are criminal, the proof whereof lies on the party accused:—To make or have moulds, frames, etc., having devices peculiar to paper used for excise permits or certificates; felony. 2 & 3 *W.* 4, *c.* 16, *s.* 3; 11 & 12 *Vict. c.* 121, *s.* 18. To make or have any frame, etc., having therein any words, etc., peculiar to and appearing in the substance of any paper provided or to be provided or used for exchequer bills [or "treasury bills," 40 & 41 *Vict. c.* 2, *s.* 10 (*ante*, p. 723)] or exchequer bonds or exchequer debentures, or any machinery for working any threads into the substance of any paper, or any such thread, and intending to imitate such words, etc., or any plate peculiarly employed for printing such exchequer bills, etc., or any die or seal peculiarly used for preparing any such plate, or for sealing such exchequer bills, etc., or any plate, die, or seal intended to imitate any such plate, die, or seal as aforesaid; felony, penal servitude not exceeding seven years. 24 & 25 *Vict. c.* 98, *s.* 9. To make or have any paper in the substance of which shall appear any words, etc., threads, etc., peculiar to and appearing in the substance of any paper provided or to be provided or used for such exchequer bills [or "treasury bills," 40 & 41 *Vict. c.* 2, *s.* 10 (*ante*, p. 723)], bonds, or debentures, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same; or taking any impression of any such plate, die or seal as in the last preceding section mentioned; felony, penal servitude not exceeding seven years. 24 & 25 *Vict. c.* 98, *s.* 10. To purchase or receive, or knowingly have any paper manufactured and provided by or under the directions of the commissioners of inland revenue or commissioners of the treasury, for the purpose of being used as exchequer bills [or "treasury bills," 40 & 41 *Vict. c.* 2, *s.* 10] or exchequer bonds or exchequer debentures, before such paper shall have been duly stamped, signed, and issued for public use, or any

such plate, die or seal as in the last two preceding sections mentioned; misdemeanor, imprisonment not exceeding *three* years (*see ante*, p. 236), 24 & 25 *Vict. c.* 98, *s.* 11. To manufacture or use paper, plates, etc., intended to imitate those used for exchequer bills and bonds; felony. 29 & 30 *Vict. c.* 25, *ss.* 20, 25. To be unlawfully in possession of such paper, plates, etc.; misdemeanor, imprisonment for not more than *three* years, nor less than six calendar months. *Id. ss.* 21, 25.

To make or have any frame, etc., for the making of paper, with the words "Bank of England" or "Bank of Ireland" visible on the substance, or to make paper with curved or waving bar or wire lines, etc., or to make, etc., or sell, etc., such paper, etc.; felony, penal servitude not exceeding fourteen years. 24 & 25 *Vict. c.* 98, *s.* 14. (*See s.* 15.) To engrave on any plate, etc., any bank-note, etc., or blank bank-note, bill, etc., or use and have possession of such plate, etc., or utter, or have paper upon which a blank bank-note, etc., shall be printed; felony, subject to the same punishment. *Id. s.* 16. To engrave *in England* upon a plate part of a note purporting to be a note of a Scotch bank is an offence within *s.* 16, notwithstanding *s.* 55, which provides that nothing in the Act contained shall extend to Scotland. *R.* v. *Brackenridge*, *L. R.* 1 *C. C. R.* 133; 37 *L. J.* (*M. C.*) 86. To engrave on any plate, etc., any word, number, figure, character, or ornament resembling any part of a bank-note, etc.; or use or have such plate, etc., or utter or have any paper on which there shall be an impression of any word, etc.; felony, subject to the same punishment. 24 & 25 *Vict. c.* 98, *s.* 17. This section applies to notes, etc., of bodies corporate established under foreign law. *R.* v. *Auffret*, 62 *J. P.* 521; *R.* v. *Zeigert*, 10 *Cox*, 555. For indictment, *see post*, p. 766.

To engrave or possess plates for forging share warrants or coupons of companies; felony, penal servitude for life or not less than three years, or imprisonment, with or without hard labour, for not over two years. 30 & 31 *Vict. c.* 131, *s.* 36; 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

To make, use, or have possession of any frame, etc., for the making of paper, with the name or firm of any person or persons, body corporate, or company carrying on business as bankers, appearing on the substance; or to make, sell, etc., or have possession of such paper; felony, subject to the same punishment. 24 & 25 *Vict. c.* 98, *s.* 18. *See R.* v. *Keith*, *Dears.* 486; 24 *L. J.* (*M. C.*) 110; 6 *Cox*, 533. To engrave plates, etc., for foreign bills or notes, or use or have such plates, or utter any paper on which any part of such bill, etc., may be printed; felony, subject to the like punishment. *Id. s.* 19. *See R.* v. *Faderman*, 4 *Cox*, 359: *R.* v. *Goldstein*, *R. & R.* 473; 3 *B. & B.* 201: *R.* v. *Valler*, 1 *Cox*, 84; *R.* v. *Warshaner*, 1 *Mood. C. C.* 466: *R.* v. *Harris*, 7 *C. & P.* 416, 428, 430: *R.* v. *Hannon*, 2 *Mood. C. C.* 77; 9 *C. & P.* 11: this was a case as to a colonial (Canadian) bank: *R.* v. *Rinaldi*, *L. & C.* 330; 33 *L. J.* (*M. C.*) 28; 9 *Cox*, 391. To engrave or make without lawful authority upon any plate, etc., any stock certificate or coupon purporting to be such a stock certificate or coupon as is mentioned in the *Forgery Act*, 1870, or to use or have such plate, etc., or to utter or to have any paper upon which any such blank certificate or coupon or part thereof shall be printed; felony, subject to the like punishment. 33 & 34 *Vict. c.* 58, *s.* 5. To engrave upon any plate, etc., any India stock certificate or coupon, purporting to be issued under the *India Stock Certificate Act*, 1863, or to use or have such plate, etc., or to utter or have any paper upon which any such blank India stock certificate or coupon, or part thereof, shall be printed; felony, subject to the like punishment. 26 & 27 *Vict. c.* 73, *s.* 15. As to the instruments for forging stamps denoting duties chargeable by law as stamp duties, *see* 54 & 55 *Vict. c.* 38, *s.* 18,

sub-s. 9 (*ante*, p. 759). As to the making, etc., of paper in imitation of paper used for stamp duties, *see Id. s.* 14. As to the possession of paper, plates, or dies used for stamp duties, *see Id. s.* 15. *Sect.* 16 permits the issue and execution of search warrants for forged dies, etc. *Sects.* 14–16 were extended to paper used for excise licences by 61 & 62 *Vict. c.* 46, *s.* 12. As to instruments for forging stamps used in pursuance of the *Local Stamp Act*, 1869, *see* 32 & 33 *Vict. c.* 49, *s.* 8. Making or possessing without lawful excuse dies, etc., for making a fictitious postage stamp of any British colony or foreign state; summarily punishable, 47 & 48 *Vict. c.* 76, *s.* 7. *See Dickins* v. *Gill* [1896] 2 *Q. B.* 310.

Indictment under 24 & 25 *Vict. c.* 98, *s.* 17 (*ante*, p. 765).

Commencement as ante, p. 710]—without lawful authority or excuse feloniously did knowingly have in his possession certain plates, to wit, two copper plates for the impressing and making upon paper certain numbers, figures, and characters apparently intended to resemble part of a bank-note of a certain body corporate carrying on the business of bankers other than the governor and company of the Bank of England, and the governor and company of the Bank of Ireland, to wit, part of a bank-note of 10*l.* of a certain body corporate known as the National Bank of the South African Republic; against the form [*as ante*, p. 465].

FRAUDS AGAINST THE DECLARATION OF TITLE ACT, 1862.

Statute.

25 & 26 *Vict. c.* 67.]—This Act contains provisions punishing as misdemeanors the making of false statements (*s.* 44) or the suppression of material documents in proceedings before the court, and as a felony (*s.* 45), fraudulent forgery or alteration of certificates or documents of title. *Sect.* 46 saves civil remedies: *s.* 47 saves obligation to make discovery, but makes answers thus obtained inadmissible in criminal proceedings (*cf. ante*, pp. 328, 329).

FRAUDS AGAINST THE TRANSFER OF LAND ACT, 1862.

Statute.

25 & 26 *Vict. c.* 53.]—This statute contains provisions directed against frauds with reference to the registration of land, treating them as indictable misdemeanors. *See ss.* 105, 106, 107, 138, *and* 139. No registration has taken place under this Act since 1875. *See* 38 & 39 *Vict. c.* 87, *s.* 125.

FRAUDS AGAINST THE LAND TRANSFER ACTS, 1875 AND 1897.

Statutes.

38 & 39 *Vict. c.* 87 (*Land Transfer Act*, 1875), *s.* 99:]—If in the course of any proceedings before the registrar or the court in pursuance of this

Act any person concerned in such proceedings as principal or agent, with intent to conceal the title or claim of any person, or to substantiate a false claim, suppresses, or attempts to suppress, or is privy to the suppression of any document or of any fact, the person so suppressing, attempting to suppress, or privy to suppression, will be guilty of a misdemeanor, and upon conviction on indictment shall be liable to be imprisoned for a term not exceeding two years, with or without hard labour, or to be fined such sum not exceeding five hundred pounds as the court before which he is tried may award.

Sect. 100.]—If any person fraudulently procures, attempts to fraudulently procure, or is privy to the fraudulent procurement of any entry on the register, or of any erasure from the register or alteration of the register, such person shall be guilty of a misdemeanor, and upon conviction on indictment be liable to imprisonment for any term not exceeding two years, with or without hard labour, or to be fined such sum not exceeding five hundred pounds as the court before which he is tried may award; and any entry, erasure, or alteration so made by fraud shall be void as between all parties or privies to such fraud.

Sect. 101.]—If any person in any affidavit or declaration required or authorized to be made for any purpose under this Act, or any order or general rules made in pursuance thereof, wilfully makes a false statement in any material particular, he shall be guilty of a misdemeanor, and upon conviction on indictment shall be liable to imprisonment, with or without hard labour, for any term not exceeding two years, or to be fined such sum not exceeding five hundred pounds as the court before which he is tried may award.

Sect. 102.]—No proceeding or conviction for any act declared by this Act to be a misdemeanor shall affect any remedy which any person aggrieved by such act may be entitled to, either at law or in equity.

Sect. 103.]—Nothing in this Act contained shall entitle any person to refuse to make a complete discovery by answer in any legal proceeding, or to answer any question or interrogatory in any civil proceeding, in any court of law or equity, or in the courts of bankruptcy; but no answer to any such bill, question, or interrogatory shall be admissible in evidence against each person in any criminal proceeding under this Act. *See ante*, p. 328, *et seq.*

60 & 61 *Vict. c.* 65 (*Land Transfer Act*, 1897), *s.* 20.]—*Power to make registration of title compulsory on sale. Exercised as to the whole of the administrative county of London.*

Sect. 26.]—This Act . . . shall be construed as one with the *Land Transfer Act*, 1875.

Sect. 9.

FALSE PERSONATION.

Common Law.

At common law false personation was indictable only as a cheat, and was therefore punishable as a misdemeanor. 3 *Chit. Cr. L.* 1080.

PERSONATING SEAMEN, SOLDIERS, ETC.

Statutes.

28 & 29 *Vict. c.* 124 (*Admiralty Powers, etc., Act*, 1865), *s.* 8—*Personating Seamen, etc.*]—If any person in order to receive any pay, wages, allotment, prize money, bounty money, grant or other allowance in the nature thereof, half-pay, pension, or allowance from the Compassionate Fund of the Navy, payable or supposed to be payable by the Admiralty, or any other money so payable, or supposed to be payable, or any effects or money in charge or supposed to be in charge of the Admiralty, falsely and deceitfully personates any person entitled or supposed to be entitled to receive the same, every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding five years . . . or on summary conviction before a justice, sheriff, or magistrate, shall be liable to be imprisoned for any term not exceeding six months, with or without hard labour.

Sect. 9—*Saving for punishment under other Acts, etc.*]—Nothing in this Act shall prevent any person from being proceeded against and punished under any other Act, or at common law in respect of an offence (if any) punishable as well under this Act as under any other Act, or at common law. [*Cf.* 52 & 53 *Vict. c.* 63, *s.* 33, *ante*, p. 170.]

7 *G.* 4, *c.* 16 (*Chelsea, etc., Hospitals Act*, 1826), *s.* 38—*Personating Soldiers, etc.*]—If any person shall willingly and knowingly personate or falsely assume the name or character, or procure any other to personate or falsely assume the name or character of any officer, non-commissioned officer, soldier, or other person entitled or supposed to be entitled to any pension, wages, pay, grant, or other allowance of money, prize money, or relief, due or payable, or supposed to be due or payable, for on no account of any service done or supposed to be done by any such officer, non-commissioned officer, soldier, or other person as aforesaid in his Majesty's army or other military service, or shall personate or falsely assume the name or character of the executor or administrator, wife, relation, or creditor, of any such officer, non-commissioned officer, soldier, or other person as aforesaid, in order fraudulently to receive any pension, wages, pay, grant or other allowance of money, prize money, or relief due or payable, or supposed to be due or payable, for or on account of any services done, or supposed to be done by any such officer, non-commissioned officer, soldier, or other person as aforesaid . . . [*portions as to forgery, ante*, p. 761; *as to perjury, post, tit.* "*Perjury*"], every such person so offending, being thereof lawfully convicted, shall be and is hereby declared and adjudged to be guilty of felony, and shall and may be *transported* for life, or for such term of years as the court shall adjudge. [*The punishment is now penal servitude for life or not less than three years, or imprisonment, with or without hard labour, for not more than two years.* 20 & 21 *Vict. c.* 3; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2, *ante*, pp. 235, 236.]

Sect. 35—*Description of property in indictment.*]—*Ante*, p. 65.

2 & 3 *W.* 4, *c.* 53 (*Army Prize Money Act*, 1832), *s.* 49—*Personating soldiers, etc.*]—If any person shall knowingly and willingly personate or

falsely assume the name or character, or procure any other person or personate or falsely assume the name or character, of any officer, non-commissioned officer, soldier, or other person entitled or supposed to be entitled to any prize money, grant, bounty money, share or other allowance of money, due or payable, or supposed to be due or payable, for or on account of any service performed or supposed to have been performed by any officer, non-commissioned officer, soldier, or other person who shall have really served or be supposed to have served in his Majesty's army, or in any other military service, or shall personate or falsely assume, or act, aid or assist in personating or falsely assuming the name or character, or procure any other person to personate or falsely assume the name or character, of the executor or administrator, wife, widow, next of kin, relation or creditor of any such officer, non-commissioned officer, soldier, or other person, as aforesaid, in order to receive or to enable any other person to receive any prize money, grant, bounty money, share, or other allowance of money, due or payable, or supposed to be due or payable, for or on account of any service performed, or supposed to have been performed, by any such officer, non-commissioned officer, soldier, or other person as aforesaid . . . [*portions as to forgery, ante*, p. 761; *as to perjury, post, tit.* "*Perjury*"]; all and every person so offending, being thereof lawfully convicted, shall be and are and is hereby declared and adjudged to be guilty of felony, and shall be transported beyond the seas for life, or for any term not less than seven years as the court before whom such person or persons shall be convicted shall adjudge. [*See* 44 & 45 *Vict. c.* 58, *s.* 142, *infra. The punishment is now the same as under* 7 *G.* 4, *c.* 16, *s.* 38, *ante*, p. 768.]

37 & 38 *Vict. c.* 36—*False Personation Act*, 1874.]—*See post*, p. 772.

44 & 45 *Vict. c.* 58 (*Army Act*), *s.* 142.]—(2.) Any person who falsely represents himself to any military, naval, or civil authority to belong to, or be a particular man of, the regular reserve or auxiliary forces shall be deemed to be guilty of personation. (3.) Any person who is guilty of an offence under the *False Personation Act*, 1874 (*post*, p. 772), in relation to any military pay, reward, pension, or allowance, or to any sum payable in respect of military service, or to any money or property in the possession of the military authorities, or is guilty of personation under this section, shall be liable on summary conviction to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding 25*l.* (4) Provided that nothing in this section shall prevent any person from being proceeded against and punished under any other enactment or at common law in respect of any offence, so that he be not punished twice for the same offence. [*Cf.* 52 & 53 *Vict. c.* 63, *s.* 33, *ante*, p. 170.]

Indictment for personating a Seaman. (28 & 29 *Vict. c.* 124, *s.* 8, *ante*, p. 768.)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of August, in the year of our Lord ——, at the parish of ——, in the county of ——, and within the jurisdiction of the said court, in order to receive certain pay then payable by the Admiralty ("*any pay, wages, allotment, prize money, bounty money, grant, or other allowance in the nature thereof, half-pay, pension, or allowance from the Compassionate Fund of the Navy, payable, or supposed to be payable, by the Admiralty, or any other money so payable, or*

supposed to be payable, or any effects or money in charge or supposed to be in charge of the Admiralty") did unlawfully, falsely, and deceitfully personate one J. N., a person then entitled to receive the same pay ("*any person entitled or supposed to be entitled to receive the same*"); against the form [*as ante*, p. 465].

Misdemeanor: penal servitude for any term not exceeding five years and not less than three years, or imprisonment not exceeding two years, with or without hard labour. 28 & 29 *Vict. c.* 124, *s.* 8; 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

In indictments for the personation of soldiers, etc., the intent may be laid to defraud "the Lords and others, Commissioners of the Royal Hospital for Soldiers at Chelsea, in the county of Middlesex (London)." 7 *G.* 4, *c.* 16, *s.* 35 (*ante*, p. 65).

Evidence.

Prove that J. N. was a person entitled to receive pay from the Admiralty. *See R.* v. *Brown*, 2 *East, P. C.* 1007: *R.* v. *Tannet, R. & R.* 351. Prove that the defendant personated or assumed the name and character of J. N. The offence will be complete, though the personated seaman be dead; *R.* v. *Martin, R. & R.* 324; and even though the wages have been paid. *R.* v. *Cramp, Id.* 327. So, upon an indictment on *s.* 38 of the *Chelsea, etc., Hospitals Act*, 1826 (7 *G.* 4, *c.* 16), for forging the name of a person to a letter of attorney for the receipt of a pension "supposed to be due" to such person; it was held that the defendant was rightly convicted, although it appeared that no such pension was actually existing. *R.* v. *Pringle*, 2 *Mood. C. C.* 127; 9 *C. & P.* 408. It is no defence to an indictment under 2 & 3 *W.* 4, *c.* 53, *s.* 49 (*ante*, p. 768), for personating a soldier to prove that the prisoner was authorized by the soldier to personate him; *R.* v. *Lake*, 11 *Cox*, 333; or that the prisoner had bought from the soldier personated the prize money to which the latter was entitled. *Id.*

PERSONATING OWNERS OF STOCK, ETC.

Statutes.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 3—*Personating owners of stock transferable at the bank or of shares in companies.*]—Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity, or other public fund, which now is or hereafter may be transferable at the Bank of England or at the Bank of Ireland, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society, which now is or hereafter may be established by charter, or by, under, or by virtue of any Act of Parliament, or any owner of any dividend or money payable in respect of any such share or interest as aforesaid, and shall thereby transfer or endeavour to transfer any share or interest belonging to any such owner, or thereby receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*For indictment, see post*, p. 771.]

33 & 34 *Vict. c.* 58 (*Forgery Act*, 1870), *s.* 4—*Personation of owners of stock.*]—If any person falsely and deceitfully personates any owner of any

share or interest of or in any such stock as aforesaid [*i.e., any stock as defined in the National Debt Act*, 1870, 33 & 34 *Vict. c.* 71], or of any such stock certificate or coupon as aforesaid [*i.e., any stock certificate or coupon issued in pursuance of Part V. of the National Debt Act*, 1870, *or of any former Act*], and thereby obtains or endeavours to obtain any such stock certificate or coupon, or receives or endeavours to receive any money due to any such owner, as if such person were the true and lawful owner,—he shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .

26 & 27 *Vict. c.* 73 (*India Stock Certificate Act*, 1863), *s.* 14—*Personation of owners of India stock.*]—Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in India stock, or of any India stock certificate or coupon, issued in pursuance of this Act, and shall thereby obtain or endeavour to obtain any such India stock certificate or coupon, or receive or endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .

30 & 31 *Vict. c.* 131 (*Companies Act*, 1867), *s.* 35—*Personation of owners of shares.*]—Whosoever falsely and deceitfully personates any owner of any share or interest of or in any company or of any share warrant or coupon, issued in pursuance of this Act, and thereby obtains or endeavours to obtain any such share or interest, or share warrant or coupon, or receives or endeavours to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .

32 & 33 *Vict. c.* 102 (*Metropolitan Board of Works Loans Act*, 1869), *s.* 19.]—*Ante*, p. 742.

38 & 39 *Vict. c.* 83 (*Local Loans Act*, 1875), *s.* 32.]—*Ante*, p. 743.

40 & 41 *Vict. c.* 59 (*Colonial Stock Act*, 1877), *s.* 21.]—*Ante*, p. 743.

Indictment for Personation under 24 & 25 *Vict. c.* 98, *s.* 3.

Commencement as ante, p. 710]—feloniously did falsely and deceitfully personate one J. N., the said J. N. then being the owner of a certain share and interest in certain stock and annuities, which were then transferable at the Bank of England, to wit [*state the amount and nature of the stock*]; and that the said J. S. thereby did then transfer ("*transfer or endeavour to transfer*") the said share and interest of the said J. N. in the said stock and annuities, as if he the said J. S. were then the true and lawful owner thereof; against the form [*as ante*, p. 465].

Felony: penal servitude for life or not less than three years, or imprisonment not exceeding two years, with or without hard labour.—24 & 25 *Vict. c.* 98, *s.* 3; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 98, *s.* 51 (*ante*, p. 709).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the personation and the transfer, as stated in the indictment.

PERSONATION TO OBTAIN PROPERTY.

Statute.

37 & 38 *Vict. c.* 36 (*False Personation Act*, 1874), *s.* 1—*Personation in order to obtain property to be felony.*]—If any person shall falsely and deceitfully personate any person, or the heir, executor, or administrator, wife, widow, next of kin, or relation of any person, with intent fraudulently to obtain any land, estate, chattel, money, valuable security, or property, he shall be guilty of felony, and upon conviction shall be liable . . . to be kept in penal servitude for life. . . .

Sect. 2—*Saving.*]—Nothing in this Act shall prevent any person from being proceeded against and punished under any other Act, or at common law, in respect of an offence (if any) punishable as well under this Act as under any other Act, or at common law. [*Cf.* 52 & 53 *Vict. c.* 63, *s.* 33, *ante*, p. 170.]

Sect. 3—*Offences against this Act not to be tried at general or quarter sessions.*]—No offence against this Act shall be prosecuted or tried at any court of general or quarter sessions of the peace. [*See ante*, p. 127.]

5 & 6 *Vict. c.* 38, *s.* 1—*Offence not triable at quarter sessions.*]—*Ante*, p. 126.

54 & 55 *Vict. c.* 69, *s.* 1—*Minimum term of penal servitude and term o imprisonment.*]—*Ante*, p. 235.

PERSONATING BAIL, ETC.

Statute.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 34.] Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall, in the name of any other person, acknowledge any recognisance or bail, or any cognovit actionem, or judgment, or any deed, or other instrument, before any court, judge, or other person lawfully authorized in that behalf, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . .

52 & 53 *Vict. c.* 10 (*Commissioners of Oaths Act*, 1889), *s.* 1, *sub-s.* 2.]—A commissioner of oaths may by virtue of his commission in England or elsewhere take any bail or recognisance of bail in or for the purpose of any civil proceeding in the Supreme Court, including all proceedings on the revenue side of the [King's] Bench Division.

Indictment.

Commencement as ante, p. 710]—feloniously and without lawful authority or excuse, before the Honble. Sir A. B., one of the judges of the High Court of Justice ["*any court, judge, or person*"] then being lawfully authorized in that behalf, did acknowledge a certain deed ["*any recognizance or bail, or any cognovit actionem, or judgment, or any deed or other instrument.*" *Describe the instrument and the proceeding, if any, in which it is made*] in the name of J. N., against the form [*as ante*, p. 465].

Felony: penal servitude for not more than seven nor less than three years, or imprisonment with or without hard labour, for not more than two years. 24 & 25 *Vict. c.* 98, *s.* 34; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace, see* 24 & 25 *Vict. c.* 98, *s.* 51 (*ante*, p. 709).

NOTE.—The form of indictment in the 21st edition of this work, (p. 706) is omitted as obsolete. Bail is not now taken in civil actions except under the *Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 6; *R. S. C.* 1883, *O.* 69; or by bail bond in admiralty causes. Bail is still required on a *capias* in revenue cases. *See Revenue Rules of* 22*nd June*, 1860; *Stat. Rules & Orders Revised* (ed. 1904), *vol.* 12, *tit.* "*Supreme Court E.*," p. 587, *et seq.* As to bail before justices of the peace and in the High Court in criminal cases, *see ante*, pp. 110–116, and *Short & Mellor, Cr. Off. Practice*, 318, 373, 423. Bail on the Crown side of the *K. B. D.* is justified before the judge in chambers, or, if he so orders, before a justice of the peace; *see Cr. Off. Rules*, 1886, *r.* 122, which supersedes 11 *G.* 4 & 1 *W.* 4, *c.* 70, *s.* 12 (*rep.*). "Acknowledgments" of deeds by married women are now rare, owing to the changes in the capacity of married women effected by the *Married Women's Property Acts*. *See Re Harkness and Allsop* [1898] 2 *Ch.* 358: *Re Brooke and Fremlin* [1898] 1 *Ch.* 647.

Evidence.

Prove the document and that the signature is that of the defendant. Proof of lawful authority or excuse lies upon him. 24 & 25 *Vict. c.* 98, *s.* 34 (*ante*, p. 773).

PERSONATION OF VOTERS.

35 & 36 *Vict. c.* 33—*Ballot Act*, 1872, *s.* 24.]—*See post, tit.* "*Corrupt. etc., Practices at Parliamentary Elections*"; "*Corrupt, etc., Practices at Municipal Elections.*"

CHAPTER II.

OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

SECT. 1. *Homicide*, p. 774.
2. *Endeavouring to Conceal the Birth of Children*, p. 823.
3. *Attempts to procure Abortion*, p. 826.
4. *Assault, Battery, Wounding, etc.*, p. 830.
5. *False Imprisonment*, p. 891.
6. *Abduction*, p. 896.
7. *Rape, etc.*, p. 905.
8. *Sodomy, etc.*, p. 923.

SECT. 1.—HOMICIDE.

MURDER AND MANSLAUGHTER.

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 1—*Punishment of murder.*]—Whosoever shall be convicted of murder shall suffer death as a felon. [*This section re-enacts* 9 *G.* 4, *c.* 31, *s.* 3.]

Sect. 2—*Sentence for murder.*]—Upon every conviction for murder the court shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence and in respect thereof may be had and taken, in the same manner in all respects as sentence of death might have been pronounced and carried into execution, and all other proceedings thereupon and in respect thereof might have been had and taken, before the passing of this Act, upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon. [*As to the change in the law effected by this section, see ante*, p. 233.]

31 & 32 *Vict. c.* 24 (*Capital Punishment Amendment Act*, 1868), *s.* 2—*Judgment of death for murder to be executed within prison walls.*]—Judgment of death, to be executed on any prisoner sentenced after the passing of this Act on any indictment or inquisition for murder, shall be carried into effect within the walls of the prison in which the offender is confined at the time of execution.

Sect. 3.—*Provision for presence of sheriff and certain prison officials and others at execution.*

24 & 25 *Vict. c.* 100, *s.* 3—*Burial of offender executed.*]—The body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined after conviction, and the sentence of the court shall so direct. [*This section was framed from* 2 & 3 *W.* 4, *c.* 75, *s.* 16, *and* 4 & 5 *W.* 4, *c.* 26, *s.* 2.]

31 & 32 *Vict. c.* 24, *s.* 6—*Burial of offender executed.*]—The body of every offender executed shall be buried within the walls of the prison within which judgment of death is executed on him: provided that if one of [his] Majesty's principal secretaries of state is satisfied, on the representation of the visiting justices of a prison, that there is not convenient space within the walls thereof for the burial of offenders executed therein, he may, by writing under his hand, appoint some other fit place for that purpose, and the same shall be used accordingly.

Sect. 7—*Power of Secretary of State to make regulations*].—*See Regulations of June* 5, 1902. *Statutes, Rules, and Orders Revised* (ed. 1904), *vol.* 10, *tit.* "*Prison E.*" p. 65.

Sect. 15—*Saving clause as to legality of execution.*]—The omission to comply with any provision of this Act shall not make the execution of judgment of death illegal in any case where such execution would otherwise have been legal.

Sect. 16—*General saving.*]—Except in so far as is hereby otherwise provided, judgment of death shall be carried into effect in the same manner as if this Act had not passed.

44 & 45 *Vict. c.* 64 (*Central Criminal Court* (*Prisons*) *Act*, 1881), *s.* 2 . . . (5).]—Where judgment of death is passed at the Central Criminal Court upon a person convicted of any offence, the judgment may be carried into execution in any prison in the Central Criminal Court district, or in the county, if any, where the offence was committed, or is supposed to have been committed, which the justice or judge of the said court passing sentence, or any other justice or judge of the court subsequently may order, and if no order is made, then in the prison in which the convict is for the time being confined; and such sheriff as is ordered by any justice or judge of the said court, or, if no order is made, the sheriff of the county in which the offence was committed or is supposed to have been committed, or if the offence was committed or is supposed to have been committed on the high seas, or if the county in which the offence was committed does not clearly appear, the sheriff of Middlesex shall be charged with the execution of the judgment; and the sheriff charged with the execution of the judgment shall for that purpose have the same jurisdiction and powers and be subject to the same duties in the prison in which the judgment is to be carried into execution, although such prison is not situate within his county, as he has by law with respect to the common gaol of his county, or would have had if the *Prison Act*, 1865 (28 & 29 *Vict. c.* 126), and the *Prison Act*, 1877 40 & 41 *Vict. c.* 21), had not passed.

The coroner whose duty it is to hold an inquest on the bodies of persons dying in any prison shall hold an inquest in accordance with the *Capital Punishment Amendment Act*, 1868 (31 & 32 *Vict. c.* 24) on the body of any convict executed in that prison. [*See also the Central Criminal Court Act*, 1837 (7 *W.* 4 & 1 *Vict. c.* 77. *The provisions of the Central Criminal Court Act*, 1834 (4 & 5 *W.* 4, *c.* 36), *and of* 44 & 45 *Vict. c.* 64, *as to Newgate prison have lapsed with the demolition of that prison.*]

50 & 51 *Vict. c.* 55 (*Sheriffs Act*, 1887), *s.* 13.]—Where judgment of death has been passed upon a convict at any court of assize or any sessions of oyer and terminer or gaol delivery held for any county or riding or division or other part of a county, the sheriff of such county shall be

charged with the execution of such judgment, and may carry such judgment into execution in any prison which is the common gaol of his county or in which the convict was confined for the purpose of safe custody prior to his removal to the place where such court was held, and shall, for the purpose of such execution, have the same jurisdiction and powers over and in the prison in which the judgment is to be carried into execution, whether such prison is or is not situate within his county, and over the officers of such prison, as he has by law over and in the common gaol of his county and the officers thereof, or would have had if the *Prison Act*, 1865 (28 & 29 *Vict.* c. 126), and the *Prison Act*, 1877 (40 & 41 *Vict.* c. 21), had not passed, and shall be subject to the same responsibility and duties as if the said Acts had not passed. [*For special provision as to sheriff of Cheshire, see* 30 & 31 *Vict.* c. 36, *s.* 4.]

(2.) This section shall be in addition to, and not in derogation of, any power authorized to be exercised by order in council under the *Winter Assizes Act*, 1876 (39 & 40 *Vict.* c. 57), and the *Spring Assizes Act*, 1879 (42 & 43 *Vict.* c. 1) or either of them, and of the provisions of the *Central Criminal Court (Prisons) Act*, 1881 (*ante*, p. 775).

24 & 25 *Vict.* c. 100, *s.* 5—*Punishment of manslaughter.*]—Whosoever shall be convicted of manslaughter shall be liable, at the discretion of the court, to be kept in penal servitude for life, . . . or to pay such fine as the court shall award, in addition to or without any such other discretionary punishment as aforesaid. [*And see s.* 71, *post*, p. 778. *This section re-enacts* 9 *G.* 4, *c.* 31, *s.* 9.]

4 *Edw.* 7, *c.* 15 (*Prevention of Cruelty to Children Act*, 1904), *ss.* 1 (3), 12–18—*Procedure and evidence on a charge of manslaughter of a child under* 16.]—*See post*, pp. 877, 882–885.

24 & 25 *Vict.* c. 100, *s.* 6—*Form of indictment for murder or manslaughter.*]—In any indictment for murder or manslaughter, *or for being an accessory to any murder or manslaughter*, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant "did feloniously, wilfully, and of his malice aforethought kill and murder the deceased;" *and it shall be sufficient in any indictment for manslaughter to charge that the defendant "did feloniously kill and slay the deceased;" and it shall be sufficient in any indictment against an accessory to any murder or manslaughter to charge the principal with the murder or manslaughter (as the case may be) in the manner hereinbefore specified, and then to charge the defendant as an accessory in the manner heretofore used and accustomed.* [*This section re-enacts* 14 & 15 *Vict.* c. 100, *s.* 4, *with the additions italicized.*]

Sect. 7—*Homicide not felonious.*]—No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony. [*This section re-enacts* 9 *G.* 4, *c.* 31, *s.* 10. *As to former law, see Fost.* 188: 1 *Hawk. c.* 29: 1 *Bl. Com.* 188: 52 *H.* 3, *c.* 25: 6 *Edw.* 1, *c.* 9.]

Sect. 8—*Petit treason to be treated as murder.*]—Every offence which before the commencement of the Act of the ninth year of King George the Fourth, chapter thirty-one [*i.e.*, 1 July, 1828], would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried and punished as

principals and accessories in murder. [*This section re-enacts* 9 *G.* 4, *c.* 31, *s.* 2. *As to petit treason, see* 1 *Hawk. c.* 32; 3 *Chit. Cr. L.* 742.]

Sect. 9—*Murder or manslaughter abroad—Venue.*]—Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the [King's] dominions, or without, *and whether the person killed were a subject of* [*his*] *Majesty or not, every offence committed by any subject of* [*his*] *Majesty, in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place;* provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this Act. [*This section is framed on* 9 *G.* 4, *c.* 31, *s.* 7, *with the additions in italics. As to its effect, see Greaves, Crim. Law Cons. Acts* (2nd ed.), p. 42, *and ante*, p. 37. *In R.* v. *Helsham*, 4 *C. & P.* 394, *on an indictment under* 9 *G.* 4, *c.* 31 *s.* 7 (*rep.*), *of which this is a re-enactment, it was held that the accused must be described as a British subject; sed quære. See R.* v. *Jameson* [1896] 2 *Q. B.* 425.]

Sect. 10—*Death within the realm of a person feloniously stricken outside the realm: Venue.*]—Where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die of such stroke, poisoning, or hurt in England or Ireland, or being feloniously stricken, poisoned, or otherwise hurt at any place in England or Ireland, shall die of such stroke, poisoning or hurt upon the sea, or at any place out of England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in England or Ireland in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that country or place. [*This section re-enacts* 9 *G.* 4, *c.* 31, *s.* 8; *see ante*, p. 37.]

25 *& 26 Vict. c.* 65—*Jurisdiction in Homicides Act*, 1862.]—*Provisions for trial of persons subject to military law, for the murder or manslaughter of any person subject to military law, before the Central Criminal Court, where the offence has been committed in England or Wales, but out of the jurisdiction of that court.* (*See ante*, p. 46.)

24 *& 25 Vict. c.* 100, *s.* 66—*Persons loitering at night and suspected of any felony against this Act, may be apprehended.*]—Any constable or peace officer may take into custody, without a warrant, any person whom he shall find lying or loitering in any highway, yard, or other place during the night, and whom he shall have good cause to suspect of having committed or being about to commit *any felony in this Act* mentioned, and shall take such person *as soon as reasonably may be* before a justice of the peace, to be dealth with according to law. [*This section re-enacts* 9 *& 10 Vict. c.* 25, *ss.* 13, 14, *with the additions italicized.*]

Sect. 67—*Accessories, etc.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the

first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except murder) shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour; and every accessory after the fact to murder shall be liable at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labour; and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor punishable under this Act shall be liable to be proceeded against, indicted and punished as a principal offender. [*This section re-enacts* 9 *G.* 4, *c.* 31, *s.* 31; *see ante*, pp. 12–21.]

Sect. 68—*Offences committed within Admiralty jurisdiction: Venue.*]—All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed "on the high seas;" provided that nothing herein contained shall alter or affect any of the laws relating to the government of her Majesty's land or naval forces. (*See ante*, pp. 39–43.)

Sect. 70—*Whipping— . . .*]—Whenever whipping may be awarded for any offence under this Act, the court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence. [*See ante*, p. 239.]

Sect. 71—*Fine and sureties.*]—Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the court may, if it shall think fit, in addition to or in lieu of any punishment by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour;

And in case of any *felony* punishable under this Act otherwise than with death, the court may, if it shall think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized; provided that no person shall be imprisoned for not finding sureties under this clause for any period exceeding one year. [*See ante*, p. 240.]

Sect. 73—*Prosecution by parish officers—costs.*]—*See ante*, p. 258, *post*, p. 870.

Indictment for Murder. (*Common Law: see* 24 *&* 25 *Vict. c.* 100, *s.* 6, *ante*, p. 776.)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the 1st day of June, in the year of our Lord ——, in the parish of ——, and within the jurisdiction of the

said court, feloniously, wilfully, and of his malice aforethought, did kill and murder one J. N., against the peace of our lord the King, his crown and dignity. [*As to the venue, see ante*, pp. 36–43. *Upon this indictment, if the evidence so warrants, the jury may negative the malice aforethought, acquit of murder, and return a verdict of manslaughter. R. v. Greenwood*, 7 *Cox*, 404; *but see R. v. Maloney*, 9 *Cox*, 6: *R. v. French*, 14 *Cox*, 328. *See ante*, p. 216.]

On an indictment of two for the murder of the same person, separate trials may be ordered. R. v. Jackson, 7 *Cox*, 357.

On an indictment for child murder, the jury may convict of an attempt to conceal the birth thereof, post, p. 823.]

Prior to 1851 *great particularity was necessary in the statement in the indictment of the manner in which the death was caused, and in the proof relating thereto. See* 2 *Hale*, 185, 186: *R. v. Mosley*, 1 *Mood. C. C.* 97: *R. v. Mackalley*, 9 *Co. Rep.* 67 *b. The technical strictness thus required led, in numerous instances, to a great and scandalous failure of justice, for examples of which see R. v. Kelly*, 1 *Mood. C. C.* 113: *R. v. Thompson, Id.* 139: *R. v. Hughes*, 5 *C. & P.* 126: *R. v. Jones*, 1 *C. & K.* 243. *By* 24 *& 25 Vict. c.* 100, *s.* 6 (*ante*, p. 776), *it is not necessary to set forth the manner or means of death, but it is sufficient, in an indictment for murder, to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and in an indictment for manslaughter, to charge that he did feloniously kill and slay the deceased.*

Felony; death. 24 *& 25 Vict. c.* 100, *s.* 1.]—*The sentence of death must be pronounced, and cannot now be recorded* (24 *& 25 Vict. c.* 100, *s.* 2, *and vide ante*, p. 233). *The time and place of execution appear not to be part of the sentence. R. v. Doyle*, 1 *Leach*, 67; *and are fixed by the sheriff* (50 *& 51 Vict. c.* 55, *s.* 13). *As to the mode of executing the sentence, see* 24 *& 25 Vict. c.* 100, *s.* 3: 31 *& 32 Vict. c.* 24, *ss.* 2, 6 (*ante*, pp. 774, 775). *The authority to the sheriff for the execution is the judgment of the court without any warrant or copy of the calendar. R. v. Antrobus*, 2 *A. & E.* 788, 798; 4 *N. & M.* 565. *The question who is the proper sheriff to execute the sentence depends in the Central Criminal Court District on* 44 *& 45 Vict. c.* 64, *s.* 2 (*ante*, p. 775), *and elsewhere on* 50 *& 51 Vict. c.* 55, *s.* 13 (*Id.*). *In R. v. Garside*, 2 *A. & E.* 266; 4 *L. J.* (*M. C.*) 3, *the sheriff of the city of Chester refused to execute the prisoners, who were removed by habeas corpus into the court of King's Bench, and executed by the marshal of the Marshalsea, assisted by the sheriff of Surrey. See now* 30 *& 31 Vict. c.* 36, *s.* 4.

The offence of murder is not triable at quarter sessions. 5 *& 6 Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Indictment for Manslaughter. (*Common Law: see* 24 *& 25 Vict. c.* 100, *ss.* 5, 6.)

The form of the indictment for manslaughter is the same as an indictment for murder, omitting the words "wilfully and of his malice aforethought," and substituting the word "slay" for "murder." See 24 *& 25 Vict. c.* 100, *s.* 6 (*ante*, p. 776). *Even before* 14 *& 15 Vict. c.* 100, *s.* 24 (*ante*, p. 86), *it need not conclude "contra formam statuti." R. v. Chatburn*, 1 *Mood. C. C.* 403: *R. v. Berry*, 1 *M. & Rob.* 463. *Nor is it necessary where the manslaughter arises from an act of omission, that such act of omission should be stated in the indictment. R. v. Smith*, 11 *Cox*, 210. *As to the cases in which homicide is manslaughter and not murder, see post*, p. 782, *et seq. A summary conviction for assault under s.* 42 *of* 24 *& 25 Vict. c.* 100, *is not*

a bar to a subsequent indictment for manslaughter, upon the death of the man assaulted, consequent upon the same assault. R. v. *Morris, L. R.* 1 *C. C. R.* 90; 36 *L. J. (M. C.)* 84. (*And see ante*, p. 177.) *On an indictment of a person over sixteen for the manslaughter of a child under sixteen, the jury may convict for an offence against s.* 1 *of the Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15, *s.* 1 (3)), *post*, p. 877.

Felony: punishable with penal servitude for life or for not less than three years, or imprisonment with or without hard labour, not exceeding two years, or with fine, in addition to or without such other punishment.—24 & 25 *Vict. c.* 100, *s.* 5; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence for the Prosecution.

The evidence on indictments of murder and manslaughter is the same except on the question of "malice aforethought" (*post*, p. 786). It is said that in manslaughter the prosecution must prove all the circumstances under which the homicide took place, and that in murder it is sufficient to prove the homicide. But in practice this distinction is not now made.

One J. N.]—It must be proved that J. N. was the person killed, otherwise the defendant must be acquitted, unless the variance be amended at the trial (*ante*, p. 300). If the name of the deceased be unknown, it should be stated so in the indictment. *See ante*, p. 56. The person killed must be in the King's peace. This includes even persons under sentence of death. *See Commonwealth* v. *Bowen*, 13 *Mass.* 91.

If the deceased were an alien enemy, and killed in the actual heat and exercise of war, this is matter of justification, as the alien is not in the King's peace, which may be proved on the part of the defendant. *See* 1 *Hale*, 433; 3 *Co. Inst.* 50.

But killing even an alien enemy within the kingdom, unless in the actual exercise of war, would be murder. 1 *Hale*, 433. The same rule applies where an alien enemy is charged with killing a British subject. *R.* v. *Depardo, R. & R.* 134; 1 *Taunt.* 26; 9 *R. R.* 693. And it is no matter either of excuse or justification, that the deceased was an outlaw, or one attained of præmunire. 1 *Hale*, 433; *and see Commonwealth* v. *Bowen, ubi supra.*

Feloniously, wilfully, and of his malice aforethought did kill and murder.]—The law presumes every homicide to be murder until the contrary appears. On charges of murder a distinction is drawn by *Coke* (3 *Inst.* 51) and *Hale* (1 *P. C.* 451) between "express malice," or "malice in fact," and "implied malice," or "malice in law." For a criticism of this distinction, *see post*, p. 768, *and Steph. Dig. Cr. Law* (6th ed.) p. 407; *and see* 3 *Steph. Hist. Cr. Law*, p. 18; *Encycl. Eng. Law, tit.* "*Murder.*" According to Mr. Justice *Foster*, p. 255, "In every charge of murder, *the fact of killing being first proved*, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner unless they arise out of the evidence produced against him, for the law presumeth the fact to have been founded in malice until the contrary appeareth;" *cf. R.* v. *Noon*, 6 *Cox*, 137, *Cresswell*, J. Therefore the prosecutor is not bound to prove malice, or any facts or circumstances beside the homicide, from which the jury may presume it; and it is for the defendant to give in evidence such facts and circumstances as may

prove the homicide to be justifiable or excusable, or that at most it amounted to manslaughter. *Id. R.* v. *Greenacre*, 8 *C. & P.* 35. Thus upon an indictment for manslaughter by negligent driving, on proof being given of the killing, it was held to lie on the accused to show that he had driven with proper skill and care. *R.* v. *Cavendish*, *Ir. Rep.* 8 *C. L.* 178. (*See post*, p. 801, *et seq.*) But it is said to be proper to call as witnesses for the prosecution all persons present when the killing took place to give all available accounts of the circumstances of the killing. *R.* v. *Holden*, 8 *C. & P.* 606; *and see ante*, p. 414.

In cases of express malice, homicide is usually committed in secret, and it is rarely practicable to substantiate it by direct and positive testimony; in most cases, therefore, the guilt of the defendant can be established upon circumstantial evidence merely. Upon this subject it is only necessary to refer to what has been already said upon the doctrine of presumptions (*ante*, p. 339), repeating here merely the caution laid down by Lord *Hale* (*ante*, p. 339), never to convict a man of murder or manslaughter on circumstantial evidence alone, unless the body has been found. 2 *Hale*, 290; 11 *St. Tr.* 464, *n.* This caution need not be followed where very strong circumstantial evidence of death can be given. (*a*) *See R.* v. *Hindmarsh*, 2 *Leach*, 569: *R.* v. *Perry*, 14 *St. Tr.* 1312: *and see* 1 *Russ. Cr.* (6th ed.) 158, 159: *R.* v. *Hopkins*, 8 *C. & P.* 591: *R.* v. *Cheverton*, 2 *F. & F.* 833, *Erle*, J.

The circumstantial evidence necessary to establish murder or manslaughter ought to be overwhelmingly strong. *R.* v. *Hodge*, 2 *Lewin*, 227: *R.* v. *Gardner*, 1 *F. & F.* 669, *Bramwell*, B.: *R.* v. *Franz*, 2 *F. & F.* 580, *Blackburn*, J.

In cases of implied malice (*see post*, p. 786), the homicide is usually committed in the presence of others, who may prove it; if not, it must be proved by circumstantial evidence.

It must also be shown that the deceased died of the wound or other injury given him by the defendant, within a year and day after he received it: for if he died after that time, the law would presume that his death had proceeded from some other cause. 1 *Hawk. c.* 31, *s.* 9; 1 *East*, *P. C.* 344. In *R.* v. *McIntyre*, 2 *Cox*, 379, *Coleridge*, J., where a blow was given which in the opinion rendered a restorative necessary, and the injured person being unable to swallow was choked in administering the restorative, it was held that the death was caused by the blow. If a man have a disease, which in all likelihood would terminate his life in a short time, and another give him a wound or hurt which hastens his death, this is such a killing as constitutes murder (1 *Hale*, 427), or at the least manslaughter. *R.* v. *Murton*, 3 *F. & F.* 492, *Byles*, J. Upon a trial for manslaughter, it appeared that the deceased, at the time of the blow given, was in an infirm state of health, and this circumstance was observed upon on behalf of the prisoner, but *Parke*, J., in summing up, said, "It is said that the deceased was in a bad state of health, but that is perfectly immaterial, as, if the prisoner was so unfortunate as to accelerate her death, he must answer for it." *R.* v. *Martin*, 5 *C. & P.* 128; *and see R.* v. *Wall*, 28 *St. Tr.* 51, 145, *Macdonald*, C.B.

If a man be wounded, and the wound turn to a gangrene or fever for

(*a*) In *Upington* v. *Solomon* [1879] 9 *Buchanan*, *Cape Supreme Court Reports*, 240, at p. 276, *Sir H. de Villiers*, C.J., said: "I never understood the law as to the *corpus delicti* to go so far as to hold that where witnesses swear that they saw the person shot by means of a gun, and where they saw the deceased actually dying, a jury may be called upon to say that there is no proof of death whatsoever. I have always understood this rule as to *corpus delicti* to apply to those cases in which death is relied upon from the fact of the disappearance of the deceased." *See also R.* v. *Kenniff* [1903] *Queensland St. Rep.* 17.

want of proper applications, or from neglect, and the man die of the gangrene or fever: *see R.* v. *Flynn*, 16 *W. R.* 319 (*C. C. R. Ir.*); or if it become fatal from the refusal of the party to undergo a surgical operation (*R.* v. *Holland*, 2 *M. & Rob.* 351); or if death result from an operation rendered advisable by the act of the accused (*R.* v. *Davis*, 15 *Cox*, 174, *Mathew*, J.); this is homicide, and murder or not, according to the circumstances under which the wound is given. 1 *Hale*, 428. But if it appeared that the man's death was caused by improper applications to the wound, and not by the wound itself, it would be otherwise. *Id.* Murder may be committed without any stroke or wound; *e.g.*, by neglect or ill-treatment. *R.* v. *Huggins*, 17 *St. Tr.* 309, 374; 2 *Ld. Raym.* 1574; *and see post*, p. 783.

Evidence for the Defendant.

The defendant has to prove, either that the murder was not committed by him, or that the offence actually committed does not amount to murder. This defence may be, and frequently is, made out by the examination in chief of the witnesses for the prosecution; but if not, it may be proved from their cross-examination, or by witnesses called for the defence.

We have seen (*ante*, p. 780) that the prosecutor is not bound to prove that the homicide was committed from malice prepense. If he prove the homicide, the law presumes the malice; but the defendant may rebut the presumption, by proving that the homicide was *justifiable*, or *excusable* (*see* 24 & 25 *Vict. c.* 100, *s.* 7, *ante*, p. 776), or that at most it amounted to *manslaughter* only, and not to *murder*.

Justifiable homicide is of three kinds:—1. Where the proper officer executes a criminal in strict conformity with his sentence. 2. Where an officer of justice, or other person acting in his aid, in the legal exercise of a particular duty, kills a person who resists or prevents him from executing it. 3. Where the homicide is committed in prevention of a forcible and atrocious crime: as, for instance, if a man attempt to murder or rob another, and be killed in the attempt, the slayer shall be acquitted and discharged. *See Bracton de Coronâ, ff.* 120 *b*, 121; 1 *Hale*, 487, 488; 1 *Hawk. c.* 28; 24 & 25 *Vict. c.* 100, *s.* 7 (*ante*, p. 776).

Excusable homicide is of two kinds:—1. Where a man doing a *lawful* act, without any intention of hurt, by accident kills another; as, for instance, where a man is working with a hatchet, and the head by accident flies off, and kills a person standing by. This is called homicide *per infortunium*, or by misadventure: *see Stanley* v. *Powell* [1891] 1 *Q. B.* 86; *Fost.* 264. 2. Where a man kills another upon a sudden encounter, merely in his own defence, or in defence of his wife, child, parent, or servant, and not from any vindictive feeling; which is termed homicide *se defendendo*. *See* 24 & 25 *Vict. c.* 100, *s.* 7 *and note* (*ante*, p. 776).

Definitions of Murder and Manslaughter.

Murder is thus defined or described by Lord *Coke* (3 *Inst.* 47): "Where a person of sound memory and discretion—unlawfully killeth—any reasonable creature in being—and under the king's peace (*ante*, p. 780) —with malice aforethought, either express or implied" (*post*, p. 786).

Manslaughter is the unlawful and felonious killing of another without any malice either express or implied. *R.* v. *Taylor*, 2 *Lewin*, 215; *and*

see Steph. Dig. Cr. L. (6th ed.) 409. It is of two kinds:—(*a*) Involuntary manslaughter; where a man, doing an *unlawful act* not amounting to felony, by accident kills another (*see R.* v. *Franklin*, 15 *Cox*, 163, *post*, p. 800); or where a man, by *culpable neglect of a duty* imposed upon him, is the cause of the death of another. And it may be stated generally, that that which constitutes murder, if done by design and of malice prepense in the eye of the law, constitutes manslaughter when arising from culpable negligence. *See R.* v. *Hughes*, *Dears. & B.* 248; 26 *L. J.* (*M. C.*) 202 (*C. C. R.*). (*b*) Voluntary manslaughter; where upon a sudden quarrel, two persons fight, and one of them kills the other; or where a man greatly provokes another, by some personal violence, etc., and the other immediately kills him.

1. *Murder* and *manslaughter* can be committed only by a person of sound memory and discretion. They cannot be committed by an idiot, lunatic, or infant, unless, indeed, he show a consciousness of doing wrong, and a discretion or discernment between good and evil. 4 *Bl. Com.* 195; 1 *Hawk. c.* 1. (*See ante*, pp. 11, 22–30.) On the trial of a child of thirteen years of age for murder by poisoning, *Pollock*, C.B., in drawing the distinction between murder and manslaughter, laid it down that no one could commit murder unless he was conscious that the act done was one which would be likely to cause death. *R.* v. *Vamplew*, 3 *F. & F.* 520. But if any person procure a madman, etc., to murder another, the procurer is guilty of the murder; 1 *Hawk*, *c.* 31, *s.* 7; although, perhaps, not present at the time it was committed. (*See ante*, p. 12.) It is no defence on behalf of a foreigner, charged in England with an offence committed here, that he did not know he was doing wrong, the act not being an offence in his own country. *R.* v. *Esop*, 7 *C. & P.* 456.

2. The killing must be unlawful and not excusable or justifiable. It may be by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome. 4 *Bl. Com.* 193; 1 *Hale*, 431; 1 *Hawk. c.* 31, *s.* 4. Taking away a man's life by perjury is not, in law, murder; *see R.* v. *Macdaniel*, *Fost.* 131; 19 *St. Tr.* 745; 1 *Leach*, 44; 1 *East*, *P. C.* 333; *and see* 4 *Bl. Com.* 196, *n.*; although *in foro conscientiæ* it is as much so as killing with a sword. If a man, however, do any other act, of which the probable consequence may be and eventually is death, such killing may be murder, although no stroke were struck by himself; as was the case of the gaoler, who caused the death of a prisoner by imprisoning him in unwholesome air; *R.* v. *Huggins*, 17 *St. Tr.* 309, 376; 2 *Ld. Raym.* 1574, 1585; *cf. R.* v. *Acton*, 17 *St. Tr.* 462, 511, 526, 546: *R.* v. *Bambridge*, *Id.* 383, 397; of the unnatural son, who exposed his sick father to the air against his will, by reason whereof he died; 1 *Hawk. c.* 31, *s.* 5; of the harlot, who laid her child in an orchard, where a kite struck it and killed it, *Crompton*, 24: of the mother, who hid her child in a pig-stye, where it was devoured; and of the parish officers, who moved a child from parish to parish till it died from want of care and sustenance. 1 *Hale*, 431, 433; 4 *Bl. Com.* 197; 1 *Hawk. c.* 31, *s.* 6. So, where an indictment charged the death of a child to have been caused by its mother casting and throwing it on a heap of ashes, and leaving it there in the open air exposed to the cold, whereby it died, this was held to contain a sufficient charge of murder, inasmuch as it alleged a *misfeasance*; but if it had charged the death to have been occasioned by a mere *nonfeasance*, in the neglect of the defendant's maternal duties, it would have been bad, unless it had also showed that the child was of so tender an age, or was placed in such a situation, as to be unable to take care of itself. *R.* v. *Waters*, 1 *Den.* 356; 2 *C. & K.* 864; 18 *L. J.* (*M. C.*) 53; 3 *Cox*, 300; *and see R.* v. *Pinhorn*, 1 *Cox*, 70;

R. v. *Hogan*, 2 *Den.* 277; 20 *L. J.* (*M. C.*) 219: *R.* v. *Cooper*, 1 *Den.* 459; 2 *C. & K.* 876; 18 *L. J.* (*M. C.*) 168: *R.* v. *Phillpot*, *Dears.* 179; 22 *L. J.* (*M. C.*) 113 (*C. C. R.*): *R.* v. *Walters*, *C. & Mar.* 164. So, where an apprentice died from harsh treatment, and want of care upon the part of his master, whilst he was labouring under disease; this was held to be murder in the master. *R.* v. *Squire*, 3 *Russ. Cr.* (6th ed.) 13. But where the death of an apprentice results rather from incautious neglect by the master, however culpable, than from actual malice or wilful intention to injure, or obstinate and reckless persistence in doing an act necessarily attended with danger, a verdict of manslaughter may properly be returned. *R.* v. *Self*, 1 *East*, *P. C.* 226; 1 *Leach*, 137; *and see R.* v. *Crumpton*, *C. & Mar.* 597. But if the charge be of a *nonfeasance*, as in neglecting to supply food, the prosecutor must not only show a duty in the defendant to supply food, but also that the apprentice (or child) was of tender years, and unable to provide for himself; *R.* v. *Friend*, *R. & R.* 20: *R.* v. *Marriott*, 8 *C. & P.* 425; and that the defendant was in the actual possession of means to provide for him; *R.* v. *Saunders*, 7 *C. & P.* 277: *R.* v. *Edwards*, 8 *C. & P.* 611: *R.* v. *Chandler*, *Dears.* 453; 24 *L. J.* (*M. C.*) 109; 6 *Cox*, 519; the mere fact that he might have obtained such means by application to the guardians of the poor or to a relieving officer was not sufficient. *R.* v. *Chandler*, *ubi supra*: *R.* v. *Rugg*, 12 *Cox*, 16 (*C. C. R.*). In *R.* v. *Jones*, 19 *Cox*, 678, on a charge of manslaughter by neglect, it was held that presumptive evidence of means had been given by proof that the prisoner at a date prior to the offence had such means as, having regard to the circumstances, would presumably not be exhausted by the date of the neglect. Under *s.* 23 (2) of the *Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15), *post*, p. 885, neglect to provide for the maintenance, etc., of a child is not excused by inability to do so without resort to the poor law. *See R.* v. *Mabbett*, 5 *Cox*, 339. If the death of a destitute person arises from neglect by a relieving officer to provide medical assistance, the officer may be convicted of manslaughter. *R.* v. *Curtis*, 15 *Cox*, 746, *Hawkins*, J. It has been held, on the authority of *R.* v. *Squire*, and *R.* v. *Saunders*, *ubi supra*, that where a husband and wife are living together, the legal obligation to maintain is on the husband, and that the wife cannot be convicted of manslaughter by neglect to supply proper food or medical aid. *R.* v. *Forsyth*, *Chester Summer Assizes*, *July* 25, 1899, *Kennedy*, J.: *see R.* v. *Senior* [1899] 1 *Q. B.* 283; 68 *L. J.* (*Q. B.*) 175 (*C. C. R.*); 17 *Cox*, 602. If a grown-up person chooses to undertake the charge of a human creature, helpless either from infancy, simplicity, lunacy, or other infirmity, he is bound to execute that charge without wicked negligence; and if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence, that person is guilty of manslaughter. Mere negligence will not do; there must be *wicked* negligence, that is, negligence so great as to satisfy a jury that the prisoner had a wicked mind in the sense that he was reckless and careless whether the creature died or not. *R.* v. *Nicholls*, 13 *Cox*, 75, *Brett*, J. If a person has the custody of another who is helpless, and leaves that other with insufficient food or medical attendance, and so cause his death, he is criminally responsible. *R.* v. *Marriott*, 8 *C. & P.* 425: *R.* v. *Instan* [1893] 1 *Q. B.* 450 (*C. C. R.*); 62 *L. J.* (*M. C.*) 86; 17 *Cox*, 602: *R.* v. *Senior* [1899] 1 *Q. B.* 283, 292 (*C. C. R.*). But if a person, having the exercise of freewill, chooses to stay in a place where he receives insufficient food, and his health is injured, and death supervenes, the master is not criminally responsible. *R.* v. *Smith*, *L. & C.* 607, 625; 10 *Cox*, 82; 34 *L. J.* (*M. C.*) 153, 162, *Erle*, C.J.; *and see post*, p. 872. As to the

facts necessary to support an indictment for killing or misusing a lunatic, *see R.* v. *Pelham*, 8 *Q. B.* 959; 15 *L. J.* (*M. C.*) 105. As to the obligation of a husband to supply necessaries for a wife living apart from him, and his liability if she dies for want of them, *see R.* v. *Plummer*, 1 *C. & K.* 600.

So, if one, under a well-grounded apprehension of personal violence, does an act which causes his death, as, for instance, jumps out of a window, or into a river, he who threatened is answerable for the consequences. *R.* v. *Evans*, 3 *Russ. Cr.* (6th ed.) 12: *R.* v. *Hickman*, 5 *C. & P.* 151: *R.* v. *Pitts*, *C. & Mar.* 284. *R.* v. *Evans* was followed in a colonial case (*R.* v. *Grimes* [1894] 15 *N. S. W. Rep.* (*Law*), 209), where a Chinaman had been robbed and brutally assaulted in a train, and thinking that his

Page 785, *lines* 36, 37.

R. v. *Knights* was followed in *R.* v. *Izod*, 20 *Cox*, 690, *Channell*, J., where it was held that to warrant the conviction of a woman for the manslaughter of her newly-born child, she must be proved to have been guilty of negligence towards the child after it was completely born. In the latter case the correctness of the ruling of *Brett*, J., in *R.* v. *Handley*, as cited on p. 752 of the 22nd edition of this work (p. 785 of the present edition), was doubted by *Channell*, J., and it is pointed out in the note to the report of *R.* v. *Izod* that the exact words of the direction of *Brett*, J., to the jury in *R.* v. *Handley* (13 *Cox*, at p. 81) were: "But supposing that the prisoner had not made up her mind that the child should die, yet had determined that none but herself should be present at its birth, without intending final concealment, but only for the purpose of hiding her shame for a time, and had to that intent delivered herself, she would, in the eye of the law, have invested herself with a responsibility from the moment of birth, viz., that of the care and charge of a helpless creature; and if, after having assumed such care and charge, she allowed the child subsequently to die from her wicked negligence, that would make her guilty of manslaughter. . . . If they (the jury) were satisfied that the mother, having made up her mind to be alone at the birth, caused its death by wicked negligence after its birth, they would return a verdict of guilty."

called to the ruling in *R.* v. *Knights*, *ubi supra*; *and see R.* v. *Middleshi* 5 *Cox*, 275, *Erle*, J. In *R.* v. *Pritchard* [1901] 17 *T. L. R.* 310; 5 *L. J. Newsp.* 119, *Wright*, J., stated that the third proposition wa not a full statement of the law. So, if a mortal wound be given t a child whilst in the act of being born, for instance, upon the head as soon as the head appears and before the child has breathed, it may be murder, if the child is afterwards born alive and dies thereof. *R.* v. *Senior*, 1 *Mood. C. C.* 346; 1 *Lewin*, 183, *n.* But it must be proved that

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3. The person killed must be "a reasonable creature in being and under the King's peace." Therefore, to kill a child in its mother's womb is no murder; but if the child be born alive, and die by reason of the potion or bruises it received in the womb, it may be murder in the person who administered or gave them. 3 *Co. Inst.* 50: 1 *Hawk. c.* 31, *s.* 16: 1 *Hale*, 433. Thus, if a person, intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world; the person who by this misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder; and the mere existence of a possibility that something might have been done to prevent the death will not render it less murder. *R.* v. *West*, 2 *C. & K.* 784; 2 *Cox*, 500. As to abortion, *see post*, p. 826. But a woman cannot be convicted even of manslaughter merely on evidence that, knowing she was near the time of delivery, she wilfully abstained from taking the necessary precautions to preserve the life of her child after its birth, in consequence of which it died. *R.* v. *Knights*, 2 *F. & F.* 46, *Cockburn*, C.J., and *Williams*, J. But in *R.* v. *Handley*, 13 *Cox*, 79, *Brett*, J., held (1) that a woman is guilty of the murder of her new-born child if, either before or after the birth of the child, she makes up her mind that it shall die, and, the child being born alive, she, with the intent that it shall die, leaves it to die, and it dies in consequence; (2) that she is guilty of murder if, without intending murder, she resolves to conceal the birth of the child by methods which will probably end in its death, and which do end in its death (*see post*, p. 825); and (3) that she is guilty of manslaughter, if, without intending the death of the child, she determines to be alone at the birth for the purpose of temporary concealment, and the child afterwards dies by reason of her wicked negligence. Before so ruling, the learned judge had his attention called to the ruling in *R.* v. *Knights*, *ubi supra*; *and see R.* v. *Middleship*, 5 *Cox*, 275, *Erle*, J. In *R.* v. *Pritchard* [1901] 17 *T. L. R.* 310; 36 *L. J. Newsp.* 119, *Wright*, J., stated that the third proposition was not a full statement of the law. So, if a mortal wound be given to a child whilst in the act of being born, for instance, upon the head as soon as the head appears and before the child has breathed, it may be murder, if the child is afterwards born alive and dies thereof. *R.* v. *Senior*, 1 *Mood. C. C.* 346; 1 *Lewin*, 183, *n.* But it must be proved that

the entire child has actually been born into the world in a living state; *R.* v. *Poulton*, 5 *C. & P.* 329; and the fact of its having breathed is not conclusive proof thereof. *R.* v. *Sellis*, 7 *C. & P.* 850: *R.* v. *Crutchley*, 7 *C. & P.* 814. There must be an independent circulation in the child before it can be accounted alive. *R.* v. *Enoch*, 5 *C. & P.* 539: *R.* v. *Wright*, 9 *C. & P.* 754. A child is born alive when it exists as a live child, breathing and living by reason of breathing through its own lungs alone, without deriving any of its living or power of living by or through any connection with its mother. *R.* v. *Handley*, 13 *Cox*, 79, *Brett*, J. But the fact of the child's being still connected with the mother by the umbilical cord will not prevent the killing from being murder. *R.* v. *Crutchley*, *ubi supra*: *R.* v. *Reeves*, 9 *C. & P.* 25: *R.* v. *Trilloe*, 2 *Mood. C. C.* 260; *C. & Mar.* 650: *R.* v. *Pritchard* [1901] 17 *T. L. R.* 310, *Wright*, J.

As to killing alien enemies, *see ante*, p. 780.

4. *Malice aforethought. Express malice.*]—To amount to murder, the killing must be committed with malice aforethought. (*See as to proof of malice and intent, ante*, p. 308, *et seq.*) According to the early writers, malice is express or implied. *Express malice* is when one, with a sedate and deliberate mind, and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. 1 *Hale*, 451. Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act as shows him to be an enemy to mankind in general; as going deliberately with a horse used to strike, or discharging a gun amongst a multitude of people. 1 *Hawk. c.* 29, *s.* 12: *c.* 31, *s.* 8. So, if a man resolve to kill the next person he meets, and do kill him, it is murder, although he knew him not; for it is universal malice. 4 *Bl. Com.* 200. And it may be necessary here to observe, that no provocation, however great, will extenuate or justify homicide, where there is evidence of express malice. *See R.* v. *Mason*, *Fost.* 132. So, where A. and B. having fallen out, A. said he would not strike, but would give B. a pot of ale to strike him; upon which B. did strike, and A. thereupon killed him; this as held to be murder. 1 *Hawk. c.* 31, *s.* 24. For criticism of these definitions, *see Steph. Dig. Cr. Law* (6th ed.), 407. As to the effect of proof that the defendant was drunk when he committed the homicide on the question of his malice, *see R.* v. *Doherty*, 16 *Cox*, 306, *Stephen*, J., *and ante*, p. 29. As to the effect of proving that the prisoner is insane, *see ante*, pp. 23–29, 183, 221.

Implied malice.]—And in many cases, where no malice is expressed or openly indicated, the law will imply it. Thus, where a man wilfully poisons another—in such a deliberate act the law presumes malice, though no particular enmity can be proved. 1 *Hale*, 455. So if a man kill another suddenly, without any, or without a considerable provocation; if he kill an officer of justice in the legal execution of his duty; or if, intending to do another *felony* (*see post*, p. 798), he undesignedly kill a man; in all these cases the law implies malice, and the offence is murder. But in all but the last of these cases there seems to be an intent to do bodily harm. *Steph. Dig. Cr. Law* (6th ed.), 409.

If two persons mutually agree to commit suicide together, and accordingly take poison or attempt to drown themselves together, but only one of them dies, the survivor is guilty of murder. *R.* v. *Dyson*, *R. & R.* 523; *R.* v. *Alison*, 8 *C. & P.* 418, *Patteson*, J.: *R.* v. *Jessop*, 16 *Cox*, 204, *Field*, J., *R.* v. *Stormonth*, 61 *J. P.* 729, *Ridley*, J.: *R.* v. *Abbott* 67 *J. P. Rep.* 151,

Kennedy, J. In like manner, where A. procures a drug, and gives it to B. with her assent, in order that she may take it to procure abortion, and B., believing herself (though not being) pregnant, takes it for that purpose, and dies from its effects, this, it seems, is *murder* in A. In such a case, however, a conviction for *manslaughter* (for which offence only the grand jury had found a bill) was upheld. *R.* v. *Gaylor, Dears. & B.* 288; 7 *Cox*, 253 (*C. C. R.*). So where an indictment charged W. with murdering herself with arsenic, and the prisoner with inciting her to commit the said murder, and it appeared on the trial that W., who was pregnant, was persuaded by the prisoner to take arsenic for the purpose of procuring miscarriage, that she received the arsenic from him and took it, in his absence, with intent to procure miscarriage, it was held that the prisoner was an accessory before the fact to the self-murder of W. *R.* v. *Russell*, 1 *Mood C. C.* 356. But where the prisoner, at the request of a pregnant woman who wished to procure abortion, obtained for her a poisonous drug, knowing the purpose for which she wanted it, but being unwilling that she should use it, but she did use it and died in consequence, it was held that the prisoner was not guilty of murder. *R.* v. *Fretwell, L. & C.* 161; 31 *L. J.* (*M. C.*) 145; 9 *Cox*, 152 (*C. C. R.*): *but see* 24 *&* 25 *Vict. c.* 100, *ss.* 58, 59 (*post*, p. 826); and as to unintentional homicide in consequence of criminal acts, *see post*, p. 797, *et seq.*

As there are very many nice distinctions, however, upon this subject of malice prepense, express and implied, it may be desirable to consider the subject more fully and minutely, which we shall do under the following heads.

Killing by poison, or by surgical instruments.]—Of all the forms of death by which human nature may be overcome, the most detestable is that of poison; because it can of all others be the least prevented either by manhood or forethought. 3 *Co. Inst.* 48. And therefore, in all cases where a man wilfully administers poison to another, 1 *Hale*, 455, or lays poison for him, and either he or another takes it, and is killed by it (*Id.* 431), the law implies malice, although no particular enmity can be proved. 4 *Bl. Com.* 34. This rule applies where a man is plied with excessive quantities of drink with intent to kill him, or knowledge that it is likely to kill him. *R.* v. *Packard, C. & Mar.* 236. And if a person knowingly give poison to A. to administer as a medicine to B., but A. neglecting to do so, it is accidentally given to B. by a child or other unconscious agent, this is in law a poisoning by the party himself, as much as if he had administered it with his own hands. *R.* v. *Michael*, 2 *Mood. C. C.* 120; 9 *C. & P.* 356. If, however, it were administered by mistake and without gross negligence, or if it were laid with an innocent intention in the place from which the deceased took it, it is merely homicide by misadventure. So, if a physician or surgeon give his patient a potion or plaister to cure him, which, contrary to expectation, kills him, this also is neither murder nor manslaughter, but misadventure. *Mirror, Book IV., c.* 16 (*Seld. Soc. Publ. Vol. VII.*, pp. 135–139). But the medical man must, at his peril, use proper skill and caution in administering a poisonous drug. *R.* v. *Macleod*, 12 *Cox*, 534. A distinction, indeed, has been taken between the administering of a potion, etc., by a regular physician, etc., and one who is not so, and the death in the latter case is said to be manslaughter at the least; *Britton, c.* 5; 4 *Co. Inst.* 251; but *Hale* very much questions the soundness of this distinction. 1 *Hale*, 430. And it seems that if a person, whether he be a regular practitioner or not, honestly and *bonâ fide* perform an operation, or use a dangerous instrument, which causes the patient's death, he is not guilty of manslaughter; *R.* v. *Van Butchell*, 3

C. & P. 629; but if he be guilty of criminal misconduct, arising from gross ignorance or criminal inattention, and not from mere error of judgment, then he will be guilty of manslaughter. *R.* v. *Williamson*, 3 *C. & P.* 635: *R.* v. *Spiller*, 5 *C. & P.* 333: *R.* v. *Chamberlain*, 10 *Cox*, 486: *R.* v. *Simpson*, 1 *Lewin*, 172: *R.* v. *Ferguson*, *ib.* 181: *R.* v. *Spilling*, 2 *M. & Rob* 107: *R.* v. *Macleod*, 12 *Cox*, 534. In *R.* v. *Long*, 4 *C. & P.* 398, 423, where the defendant, not a regular physician, killed a woman by an application, and the jury found that he entertained a criminal disregard of human life, he was convicted of and punished for manslaughter. *See R.* v. *Senior*, 1 *Mood. C. C.* 346; 1 *Lewin*, 183, *n.*: *R.* v. *Ellis*, 2 *C. & K.* 470. In *R.* v. *Webb*, 1 *M. & Rob.* 405; 2 *Lewin*, 196: Lord *Lyndhurst* laid down the following rule:—"In these cases there is no difference between a licensed physician or surgeon and a person acting as physician or surgeon without licence. In either case, if a party having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. If I entertained the least doubt of this position, I might fortify it by referring to the opinion of Lord *Ellenborough* in *R.* v. *Williamson* (*ubi supra*). I shall leave it to the jury to say, first, whether death was occasioned or accelerated by the medicines administered; and if they think it was, then I shall tell them, secondly, that the prisoner is guilty of manslaughter, if they think that in so administering the medicine he acted with a criminal intention or from very gross negligence." *See also R.* v. *Crick*, 1 *F. & F.* 519: *R.* v. *Crook*, *Id.* 521: *R.* v. *Bull*, 2 *F. & F.* 201: *R.* v. *Markuss*, 4 *F. & F.* 356: *R.* v. *Chamberlain*, 10 *Cox*, 486: *R.* v. *Macleod*, 12 *Cox*, 534. Upon such a charge, evidence cannot be gone into, on either side, of former cases treated by the prisoner, but experts can be asked their opinion as to the state of the accused, as shown by his treatment of the case in question. *R.* v. *Whitehead*, 3 *C. & K.* 202, *Maule*, J. Evidence is admissible of the effect on other patients of a drug said to have been used with fatal effects. *R.* v. *Long*, 4 *C. & P.* 398. The prisoner, a druggist, was in the habit of using bottles of a peculiar make and colour in which to send out poisons from his shop. The deceased sent to the prisoner for aconite, to be used as a liniment, and henbane to be taken internally. He also sent two bottles, one for the aconite and one for the henbane, both being bottles of the ordinary kind, but the bottle for the henbane being labelled "henbane," and also with the words "30 drops at a time." The prisoner, by mistake, put the aconite in the henbane bottle, deceased took a dose of it, and was poisoned. On the trial of the prisoner for manslaughter, *Erle*, C.J., put it to the jury that they ought not to call upon the prisoner for his defence, and that they could not convict, unless there was such a degree of complete negligence as the law meant by the word felonious. The prisoner had been put out of his ordinary course by the deceased's sending his own bottles, and although there was no doubt negligence in not observing the label on the bottle, yet the deceased had for years been sending to the shop for aconite, and only rarely for henbane. *R.* v. *Noakes*, 4 *F. & F.* 920. And on an indictment for manslaughter against a medical man by administering poison by mistake for some other drug, it is not sufficient for the prosecution merely to show that the prisoner, who dispensed his own drugs, supplied a mixture which contained a large quantity of poison; they are

bound also to show that this happened through the gross negligence of the prisoner. *R.* v. *Spencer*, 10 *Cox*, 525, *Willes*, J.

Killing by fighting.]—Killing by fighting may be either murder, or manslaughter, or homicide *se defendendo*, according to circumstances.

1. *Quarrels.*]—If two persons quarrel and afterwards fight, and one of them kill the other—in such a case, if there intervened, between the quarrel and the fight, a sufficient cooling time for passion to subside and reason to interpose, the killing would be murder: *Post.* 296; 1 *Hale*, 453; *Lord Morley's Case*, 6 *St. Tr.* 769, 771: *R.* v. *Oneby*, 17 *St. Tr.* 29, 48; 2 *Str.* 766; but if such time had not intervened—if the parties, in their passion, fought immediately, or even if, immediately upon the quarrel, they went out and fought in a field (for this is deemed a continued act of passion), the killing in such a case would be manslaughter only, 3 *Co. Inst.* 51; 1 *Hale*, 453; 1 *Hawk. c.* 31, *s.* 29; *Post.* 295, whether the party killing struck the first blow or not. *Post.* 295; 1 *Hale*, 456; *and see R.* v. *Snow*, 1 *Leach*, 151; 1 *East*, *P. C.* 244; *Re Barronet*, 1 *E. & B.* 1; *and* 1 *East*, *P. C.* 241, 270. *Lord Byron's Case*, 19 *St. Tr.* 1177: *R.* v. *Walters*, 12 *St. Tr.* 114.

Therefore, if two persons deliberately fight a duel, and one of them be killed, the other and his second are guilty of murder, 1 *Hale*, 443, 453: 1 *Hawk. c.* 31, *s.* 31: 1 *East*, *P. C.* 225–241; *see R.* v. *Oneby*, *ubi supra*, no matter how grievous the provocation, or by which party it was given. *R.* v. *Rice*, 3 *East*, 581; 7 *R. R.* 523: *R.* v. *Kinnear*, 2 *B. & Ald.* 462. The second of the deceased also is deemed guilty of murder, as being present aiding and abetting; although Lord *Hale* seems to think the rule of law, as to principals in the second degree, too far strained in that case. 1 *Hale*, 443, 453. *See R.* v. *Murphy*, 6 *C. & P.* 103: *R.* v. *Young*, 8 *C. & P.* 644: *R.* v. *Cuddy*, 1 *C. & K.* 210.

Chance medley.]—Killing in chance medley was by 22 *H.* 8, *c.* 14 and 24 *H.* 8, *c.* 5, distinguished from murder by *malice prepense*. *See* 1 *Hawk. c.* 31, *ss.* 28, 29; 4 *Bl. Com.* 184; *Woodburn's Case*, 16 *St. Tr.* 54, 80. But even in the case of a sudden quarrel, where the parties immediately fight, the case may be attended with such circumstances as will indicate malice on the part of the party killing; and the killing then would be murder, and not merely manslaughter. If, for instance, the party killing began the attack under circumstances of undue advantage—as if A. and B. quarrel, and A. draw his sword and make a pass at B., and B. thereupon draw his sword and they fight and B. is killed; A. would be guilty of murder; for his making the pass before B. had drawn his sword shows that he sought his blood. *Post.* 295. So, where A. and B. quarrelled, and A. threw a bottle at B. and then drew his sword, and B. then threw the bottle back at A. and wounded him, upon which A. immediately stabbed him; this was held to be murder. *R.* v. *Mawgridge*, 17 *St. Tr.* 57; *Kel.* (*J.*) 119. But if the parties at the commencement attack each other upon equal terms, and afterwards, in the course of the fight, one of them in his passion snatch up a deadly weapon and kill the other with it; this would be manslaughter only. *R.* v. *Snow*, 1 *Leach*, 151; 1 *East*, *P. C.* 244: *R.* v. *Taylor*, 5 *Burr.* 2793: *R.* v. *Anderson*, 3 *Russ. Cr.* (6th ed.) 63. But if use of a deadly weapon was intended from the first, the killing is murder. *R.* v. *Whiteley*, 1 *Lewin*, 173: *R.* v. *Kessal*, 1 *C. & P.* 437. So, also use of a deadly weapon used after a feigned reconciliation. *R.* v. *Selton*, 11 *Cox*, 674, *Hannen*, J. Where a third person interferes to stop a fight or assault, and is killed, the killing is murder, unless the deceased

were doing more than was necessary to stop the fight or assault. *R.* v. *Bourne*, 5 *C. & P.* 120.

The proper direction for the jury in such cases seems to be that given in *R.* v. *Smith*, 8 *C. & P.* 160, 162, by *Bosanquet*, J., with the concurrence of *Bolland*, B., and *Coltman*, J.:—"Did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon? If he did, it will amount to murder. But if he did not enter into the contest with the intention of using it, then the question will be, did he use it in the heat of passion in consequence of an attack made upon him? If he did, then it will be manslaughter. But there is another question, did he use the weapon in defence of his own life? Before a person can avail himself of that defence he must satisfy the jury that the defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger. If he used the weapon having no other means of resistance and no means of escape, in such case, if he retreated as far as he could, he would be justified." Where after mutual blows between the defendant and the deceased the defendant knocked the deceased down, and after he was upon the ground, stamped upon his stomach and belly with great force, and thereby killed him; this was held to be only manslaughter. *R.* v. *Ayes*, *R. & R.* 166: *cf. R.* v. *Rankin*, *R. & R.* 43: *R.* v. *Brown*, 1 *Leach*, 176. But where two men fought, and one overpowered the other, and put a rope round his neck and strangled him, it was held murder. *R.* v. *Shaw*, 6 *C. & P.* 372: *and see R.* v. *Thorpe*, 1 *Lewin*, 171.

So, if there be any other circumstances in the case indicative of malice in the party killing, it will be murder. As, for instance, if two persons fight upon a sudden quarrel, and be separated, and one of them afterwards, having provided himself with a deadly weapon, lies in wait for the other, to have an opportunity, thus armed, to renew the quarrel, and they accordingly meet, quarrel, and fight, and the man who is armed kills the other, this is murder. *See R.* v. *Snow*, 1 *Leach*, 151; 1 *East*, *P. C.* 244, 245: *R.* v. *Whiteley*, 1 *Lewin*, 173. So, if two persons fight from malice, and pretend or feign a reconciliation, and they afterwards meet and suddenly fight upon the score of the old malice, and one of them be killed, this is murder, and not merely manslaughter. 1 *Hale*, 451. So, if B. challenge A., and A. refuse to meet him, but tell him that he shall be on his way to such a place upon business at such a time, and B. meets him on the way and assaults him, and they fight, and A. kills B.: if it appear that A. made this communication for the purpose of evading the law, by giving the fight the appearance of a sudden quarrel, the killing would be murder; but if the communication were made undesignedly it would be manslaughter only. 1 *Hawk. c.* 31, *s.* 25.

2. *Unlawful contests.*]—A tilt or tournament, the martial diversion of our ancestors, was nevertheless an unlawful act, unless held under the commandment of the King: *see R.* v. *Coney*, 8 *Q. B. D.* 534, at 549; and so are boxing and sword-playing, the succeeding amusements of their posterity: *see* 1 *East*, *P. C.* 270: *R.* v. *Perkins*, 4 *C. & P.* 537: *R.* v. *Hargrave*, 5 *C. & P.* 170: *R.* v. *Murphy*, 6 *C. & P.* 103; therefore, if a knight in the former case, or a gladiator in the latter, be killed, such killing is manslaughter. 4 *Bl. Com.* 183. And in cases of this kind, however "fair" the fight may have been, all who are present at it and parties to it are equally guilty of manslaughter. *R.* v. *Turner*, 4 *F. & F.* 339. It is said, however, that if the King command or permit such diversion, the act being in that case lawful, the killing would be

misadventure only. *Fost.* 259; *contrà*, *Hale*, 473. And a sparring match with gloves fairly conducted is not unlawful, and therefore death caused by an injury received during such a match, does not amount to manslaughter. *R.* v. *Young*, 10 *Cox*, 371, *Bramwell*, B. If, however, parties meet, intending to fight till one gives in from exhaustion or injury received, such fighting is unlawful, whether the combatants fight in gloves or not. *R.* v. *Orton*, 14 *Cox*, 226 (*C. C. R.*). So also a sparring match with gloves fairly conducted at its commencement may become unlawful if the men fight on until they are so weak that a dangerous fall is likely to be the result of the continuance of the game. *R.* v. *Young*, *ubi supra*. All these cases are fully discussed in *R.* v. *Coney*, 8 *Q. B. D.* 534 (*C. C. R.*). And if, while engaged in a friendly game, as football, one of the players commit an unlawful act whereby death is caused to another, he is guilty of manslaughter. And the act, although in accordance with the rules of the game, would be unlawful if the person committing it intended to produce serious injury to another, or if, committing an act which he knows may produce serious injury, he is indifferent and reckless as to the consequences. *R.* v. *Bradshaw*, 14 *Cox*, 83, *Bramwell*, L.J.: *R.* v. *Moore*, 14 *Times*, *L. R.* 229. In the latter case *Hawkins*, J., refused to allow the rules of the game to be put in evidence, and ruled that the only question for the jury was whether the accused was guilty of illegal violence.

All struggles *in anger*, whether by fighting, wrestling, or in any other mode, are unlawful, and death occasioned by them is manslaughter at the least. *R.* v. *Canniff*, 9 *C. & P.* 359.

3. *Self-defence.*]—If two men fight upon a sudden quarrel, and one of them after a while endeavour to avoid any further struggle, and retreat as far as he can, until at length no means of escaping his assailant remain to him, and he then turn round and kill his assailant in order to avoid destruction; this homicide is excusable, as being committed in self-defence; *Fost.* 277; and, malice apart, it is little matter, in such a case, which struck the first blow at the beginning of the contest. *Id.*; 1 *Hale*, 479, 482; *but see* 1 *Hawk. c.* 29, *s.* 17; 63 *J. P.* 769: *R.* v. *Smith*, 8 *C. & P.* 160. And the same, of course, where one man attacks another, and the latter, without fighting, flies (*see note, post*, p. 797), and then turns round and kills his assailant, as above mentioned. But, in either of these cases, to show that it was homicide *se defendendo*, it must appear that the party killing had retreated either as far as he could, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault would permit him; 1 *Hale*, 481, 483; for the assault may have been so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then, in his defence, if there be no other way of saving his own life, he may kill his assailant instantly. The distinction between this kind of homicide and manslaughter, is, that here the slayer could not otherwise escape, although he would; in manslaughter he would not escape if he could. If, said *Lindley*, J., in *R.* v. *Knock*, 14 *Cox*, 1, 2, a man attacks me, I am entitled to defend myself, and the difficulty arises in drawing the line between mere self-defence and fighting. The test is this: a man defending himself does not want to fight, and defends himself solely to avoid fighting. Then, supposing a man attacks me and I defend myself, not intending or desiring to fight, but still fighting—in one sense—to defend myself, and I knock him down, and thereby unintentionally kill him, that killing is accidental.

And, as the manner of the defence, so is also the time, to be considered; for if the person assaulted do not fall upon the aggressor until the affray

is over, or when he is running away, that is revenge and not defence. 4 *Bl. Com.* 185. Neither, under the cover of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder; for if A. and B. agree to fight a duel, and A. give the first onset, and B. retreat as far as he safely can, and then kill A., this is murder, because of the previous malice and concerted design. 1 *Hale*, 479.

Under this excuse of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused: the act of the relation assisting being construed the same as the act of the party himself. 1 *Hale*, 484; 4 *Bl. Com.* 182. And where under circumstances that might reasonably have induced the belief that a man was cutting his wife's throat their son shot at and killed his father, it was held that if the son had reasonable grounds for believing and honestly believed that his act was necessary for the defence of his mother, the homicide was excusable. *R.* v. *Rose*, 15 *Cox*, 540, *Lopes*, J.

Lord *Bacon* (*Elem. c.* 5; *see also* 1 *Hawk, c.* 28, *s.* 26) mentions a case where two persons being shipwrecked got on the same plank, but, finding it not able to save them both, one of them thrust the other from it, and he is drowned, and says that this homicide is excusable through unavoidable necessity, and upon the principle of self-defence. This dictum is, however, unsupported by authority, and if Lord *Bacon* meant to lay down the broad proposition that a man may save his own life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not now law. *R.* v. *Dudley*, 14 *Q. B. D.* 273, 286; 54 *L. J.* (*M. C.*) 32; 15 *Cox*, 624. Therefore a man who, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder; although at the time of the act he is in such circumstances that he believes, and has reasonable ground for believing, that it affords the only chance of preserving his own life. *Id.* Dr. *Bishop* (*American Criminal Law* (8th ed.), *vol.* 1, *s.* 348 *a*) suggests that the offence was manslaughter only. On the subject of "choice of evils," *see Mayne, Indian Criminal Law* (ed. 1896), p. 364. *R.* v. *Stratton*, 21 *St. Tr.* 1046, 1224.

If, when two persons are fighting, a third comes up, and takes the part of one of them, and kills the other; this will be manslaughter in the third party; 1 *Hawk. c.* 31, *ss.* 35, 36; and murder or manslaughter in the person whom he assisted, according as the fight was deliberate and premeditated, or upon a sudden quarrel. *Id. s.* 55. If the fighting, however, were deliberate, or otherwise of malice, and the third party, when he interfered, knew it to be so, the killing would be murder, both in the party who thus interfered, and in the person whom he assisted. 1 *East, P. C.* 291, 292. If, on the other hand, the third party who thus interferes be killed, it is but manslaughter. *Id.*; *and see Anon.*, 12 *Co. Rep.* 87; *Kel.* (*J.*) 60.

Killing upon provocation.]—No provocation whatever can render homicide justifiable, or even excusable; but provocation may reduce the offence to manslaughter. If a man kill another suddenly, without any, or, indeed, without a considerable provocation, the law implies malice, and the homicide is murder; *R.* v. *Noon*, 6 *Cox*, 137: *R.* v. *Welsh*, 11 *Cox*, 336; but if the provocation were great, and such as must have greatly excited him, the killing is manslaughter only. *R.* v. *Mawgridge*, 17 *St. Tr.* 57; *Kel.* (*J.*) 119, 135; 1 *Hale*, 466; *Fost.* 290, 296, 299. In considering, however, whether the killing upon provocation amounts to murder or manslaughter, the instrument wherewith the homicide was effected must also be taken

into consideration; for if it were effected with a deadly weapon, the provocation must be great indeed to extenuate the offence to manslaughter; if with a weapon or other means not likely or intended to produce death, a less degree of provocation will be sufficient: in fact, the mode of resentment must bear a reasonable proportion to the provocation, to reduce the offence to manslaughter. Where some provoking words being used by a soldier to a woman, she gave him a box on the ear, and the soldier immediately gave her a blow with the pommel of his sword on the breast, and then ran after her, and stabbed her in the back, this was at first deemed murder; but it appearing afterwards that the blow given to the soldier was with an iron patten, and that it drew a great deal of blood, the offence was held to be manslaughter only. *R.* v. *Stedman, Fost.* 292. Where two soldiers demanded to be admitted to a public-house to drink, and the landlord refused, because it was eleven o'clock at night; one of them, however, upon the door being afterwards opened to let out company, rushed in, and whilst the landlord was struggling to get him out, the other soldier struck the landlord on the head with a sharp instrument and killed him: this was held to be murder, notwithstanding the struggle with the other soldier; besides, the landlord had a right to put him out of his house. *R.* v. *Willoughby*, 1 *East, P. C.* 288; 3 *Russ. Cr.* (6th ed.) 42. So, where a park-keeper, having found a boy stealing wood, tied him to a horse's tail, and dragged him along the park, and the boy died of the injuries he thereby received: this was held to be murder. *R.* v. *Halloway, Cro. Cor.* 131; 1 *Hale*, 454. So, in all other cases where, upon a sudden provocation, one beats another in a cruel and unusual manner, so that he dies, it is murder. 4 *Bl. Com.* 199; 1 *Hawk. c.* 31, *s.* 33: *and see R.* v. *Reason and Tranter*, 16 *St. Tr.* 1; 1 *Str.* 499; *Fost.* 292. An unwarrantable imprisonment of a man's person, however, has been held sufficient provocation to make a killing, even with a sword, manslaughter only. *Protector* v. *Buckner, Sty.* 467: *R.* v. *Withers*, 1 *East, P. C.* 233. Therefore, where a constable took a man without a warrant, upon a charge which gave him no authority to do so, and the prisoner ran away, and J. S., who was with the constable all the time, ran after the prisoner, who, to prevent his being retaken, killed J. S.; it was held to be manslaughter only, although, whilst under the charge of the constable, the prisoner struck the man who gave the charge, because a blow under the provocation of the illegal arrest would not justify the constable in detaining him, unless the blow were likely to be followed by dangerous consequences, and formed a new and distinct ground of detainer. *R.* v. *Curvan*, 1 *Mood. C. C.* 132. *See R.* v. *Thompson, Id.* 80 (*post*, p. 807). An order by a policeman to move on given to a person playing music in a street, followed by a push to give effect to the remonstrance, is not provocation excusing use of a dangerous weapon. *R.* v. *Hagan*, 8 *C. & P.* 167. Where A., to prevent B. from fighting with his brother, laid hold of him and held him down, but struck no blow, upon which B. stabbed A.; it was held, that if A. did nothing more than was necessary to prevent B. from beating his brother, and had died of the stab, the offence of B. would have been murder: but that if A. did more than was necessary to prevent the beating of his brother, it would have been manslaughter only. *R.* v. *Bourne*, 5 *C. & P.* 120. If a man pulls another's nose, or offer him any other great personal indignity, and the other thereupon immediately kills him, it is manslaughter only. *Kel.* (*J.*) 135; 4 *Bl. Com.* 191. Or if a man takes another in adultery with his wife, and kills him directly upon the spot, this is manslaughter merely. 1 *Hale*, 486: *R.* v. *Manning, Sir T. Raym*, 212: *R.* v. *Maddy*, 1 *Ventr.* 158: *R.* v *Pearson*, 2 *Lewin*, 216: *R.* v. *Kelly*, 2 *C. & K.* 814. So, if a father sees

another person in the act of committing an unnatural crime with his son, and instantly kills him, it is manslaughter only: but if, hearing of it, he goes in quest of the party and kills him, it is murder. *R.* v. *Fisher*, 8 *C. & P.* 182. Where a boy, after fighting with another, ran home bleeding to his father, and the father immediately took a small cudgel, and ran three-quarters of a mile to the place where the other boy was, and struck him a single blow of the stick, of which blow the boy afterwards died; this was held to be manslaughter only. *Anon.*, 12 *Co. Rep.* 87; *and see Fost.* 294. Where a man was indicted for the murder of his wife, and evidence was given that she assaulted him, to prove the nature of the assault which the accused had reason to apprehend, evidence was admitted of previous assaults and their character and effect. *R.* v. *Hopkins*, 10 *Cox*, 229, *Byles*, J. And where a father, seeing his daughter violently assaulted by her husband, struck the latter a fatal blow in strong resentment, it was held manslaughter. *R.* v. *Harrington*, 10 *Cox*, 370, *Cockburn*, C.J. Where a mob threw a pickpocket into a pond for the purpose of ducking him, but he was unfortunately drowned; this was held to be manslaughter. *R.* v. *Fray*, 1 *East, P. C.* 236.

Insufficient provocation.]—But as a general rule, no words or gestures, however opprobrious or provoking, will be considered in law to be provocation sufficient to reduce homicide to manslaughter, if the killing be effected with a deadly weapon, or an intention to do the deceased some grievous bodily harm be otherwise manifested; *R.* v. *Welsh*, 11 *Cox*, 336; *and see Lord Morley's Case*, 6 *St. Tr.* 769, 771: *R.* v. *Maugridge*, 17 *St. Tr.* 57, 66; *Kel.* (*J.*) 119: *R.* v. *Chetwynd*, 18 *St. Tr.* 289, 312; *Steph. Dig. Cr. Law* (6th ed.), p. 185; but if effected with a blow of a fist, or with a stick, or other weapon not likely to kill, it is manslaughter only. *Fost.* 290, 291; 1 *Hale*, 456. And if there be a provocation by blows, which are not sufficiently violent in themselves to reduce the killing below the crime of murder, yet if they be accompanied by very aggravated words and gestures, this may make it manslaughter only. *R.* v. *Sherwood*, 1 *C. & K.* 556: *R.* v. *Smith*, 4 *F. & F.* 1066. In the case last named the assault was very slight, although of a very offensive nature, spitting in the prisoner's face, but accompanied by words of great provocation. And under special circumstances there may be such a provocation by words as will reduce a killing which would otherwise be murder to manslaughter; for instance, if a husband suddenly hearing from his wife that she had committed adultery, he having had no idea of such a thing before, were thereupon to kill his wife, it *might* be manslaughter. *R.* v. *Rothwell*, 12 *Cox*, 145, *Blackburn*, J.

But in all cases, to reduce a homicide upon provocation to manslaughter, it is essential that the battery, wounding, etc., appear to have been inflicted immediately upon the provocation being given; for if there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kill the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder. *Fost.* 296: *R.* v. *Thomas*, 7 *C. & P.* 817. The prisoner and the deceased, who were previously on intimate terms, were at a public-house drinking, when a scuffle ensued, and the deceased struck the prisoner in the eye and gave him a black eye; the prisoner called for the police and went away upon the policeman coming up; in about five minutes, however, he returned and stabbed the deceased with a knife which he usually carried about him: Lord *Tenterden*, C.J., said that it was not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the offence from murder to

manslaughter; and that, if there had been any evidence of an old grudge between the parties, the crime would probably be murder: but he left it to the jury to say, whether in the interval during which the prisoner was absent, there was time for his passion to cool and reason to gain dominion over his mind; if not, they should find him guilty of manslaughter only. *R.* v. *Lynch*, 5 *C. & P.* 324; *cf. R.* v. *Eagle*, 2 *F. & F.* 827, *Erle*, C.J. Again, where the prisoner was at the house of the deceased's mother, who desired the deceased to turn the prisoner out, and he did so, giving him a kick at the time, upon which the prisoner said he would make him remember it, and went home, about 300 yards, passed through his bedroom to a kitchen adjoining, and into the pantry, where he kept a knife, and having got it, returned hastily, and met the deceased coming towards him with his hat, when a conversation ensued, and they walked together, when the deceased giving the prisoner his hat, the prisoner swore he would have his rights, and stabbed the deceased in two places, saying he had served him right: after this the prisoner ran home, repassed through the rooms to the pantry, and then went to bed, where he was shortly afterwards apprehended, and the knife found on the shelf in the pantry; *Tindal*, C.J., told the jury, that the principal question was, whether the wounds were given by the prisoner whilst smarting under a provocation so recent, as showing that he might be considered at the moment not master of his understanding, in which case it would be manslaughter only; or whether, after the provocation, there had been time for the blood to cool and reason to resume its sway, before the wound was inflicted, in which case the offence would be murder; the jury found the prisoner guilty of murder. *R.* v. *Hayward*, 6 *C. & P.* 157. If there be evidence of express malice, the killing will be murder, however great the provocation. *R.* v. *Mason*, *Fost.* 132; 1 *East*, *P. C.* 239; *and see Fost.* 296: *R.* v. *Kirkham*, 8 *C. & P.* 115.

Killing by correction.—The right of parents, schoolmasters, etc., to inflict chastisement on children or apprentices, is recognized at common law. *Combe's case*, 9 *Co. Rep.* 76 *a*; *Halliwell* v. *Counsell*, 38 *L. T.* (*N. S.*) 176; *Cleary* v. *Booth* [1893] 1 *Q. B.* 465. The right to chastise servants was also recognized at common law. *See R.* v. *Mawgridge*, 17 *St. Tr.* 57, *Kel.* (*J.*) 133; 33 *H.* 8, *c.* 12, *ss.* 6, 12. And shipmasters are said to be entitled to inflict reasonable corporal punishment at sea on seamen for disobeying orders. *The Agincourt*, 1 *Hagg. Adm.* 271: *Lamb* v. *Burnett*, 1 *Cr. & J.* 291. As to servants who are not apprentices, the right is in desuetude. As to seamen, it is controlled by 57 *& 58 Vict. c.* 60, *ss.* 220–238. As to parents, guardians, etc., it is preserved by 4 *Edw.* 7, *c.* 15, *s.* 28 (*post*, p. 886). Where a parent or person *in loco parentis* is moderately correcting his child, a master his servant or scholar, or an officer punishing a criminal, and he happens to occasion his death, it is only misadventure; but if he exceed the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensue, it is manslaughter at the least, and in some cases (according to the circumstances) murder. 1 *Hale*, 474: *R.* v. *Grey*, *Kel.* (*J.*) 64. *And see R.* v. *Wall*, 28 *St. Tr.* 51, 144, 145, *Macdonald*, C.B.: *R.* v. *Bird*, 5 *Cox*, 1, 10: *R.* v. *Drake* [1903] 22 *N. Z. L. R.* 478. Where a master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar's belly, so that each of the sufferers died; these were held to be murders; because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of killing. *Kel.* (*J.*) 133, 134; *Fost.* 262; 1 *Hawk. c.* 29, *s.* 5. So, in all cases where the correction is inflicted with a deadly weapon, and the party dies of it, it will be murder;

if with an instrument not likely to kill, though improper for the purpose of correction, it will be manslaughter. *Fost.* 262. *See R.* v. *Hopley*, 2 *F. & F.* 201. Beating a child for theft so severely as to cause death has been held manslaughter. *Anon.*, 1 *East, P. C.* 261; 3 *Russ. Cr.* (6th ed.) 136. A mother being angry with one of her children, took up a poker, and on his running to the door of the room, which was open, threw it after him and killed another child who was entering the room at the time; and it was held to be manslaughter, although she did not intend to hit the child she threw the poker at, but merely to frighten him; because it was an improper mode of correction. *R.* v. *Conner*, 7 *C. & P.* 438. In *R.* v. *Cheeseman*, 7 *C. & P.* 455, maltreatment and cruel and excessive correction of a child with fatal results by a person *in loco parentis* was held manslaughter only where the defendant honestly believed the child to be malingering. Where the father of a child two years and a half old beat it with a strap on the lower part of its back and on its thighs on its committing some childish fault, and the death of the child was accelerated by the beating, this was held to be manslaughter. *R.* v. *Griffin*, 11 *Cox*, 402. For the prisoner it was urged that there was no case to go to the jury, as the father had a right to correct his child; but *Martin*, B., after consulting with *Willes*, J., ruled that the law as to correction had reference only to a child capable of appreciating correction, and not to an infant two years and a half old, and that although a slight slap might be lawfully given to an infant by her mother, more violent treatment of an infant so young by her father would not be justifiable. *Id.* Where a master struck his servant with one of his wife's clogs, because he had not cleaned them, and death unfortunately ensued, it was held to be manslaughter only, because the clog was very unlikely to cause death, and the master consequently could not have the intention of taking away the servant's life by hitting him with it. *R.* v. *Turner, Comb.* 407, 408, *cit.*: *and see R.* v. *Wiggs*, 1 *Leach*, 378, *n.*; 3 *Russ. Cr.* (6th ed.) 135, where the defendant threw a stick at his sheep-boy for his negligence, and killed him; *R.* v. *Leggett*, 8 *C. & P.* 191, a case of alleged maltreatment of a seaman by the captain and mate of his ship. As to corporal punishment by order of a court martial, *see R.* v. *Wall*, 28 *St. Tr.* 51, 145.

Killing in defence of person or property.]—If any person attempts to rob or murder another in or near the highway (*R.* v. *Bull*, 9 *C. & P.* 22) or in a dwelling-house, or attempts burglariously to break any dwelling-house in the night-time, and is killed in the attempt, the slayer shall be acquitted and discharged; for the homicide is justifiable, and the killing is without felony. *See* 24 & 25 *Vict. c.* 100, *s.* 7 (*ante*, p. 776): *and see* 1 *Hale*, 481, 482. And the same, where a man is killed in attempting to burn a house; 1 *Hale*, 488; or where a woman kills a man who attempts to ravish her; *Bac. Elem.* 34; 1 *Hale*, 485; 1 *Hawk. c.* 28, *s.* 21; or where a man is killed in attempting to break open a house in the daytime, with intent to rob, 1 *Hale*, 488, or to commit any other forcible and atrocious crime. *Bracton Pl. Cor.* 155; *Fost.* 273; 1 *Hale*, 484; *R.* v. *Levett, Cro. Car.* 538, *cit.*; *Fost.* 299: *R.* v. *Cooper, Cro. Car.* 544: *R.* v. *Ford, Kel.* (*J.*) 51; *Fost.* 274: *see R.* v. *Symondson*, 60 *J. P.* 645, *Kennedy*, J. The killing need not be in self-defence, but may be in defence of another against whose person or property serious felony is threatened. *R.* v. *Rose*, 15 *Cox*, 540, *Lopes*, J.: *and see Handcock* v. *Baker*, 2 *B. & B.* 260; 5 *R. R.* 857. Thus not only the party whose person or property is thus attacked, but his servants or other members of his family, and even strangers who are present at the time, are equally justified in killing the assailant. 1 *Hale*,

483; *Post.* 274; *R.* v. *Rose, ubi supra* (*a*). The above rule, however, does not extend to felonies without force, such as picking pockets, 1 *Hale*, 488, nor to misdemeanors of any kind: and even in cases within the rule, it must be proved that the intent to commit such forcible and atrocious crime was clearly manifested by the felon, 1 *Hale*, 484, otherwise the homicide will be manslaughter at least, if not murder. Where a servant set to watch in his master's garden at night, shot a person whom he saw going into his master's hen-roost; it was held that he was not justified in so doing, unless he had fair ground to believe his own life to be in actual danger. *R.* v. *Scully*, 1 *C. & P.* 319; 28 *R. R.* 780: *and see R.* v. *Weston*, 14 *Cox*, 346, *Cockburn*, C.J., as to use of firearms. A constable found a man wrongfully carrying off wood (a misdemeanor); he did not know that the man had been twice before convicted, which made the offence felony. He fired at him and wounded him. Held that he had no justification. *R.* v. *Dadson*, 2 *Den.* 35; 3 *C. & K.* 148; 20 *L. J.* (*M. C.*) 57 (*C. C. R.*). In cases within the rule, it may be necessary to observe, that the party whose person or property is attacked is not obliged to retreat, as in other cases of self-defence, but may even pursue the assailant until he find himself or his property out of danger. 1 *East, P. C.* 271; *Post.* 273; *and see Aldrich* v. *Wright*, 53 *New Hampshire*, 398, where the English authorities are collected. But he must not strike blows except in self-defence. *See R.* v. *Knock*, 14 *Cox*, 1 (*b*).

What we have now said relates to *felonies* by force. In the case of forcible misdemeanors, such as trespass in taking goods, although the owner may justify beating the trespasser, in order to make him desist, yet, if it kill him, it will be manslaughter. 1 *Hale*, 485, 486. Where the defendant had kicked a trespasser out of his house and the injuries received caused the death of the trespasser, this was held to be manslaughter. *R.* v. *Wild*, 2 *Lewin*, 214. Or if, instead of beating him, he attack him with a deadly weapon, it would perhaps be murder, particularly if the wound were given after the party had desisted from the trespass. 1 *Hale*, 473. *See R.* v. *Smith*, 3 *Russ. Cr.* (6th ed.) 132, where a man was shot while masquerading as a ghost. But in defence of a man's house, the owner or his family may kill a trespasser who would forcibly dispossess him of it, in the same manner as he might, by law, kill in self-defence a man who attacks him personally; with this distinction, however, that in defending his house he need not retreat, as in other cases of self-defence, for that would be giving up his house to his adversary. 1 *Hale*, 485, 486.

Personal assaults, where the party assaulted kills his adversary, are considered *ante*, pp. 789–796. The right of killing another in self-defence does not extend to cases where a man is killed at sea, and eaten to save his comrades from otherwise an inevitable starvation. *R.* v. *Dudley*, 14 *Q. B. D.* 273; 54 *L. J.* (*M. C.*) 32; 15 *Cox*, 624 (*ante*, p. 792).

Killing without intention whilst doing another act.]—If a person, whilst

(*a*) In a colonial case, *R.* v. *Theriault* [1894] 32 *New Brunswick*, 504, where, on an indictment for murder, there was evidence that the accused acted under a reasonable apprehension of grievous bodily harm to his wife and family, it was held that this belief was a justification for the homicide on the authority of *R.* v. *Bull* (*ante*, p. 796); and *R.* v. *Smith*, 8 *C. & P.* 160 (*ante*, p. 790).

(*b*) In *Beard* v. *U. S.* [1894] 158 *U. S.* 550, 560, it was held that a man assailed *on his own land* without provocation by a person armed with a deadly weapon and apparently seeking his life was not bound to retreat, but might stand his ground: and is not guilty of murder or manslaughter if he kill his adversary by a blow given simply with the object of protecting himself.

In *Alberty* v. *U. S.*, 162 *U. S.* 499, where the accused had found a man attempting in the night-time to get into his wife's room by a window, it was held that he was right to repel the attempt by force, and was under no obligation to retreat if attacked.

doing or attempting to do another act, undesignedly kill a man—if the act intended or attempted were a felony, the killing is murder; if unlawful, but not amounting to felony, the killing is manslaughter (*R.* v. *Hodgson*, 1 *Leach*, 6; *S. C. sub nom. R.* v. *Hubson*, 1 *East P. C.* 258): if lawful, homicide by misadventure merely. *R.* v. *Woodburn*, 16 *St. Tr.* 54, 80. A distinction appears to have been taken at one time between unlawful acts which are *mala in se*, and *mala prohibita*. But it is doubtful whether this distinction is now of any value, and the unlawfulness of the act would now be determined by the law of England, and not by reference to the law of nature, or any moral standard. *See R.* v. *Senior* [1899] 1 *Q. B.* 283; 68 *L. J. Q. B.* 175: *R.* v. *Instan* [1893] 1 *Q. B.* 450. Thus, homicide in consequence of unlawful assembly is manslaughter; *R.* v. *McNaughten*, 14 *Cox*, 576 (*Ir.*); as is homicide due to an unlawful act in a game of football; *R.* v. *Bradshaw*, 14 *Cox*, 83 (*and see ante*, p. 791); or by kicking out a trespasser. *R.* v. *Wild* (*ante*, p. 797): *R.* v. *Bruce*, 2 *Cox*, 262, *Erle*, J.; and a person selling unwholesome food is liable for manslaughter of persons dying in consequence of eating it: *R.* v. *Stevenson*, 3 *F. & F.* 106: *R.* v. *Kempson*, 28 *L. J. Newsp.* 477 (*and see ante*, p. 2). If a man shoot at another's poultry, with intent to steal them, and by accident kill a man, it has been said to be murder (*see R.* v. *Woodburn*, 16 *St. Tr.* 57, 80); if without such intent, it is manslaughter, the act of shooting at the poultry being unlawful and not felonious; *Fost.* 258; but in *R.* v. *Keate* [1697] *Comb.* 406, 409, *Holt*, C.J., says that Coke's dictum on this subject (3 *Inst.* 56) is "too large. There must be a design of mischief to the person, or to commit a felony or great riot," and considerable doubt was expressed by *Stephen*, J., whether the rule that if a person whilst committing or attempting to commit a felony undesignedly kills a man—as in the case put above, of a person shooting at poultry with intent to steal them—such killing is murder, is not too broadly stated, and whether it ought not to be limited to cases where a person whilst committing or attempting to commit a felony does an act which is known to be dangerous to life, and likely in itself to cause death—as in the case of a person setting fire to a house with intent to defraud—and thus undesignedly killing a man. *R.* v. *Serné*, 16 *Cox*, 311; *and cf. R.* v. *Horsey*, 3 *F. & F.* 287, *Bramwell*, B. Where the prisoner was charged with the murder of a woman as the result of a felonious operation performed by him upon her (24 *& 25 Vict. c.* 100, *s.* 58), *Bigham*, J., told the jury that if they were of opinion that the deceased died as a result of the prisoner's unlawful operation, he was guilty of murder, but added that if they should be of opinion that the prisoner could not as a reasonable man have expected death to result, they might find a verdict of manslaughter. *R.* v. *Whitmarsh*, 62 *J. P.* 711; followed by *Lawrance*, J., in *R.* v. *Bottomley* [1903] *Liverpool Assizes*, 38 *L. J. Newsp.* 270; 115 *L. T. J.* 88; *cf. R.* v. *Radyalski*, 24 *Victoria L. R.* 687: *R.* v. *Dowdle*, 26 *Victoria L. R.* 637. In *R.* v. *Greenwood*, 7 *Cox*, 404, *Wightman*, J., told the jury that they might ignore the doctrine of constructive malice and return a verdict of manslaughter in a case where a child had died in consequence of a felony committed on her by the prisoner. And there appears to be considerable divergence of opinion amongst the judges as to the proper direction to the jury in these cases; *see* 33 *L. J. Newsp.* 546, 615.

If a man deliberately shoot at A., and miss him, but kill B., this is murder. *Fost.* 261; 1 *Hale*, 438, 441. So, if he stab at A., and by accident strike and kill B., it is murder. *R.* v. *Hunt*, 1 *Mood. C. C.* 93: *and see R.* v. *Latimer*, 17 *Q. B. D.* 359 (*C. C. R.*). If a man lay poison for A., and B. (against whom he had no malicious intent) take it, and it kill him, this is likewise murder. 1 *Hale* 436: *R.* v. *Saunders*, *Plowd.* 473:

R. v. *Gore*, 9 *Co. Rep.* 81. So, if whilst two men are deliberately fighting, and a third go between them to part them, and be killed by one of them, it is murder, 1 *Hale*, 441, whether he were killed accidentally or designedly. If a man throw a stone at a horse, and it hit the rider and kill him, it is manslaughter. 1 *Hale*, 39, 475. If, when engaged in an unlawful or dangerous sport, a man kill another by accident, it is manslaughter; *Fost*, 259, 260, 261; 1 *Hale*, 472, 473; 1 *Hawk. c.* 29, *s.* 6; if the sport were lawful and not dangerous, it would be homicide by misadventure merely. *Fost.* 260. So, if a man, intending to kill a person attempting to commit a forcible and atrocious crime against his person or property (*see ante*, pp. 791, 796), by mistake kill one of his own family, it is homicide by misadventure merely. *See Cro. Car.* 538; *Fost.* 299. Where a man is at work with a hatchet, and the head of it flies off and kills a bystander, this is homicide by misadventure. 1 *Hawk. c.* 29, *s.* 2. So, if a man, shooting at game, by accident kill another, it is homicide by misadventure merely, even although the party be unqualified; *Fost.* 259; for the use of firearms by an unqualified person was merely a prohibited act, and not *malum in se* (v. *supra*).

There are two seeming exceptions, however, to the above rule.

First. If two persons be fighting under such circumstances, that if one were killed it would be manslaughter only in the other; if in such a case an innocent party be unintentionally killed by one of them, it is manslaughter only. *Fost.* 262: *R.* v. *Brown*, 1 *Leach*, 148; 1 *East, P. C.* 231, 245, 274. This perhaps is not strictly an exception; for the act in which the parties are engaged, namely, the fighting, is not in itself felonious, although the result of it may be so. *See ante*, p. 789.

Secondly. Where an act of omission or commission, in itself lawful, is at the same time dangerous, it must appear, in order to render an unintentional homicide from it excusable, that the party whilst doing the act, acted without gross negligence, in that he used such a degree of caution as to make it improbable that any danger or injury should arise from it to others; if not, the homicide will be manslaughter at the least, the doctrine being well established that act or omission arising from culpable neglect of duty and having a fatal result is manslaughter, and if done by design or of malice prepense would be murder. *R.* v. *Hughes, Dears. & B.* 248; 26 *L. J.* (*M. C.*) 202; 7 *Cox*, 301 (*C. C. R.*). Where a dangerous and unlawful act is done, even in sport, if death results it is manslaughter: *e.g.* where the prisoners in sport had thrown stones down a coal mine, which broke a scaffolding therein and overturned a corf in which the deceased was, and precipitated him to the bottom of the mine. *R.* v. *Fenton*, 1 *Lewin*, 179, *Tindal*, C.J. If a workman throws stones or rubbish, etc., from a house, and thereby kills a person passing underneath it, it is murder, manslaughter, or homicide by misadventure, according to the degree of precaution taken by him that no person should be injured by them, and to the necessity of such precaution. *R.* v. *Hull, Kel.* (*J.*) 40. If he did it without previously warning the persons beneath, and at a time when it was likely that persons were passing, it would be murder; 3 *Co, Inst.* 57; if at a time when it was not likely that any persons were passing, it would be manslaughter; *Fost.* 262; if in a retired place, where no persons were in the habit of passing, or likely to pass, it would be misadventure merely. *Fost.* 262; 1 *Hale*, 472, 475. But if he previously gave warning to the persons beneath,—then, if it happened in a country village, where few persons pass, it is misadventure only: *Fost.* 263; 1 *Hale*, 472, 475: if in London, or other populous towns, *Kel.* (*J.*) 40, at a time when the streets are full, *Fost.* 263, it would be manslaughter.

Where death results in consequence of a negligent act, it would seem

that to create criminal responsibility the degree of negligence must be so gross as to amount to recklessness. Mere inadvertence, while it might create civil liability, would not suffice to create criminal liability. *See* *R.* v. *Noakes*, 4 *F. & F.* 920: *R.* v. *Markuss*, *ib.* 356, *Willes*, J.: *R.* v. *Finney*, 12 *Cox*, 625, *Lush*, J.: *R.* v. *Doherty*, 16 *Cox*, 306, *Stephen*, J.: *Hammack* v. *White*, 31 *L. J.* (*C. P.*) 131, *Willes*, J. And it is not sufficient to create criminal liability to show that the act which caused death constituted a tort. *R.* v. *Lowe*, 3 *C. & K.* 123; 4 *Cox*, 449, *Campbell*, C.J.: *R.* v. *Franklin*, 15 *Cox*, 163, *Field*, J.: *R.* v. *Doherty*, *ubi supra*.

In all such cases it must appear that the death was the direct and immediate result of the personal neglect or default of the defendant. For instance, where trustees appointed under a local Act for the purpose of repairing roads within a particular district, with a power to contract for executing such repairs, neglected so to contract, and by reason of such neglect one of such roads became out of repair, and a person using it was accidentally killed in consequence of its so being out of repair, it was held that the trustees were not chargeable with manslaughter. *R.* v. *Pocock*, 17 *Q. B.* 34; 6 *Cox*, 172. *And see* *R.* v. *Ledger*, 2 *F. & F.* 857: *R.* v. *Haines*, 2 *C. & K.* 368 (*post*, p. 803).

Contributory negligence.]—It is no defence to an indictment for manslaughter, where the death of the deceased is shown to have been caused in part by the negligence of the prisoner, that the deceased was also guilty of negligence, and so contributed to his own death. *R.* v. *Swindall*, 2 *C. & K.* 230; 2 *Cox*, 141. In summing up, *Pollock*, C.B., said: "The prisoners are charged with contributing to the death of the deceased by their negligence and improper conduct; and if they did so, it matters not whether he was deaf, or drunk, or negligent, or in part contributed to his own death; for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy for damages against the other. But in the case of loss of life, the law takes a totally different view: for there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person." *Id.* This ruling was cited by *Mellor*, J., apparently with approval, in *R.* v. *Dant*, *L. & C.* 567; 10 *Cox*, 102; 34 *L. J.* (*M. C.*) 119 (*C. C. R.*); and *Byles*, J., so laid down the law to the grand jury in directing them in the case of *R.* v. *Hutchinson*, 9 *Cox*, 555, where a major-general was indicted for manslaughter of a man who was killed by a shot from a cannon fired by an artilleryman acting under a superior officer, who was practising under general orders from the major-general. *See* 3 *Russ. Cr.* (6th ed.) 187, 188; and *R.* v. *Longbottom*, 3 *Cox*, 439; *R.* v. *Walker*, 1 *C. & P.* 320; 28 *R. R.* 781. In *R.* v. *Birchall* 4 *F. & F.* 1087, however, *Willes*, J., ruled that where the deceased has contributed to his death by his own negligence, although there may have been negligence on the part of the prisoner, the latter cannot be convicted of manslaughter, observing, that until he saw a decision to the contrary, he should hold that a man was not criminally responsible for negligence for which he would not be responsible in an action. But in *R.* v. *Jones*, 11 *Cox*, 544, the facts of which are set forth at p. 802, *post*, *Lush*, J., ruled that contributory negligence on the part of the deceased was not allowed as an excuse in a criminal case, and upon the case of *R.* v. *Birchall*, *ubi supra*, being cited, stated that that case was quite at variance with what he had always heard laid down. And in

R. v. *Kew*, 12 *Cox*, 355, *Byles*, J., held that contributory negligence on the part of the deceased was no answer to a charge of manslaughter. But it is submitted that evidence which in a civil case might be given to prove contributory negligence, might in a criminal case be relevant to show that the death of the deceased was not due to the culpable negligence of the accused. *See R.* v. *Bunney* [1894] 6 *Queensland L. J.* 80, 82, *Griffith*, C.J.

Animals.]—If a man have a beast that is used to do mischief, and he, knowing it, suffer it to go abroad, and it kill a man, this is manslaughter in the owner. Thus, if a commoner turns out on a common, across which there are public footpaths, a horse which he knows to be vicious, and the horse kicks and kills a child, the commoner is liable to be convicted of manslaughter, even though the child has strayed on to the common a little off the path. *R.* v. *Dant* (*ante*, p. 800). But if he had purposely turned it loose, though merely to frighten people, and to make what is called sport, it is as much murder as if he had incited a bear or dog to worry them. 1 *Hale*, 431; 4 *Bl. Com.* 197.

If a man, breaking an unruly or vicious horse, ride him amongst a crowd, and the horse kick a man and kill him, this is murder, if the rider brought the horse into the crowd with intent to do mischief, or even to divert himself by frightening the crowd; 1 *Hawk. c.* 31, *s.* 68; manslaughter, if done heedlessly and incautiously only. 1 *East. P. C.* 231. *See* 1 *Hale*, 475; 1 *Hawk. c.* 29, *s.* 12.

Carriages.]—If a man, driving a cart or other carriage, drive it over another man and kill him—if he saw or had timely notice of the probable mischief, and yet drove on, it would be murder; 1 *Hale*, 476; *Fost.* 263; if he purposely drove it furiously in amongst a crowd, it would probably be murder; *semble*, if in a street where persons were much in the habit of passing, it would be manslaughter; *per Holt*, C.J., *Anon.*, 1 *East*, *P. C.* 263; if in a place where people did not usually pass, misadventure merely, provided he took that care which persons in similar situations are accustomed to do. *Id.* The degree of care to be used in driving depends on the number of persons or vehicles in the street; *R.* v. *Murray*, 5 *Cox*, 509 (*Ir.*); and if reasonable care and diligence is used, no criminal liability is incurred. Upon an indictment for manslaughter, it appeared that the deceased was walking in the road drunk, when the prisoner, who was in a cart driving two horses without reins, and going at a furious pace, ran over him and killed him; the prisoner had called out twice to the deceased, who, from the state in which he was, and the pace of the horses, could not get out of the road: *Garrow*, B., held this to be manslaughter. *R.* v. *Walker*, 1 *C. & P.* 320; 28 *R. R.* 781. Two persons were riding furiously on horseback along the road; one passed the deceased, who was also on horseback, but the other rode against him, and both fell, the deceased being killed by the concussion: *Patteson*, J., directed an acquittal of the first who passed; and as to the second, told the jury to find him guilty of manslaughter, if they thought that by furious riding he ran against the deceased; but to acquit him if they thought that the deceased's horse was unruly, and ran against the horse of the prisoner. *R.* v. *Mastin*, 6 *C. & P.* 396. A foot-passenger was walking along the road by lamplight, when the defendant, who was near-sighted, drove along at the rate of eight or nine miles an hour, sitting at the time at the bottom of his cart, and ran over the foot-passenger and killed him; and it was held to be manslaughter. *R.* v. *Grout*, 6 *C. & P.* 629; 40 *R. R.* 830. The prisoner drove the deceased (a friend of his) in a trap to some races.

At the races the former became drunk. This was noticed by the deceased, and before commencing the journey home together, he proposed to drive. This, however, the prisoner declined, and insisted upon driving himself. He did so, setting off at a furious rate, standing up and flogging the horse, and finally the trap was upset and the deceased was thrown out and killed: *Lush*, J., directed the jury to find the prisoner guilty of manslaughter if they thought that the carriage was overturned by the prisoner's culpably negligent driving, and that that caused the death of the deceased. *R.* v. *Jones*, 11 *Cox*, 544. If the driver of a carriage race with another carriage and urge his horses to so rapid a pace that he cannot control them, it is manslaughter in both drivers if in consequence the carriage upset and a passenger be killed. *R.* v. *Timmins*, 7 *C. & P.* 499: *R.* v. *Swindall*, 2 *C. & P.* 230; 2 *Cox*, 141 (*ante*, p. 800). *R.* v. *Dalloway*, 2 *Cox*, 273. A lad out of frolic took the trapstick out of the front part of a cart, in consequence of which it upset, and the carman, who was loading sacks therein, was killed; and this was held to be manslaughter. *R.* v. *Sullivan*, 7 *C. & P.* 541. The law as above stated applies to bicycles as well as to other carriages. *R.* v. *Parker*, 59 *J. P.* 793: *R.* v. *Thirgood*, 63 *J. P.* 442.

Vessels.]—To make the captain of a vessel liable for manslaughter in causing a person to be drowned by running down a boat in which he was, it was held that it must be shown that the captain did some act which conduced to the death; and that a mere omission to do the whole of his duty was not sufficient. *R.* v. *Green*, 7 *C. & P.* 156: *R.* v. *Allen*, *Id.* 153; *see R.* v. *Barrett*, 2 *C. & K.* 343: *R.* v. *Haines*, *Id.* 368. In the case of navigation of a river, the same care must be taken as on a public highway on land. *R.* v. *Taylor*, 9 *C. & P.* 672. Gross mismanagement of a boat by the person in charge, whereby it is upset and an occupant drowned, is manslaughter. *R.* v. *Williamson*, 1 *Cox*, 97; *and cf. R.* v. *Waters*, 6 *C. & P.* 328.

Engines and trains.]—Persons in charge of trains are guilty of manslaughter if a fatal accident results from gross and culpable negligence or recklessly negligent conduct. *R.* v. *Trainer*, 4 *F. & F.* 105: *R.* v. *Birchall*, *Id.* 1087: *R.* v. *Gray*, *Id.* 1098: *R.* v. *Elliott*, 16 *Cox*, 710 (*Ir.*). Deliberate or gross neglect of the rules of the railway would amount to gross negligence, but honest errors of judgment would not. *Id.* A man was held not guilty of manslaughter who stopped a steam engine and left it, and in his absence another set it in motion, whereby a man was killed. *R.* v. *Hilton*, 2 *Lewin*, 214. But it was held manslaughter where a man in charge of an engine left it in the care of an ignorant boy, by whose lack of skill another was killed. *R.* v. *Lowe*, 3 *C. & K.* 123; 4 *Cox*, 449, *Campbell*, C.J. Where a fatal accident was caused by a train running off the line at a place where the rails had been taken up without allowing sufficient time to replace them, and without giving sufficient warning to the engine driver, it was held that the foreman of platelayers was liable if his negligence was a material and substantial cause of the accident, although he was under the general directions of an inspector, and though the engine driver had not kept a good look out. *R.* v. *Benge*, 4 *F. & F.* 504. Where the prisoner was employed by the owner of a tramway crossing a public road to warn persons when trucks were crossing the road, with strict orders never to be absent from his post, and the deceased was killed by some trucks, which were travelling on the tramway and crossing the road, of the approach of which he had received no notice from the prisoner, who was absent from his duty; it was held, that there being no duty imposed

by statute upon the owner of the tramway to place a watchman where the tramway crossed the road, the prisoner was merely the private servant of such owner, and that, consequently, his negligence did not constitute such a breach of duty as to make him guilty of manslaughter. *R.* v. *Smith*, 11 *Cox*, 210, *Lush*, J. In *R.* v. *Pittwood*, 19 *T. L. R.* 37; 47 *Sol. J.* 42, 182, *Wright*, J., the prisoner, a gatekeeper on a railway, forgot to close the gates. A man drove over the line and was killed by a train. A contention that the defendant owed no duty to deceased, but only to the railway company, was overruled, and the prisoner was convicted of manslaughter.

Mines.]—Where it appeared that the deceased was employed with others in walling the inside shaft of a colliery, and that it was the duty of the defendant to place a stage on the mouth of the shaft, and the death of the deceased was the direct consequence of the negligent omission on the part of the defendant to perform that duty, he was held to have been properly convicted of manslaughter. *R.* v. *Hughes*, *Dears. & B.* 248; 26 *L. J.* (*M. C.*) 209; 7 *Cox*, 301: *see R.* v. *Gregory*, 2 *F. & F.* 158. Neglect of a duty to ventilate a mine leading to a fatal explosion of fire damp renders the person on whom the duty lay liable to conviction of manslaughter. *R.* v. *Haines*, 2 *C. & K.* 368.

Explosives.]—The defendant made fireworks, contrary to 9 *&* 10 *W.* 3, *c.* 7 (*rep.*), and kept upon his premises a quantity of combustibles for the purpose of his business as a maker of fireworks. In his absence, by the negligence of one of his servants, a fire broke out amongst such combustibles, and a rocket ignited thereby flew across the street, set fire to the opposite house, and caused the death of a person therein. The defendant was held not to be guilty of manslaughter, because the death did not happen by any personal interference or negligence on his part. *R.* v. *Bennett*, *Bell*, 1; 28 *L. J.* (*M. C.*) 27; 8 *Cox*, 74. 9 *&* 10 *W.* 3, *c.* 7, is repealed, but similar provisions are made by the *Explosives Act*, 1875 (38 *&* 39 *Vict. c.* 17), and the regulations made thereunder.

Neglect of the helpless.]—Premeditated neglect or ill-treatment by persons having custody, charge, or control of helpless persons, whether children, imbeciles, or lunatics, or sick or aged, by deliberate omission to supply them necessary food, etc., if attended with fatal results, seems to be murder. *R.* v. *Condè*, 10 *Cox*, 547: *R.* v. *Bubb*, 4 *Cox*, 455: *R.* v. *Self*, 1 *Leach*, 137; 1 *East*, *P. C.* 226, and if the same result flows from gross neglect in such a case, the offender is guilty of manslaughter. *R.* v. *Instan* [1893] *Q. B.* 450 (*C. C. R.*); *and see ante*, p. 784. As to the distinction drawn in such cases between misfeasance and mere nonfeasance, *see ante*, p. 784.

By *s.* 1 of the *Prevention of Cruelty to Children Act*, 1894 (57 *&* 58 *Vict. c.* 41, now repealed and re-enacted as *s.* 1 of the *Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15), *post*, p. 877), if any person who has the custody, charge, or care of a child wilfully neglects such child in a manner likely to cause such child injury to its health, that person is guilty of a misdemeanor. In *R.* v. *Senior* [1899] 1 *Q. B.* 283 (*C. C. R.*), the prisoner was charged with the manslaughter of his infant child, of which he had the custody. It was proved that he belonged to a sect known as the Peculiar People, who objected on religious grounds to calling in medical aid and to the use of medicine, and that he had wilfully and deliberately abstained from providing medical aid and medicine necessary for the child, though he knew it to be dangerously ill, but that in other respects he had done all he could in the best

interests of the child; and that the prisoner had the means to procure medical aid which would have prolonged and probably saved the child's life. Upon these facts, it was held that there was evidence that the prisoner had wilfully neglected the child in a manner likely to cause injury to its health within the meaning of the Act, and that having thereby caused or accelerated the death of the child the prisoner was rightly convicted of manslaughter (*a*): and *Russell*, L.C.J., was inclined to the opinion that at common law, and apart from the statute, the result would have been the same. *R.* v. *Semor* [1899] 1 *Q. B.* at p. 292. As to evidence of means, *see R.* v. *Jones*, 19 *Cox*, 678. But it is to be observed that under *s.* 23 of the *Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15, *post*, p. 885), want of means is no defence if the accused could have resorted to the poor law for relief.

A young unmarried woman being about to be confined, returned to the house of her stepfather and mother. There she was taken in labour, during her stepfather's absence, and the mother did not take ordinary care to procure the assistance of a midwife, though she could have got one had she wished to do so. In consequence of such want of assistance the daughter died in her confinement. There was no evidence that the mother had any means of paying for the midwife's services. It was held, under these circumstances, that there was no legal duty on the part of the mother to call in a midwife, and consequently no such breach of duty as to render her liable to be convicted of manslaughter. *R.* v. *Shepherd*, *L. & C.* 147; 31 *L. J.* (*M. C.*) 102; 9 *Cox*, 123 (*C. C. R.*).

Poison.]—Where a man lays poison to kill rats, and another man takes it, and it kills him, if the poison were laid in such a manner or place as to be mistaken for food, it is, perhaps, manslaughter; 1 *Hale*, 431; if otherwise, misadventure only. *Id.* If an improper quantity of spirituous liquors be given to a child of tender years heedlessly and for brutal sport, if death ensue it will be manslaughter. *R.* v. *Martin*, 3 *C. & P.* 211: *and see R.* v. *Packard*, *ante*, p. 787.

Weapons.]—If a man knowing that people are passing along the street throws a stone, or shoots an arrow over the house or wall with intent to do hurt to people, and one is thereby slain, this is murder, and if it were without such intent, yet it is manslaughter, and not barely *per infortunium*, because the act itself was unlawful: 1 *Hale*, 474: 1 *Hawk. c.* 29, *s.* 9: 3 *Co. Inst.* 57. If he discharge a gun merely for the purpose of unloading it, or the like, and death ensue—then, if it were in a place where persons were likely to pass, it is manslaughter; *R.* v. *Burton*, 1 *Str.* 481; otherwise, misadventure only. As to death occasioned by spring-guns, *see Ilott* v. *Wilks*, 3 *B. & Ald.* 304: *Bird* v. *Holbrook*, 4 *Bing.* 628; *R.* v. *Heaton*, 60 *J. P.* 508; 24 *& 25 Vict. c.* 100, *s.* 31 (*post*, p. 852). Where a man gave a loaded gun to his servant to protect a corn-field from deer during the night, with instructions to fire when he heard any bustle in the corn by the deer; and the master himself unfortunately rushed into the corn during the night, and the servant imagining it to be deer, fired, and shot his master; this was held to be misadventure. 1 *Hale*, 476: 1 *East*, *P. C.* 266. Where a man, finding a pistol in the street, brought it home, and imagining (from having tried it with a rammer) that it

(*a*) The judgment contains a history of prior legislation and decisions on this subject, and refers particularly to *R.* v. *Wagstaffe*, 10 *Cox*, 530; 31 *& 32 Vict. c.* 122, *s.* 37 (*rep.*): *R.* v. *Downes*, 1 *Q. B. D.* 25; 45 *L. J.* (*M. C.*) 8; 13 *Cox*, 111; and *R.* v. *Morby*, 8 *Q. B. D.* 571; 51 *L. J.* (*M. C.*) 85; and definitely dissents from *R.* v. *Hines*, 80 *Cent. Crim. Ct. Sess. Pap.* 309, *Pigott*, B.

was not loaded, presented it in sport at his wife, drew the trigger and killed her; this was held to be manslaughter; *R.* v. *Rampton, Kel.* (*J.*) 41; but Mr. Justice *Foster* doubts the propriety of the decision, as the defendant took the usual precaution to ascertain that the pistol was not loaded; *see Fost.* 263, 264, 265; but clearly, if he took not this or other reasonable precaution, it would be manslaughter. *R.* v. *Campbell*, 11 *Cox*, 323: *R.* v. *Jones*, 12 *Cox*, 628. It has been held that killing by accidental discharge of a gun used without legal excuse, is manslaughter. *R.* v. *Weston*, 14 *Cox*, 346, *Cockburn*, C.J.: *and see R.* v. *Skeet*, 4 *F.* & *F.* 931, where the gun of a poacher, who was resisting lawful arrest by a keeper, accidentally went off and killed the keeper. If a man shooting at butts, or a target, by accident kill a bystander, it is misadventure; 1 *Hale*, 472; but this must be understood of cases where a proper precaution to prevent accidents has been taken; for if the target, etc., be placed near a highway or path, where persons are in the habit of passing, the killing would probably be held to be manslaughter. A., B., and C. went into a field in proximity to certain roads and houses, taking with them a rifle which would be deadly at a mile, and all three practised firing with it at a target which they erected in the field, from a distance of about 100 yards. They took no precautions of any kind to prevent danger from the firing. One of the shots, thus fired by one, though it was not proved by which one, of them, killed a boy in a tree in a garden near the field, at a spot distant 393 yards from the firing-point. It was held that A., B., and C. had been guilty of a breach of duty in firing at the place in question, without taking proper precautions to prevent injury to others, and were guilty of manslaughter. *R.* v. *Salmon*, 6 *Q. B. D.* 79; 50 *L. J.* (*M. C.*) 25; 14 *Cox*, 494. A cannon which had burst and had been returned to an ironfounder was sent back by him in so imperfect a state that on being fired it burst again and killed a person; and it was held to be manslaughter. *R.* v. *Carr*, 8 *C.* & *P.* 163. The defendant having a right to the possession of a gun which was in the hands of the deceased, and which he knew to be loaded, attempted to take it away by force, and in the struggle which ensued the gun accidentally went off, and caused the death of the deceased. This was held by *Campbell*, C.J., to be manslaughter, inasmuch as the discharge of the gun was the result of the defendant's unlawful act, in attempting to retake the gun *by force*. *R.* v. *Archer*, 1 *F.* & *F.* 351.

Killing officers of justice, and the like.]—If a man kill an officer of justice, either civil or criminal, such as a bailiff, constable, watchman, etc., in the legal execution of his duty, or any person acting in aid of him (whether specially called thereunto or not, 1 *Hale*, 462), or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the offender will be guilty of murder. 1 *Hale*, 457, 460: *Fost.* 270, 308, *et seq.*: *R.* v. *Porter*, 12 *Cox*, 444. And the officer and persons acting in aid of him enjoy this protection, *eundo, morando, et redeundo:* therefore, if an officer, on his way to do his duty, be opposed and killed, or if he arrive at the place, and in consequence of opposition retreat, and on his retreat be killed, it is murder. *Fost.* 308, 309: 9 *Co. Rep.* 68 *a. and b.*: 1 *Hale*, 462: *R.* v. *Phelps, C.* & *Mar.* 180. Three things are to be attended to in matters of this kind: the legality of the deceased's authority, the legality of the manner in which he executed it, and the defendant's knowledge of that authority; for if an officer be killed in attempting to execute a writ or warrant invalid on the face of it, or against a wrong person, or out of the district in which alone it could legally be executed; or if a private person interfere and act in a case

where he has no authority by law to do so; or if the defendant had no knowledge of the officer's business, or of the intention with which a private person interferes, and the officer or private person be resisted and killed; the killing will be manslaughter only: *see Fost.* 311, 312.

1. *As to the legality of the authority.*]—If an officer having a warrant from a proper magistrate to apprehend B. for felony; or if B. be indicted for felony; or if the hue and cry be levied against B.; in these cases, if B. or any of his accomplices kill the officer or any person joining in the hue and cry, or lawfully effecting or attempting to effect B.'s arrest, it is murder, whether B. be guilty or innocent of the felony charged against him. *Fost.* 318: *R.* v. *Porter*, 12 *Cox*, 444. But it is murder only if violence is used to prevent arrest, or to effect rescue or escape. Accidental killing in course of a struggle with the officers of justice seems to be manslaughter only, *Id.*, *and see R.* v. *Tooley*, 2 *Ld. Raym.* 1296, 1300, and for the killing to be murder the accused must know or be told that the person seeking his arrest is acting as an officer of justice. *R.* v. *Gordon*, 1 *East, P. C.* 315; 1 *Leach*, 515; *and see post*, p. 811. But the killing is not murder, but only manslaughter, where the warrant under which the officer of justice is acting is not sufficient to justify him in arresting or detaining a prisoner, or he has no warrant at all, and the case is one in which he has not at law authority to arrest without warrant. *See R.* v. *Allen*, 17 *L. T.* (*N. S.*) 222; *Steph. Dig. Cr. L.* (6th ed.) 420, *Blackburn*, J. This rule has been held to apply where the warrant is illegal, and void upon the face of it, *see* 1 *Hale*, 457; 1 *East, P. C.* 310, or issued with a blank in it, and the blank afterwards filled up; *R.* v. *Stockley*, 1 *East, P. C.* 310; *and see Housin* v. *Barrow*, 6 *T. R.* 122; 3 *R. R.* 135: *R.* v. *Winwick*, 8 *T. R.* 454: *R.* v. *Hood*, 1 *Mood. C. C.* 281; 22 *R. R.* 746; or issued with an insufficient description of the defendant, as, for instance, if it were to take the son of J. S., *Id.*, or if it be attempted to be executed against C. instead of B. But a mere informality in the warrant is no excuse for hitting the officer who attempted to execute it. *R.* v. *Allen*, 17 *L. T.* (*N. S.*) 222; *Steph. Dig. Cr. L.* (6th ed.) 184, 414, where the decisions are considered; *and see R.* v. *Fursey*, 3 *St. Tr., N. S.* 543, *and cf.* 6 *Id.* 219, *n.* If a writ of execution in civil cases be correct upon the face of it, although the judgment be erroneous, or the proceedings irregular, if the officer, in endeavouring to execute it, be resisted and killed, it is murder; 1 *Hale*, 457: *Fost.* 311, 312. So in the case of process out of an inferior court, as the county court, the production of a warrant good on the face of it, and appearing to be issued in a case in which the court had jurisdiction, is sufficient to justify an arrest under it, and render the party, if he resist the arrest, liable to an indictment for an assault upon the officer. *R.* v. *Davis*, *L. & C.* 64; 30 *L. J.* (*M. C.*) 159. But if the writ were a nullity on the face of it, or if the warrant upon it were attempted to be executed by any other than the officer to whom it was directed (the officer himself not being present, or at least acting in the arrest, *see* 1 *Cowp.* 65), the killing would be manslaughter only. If an innocent person be charged with a felony, and an attempt be made to arrest him for it without warrant, and he resist and kill the party attempting to arrest him; if the party attempting to arrest were a constable, the killing is murder; 1 *Hawk. c.* 28, *s.* 12: 2 *Hale*, 84, 87, 91; if a private person, manslaughter; *see* 2 *Hale*, 83, 92; because the constable has authority by law to arrest in such a case, but a private person has not. And the same in all cases where a person is arrested, or attempted to be arrested, upon a reasonable suspicion of felony. *See Samuel* v. *Payne*, 1 *Doug.* 359. Upon an indictment for shooting at and cutting a constable with intent, etc., it appeared that the

defendant had been given in charge to the constable for having a forged note in his possession, and upon the constable attempting to handcuff him, had fired a pistol at the constable and wounded him, and afterwards cut him with the cock of the pistol, it was argued that the charge imported no legal offence, for if he did not know the note to be forged, the defendant was no felon, and the arrest was illegal; but it was held that the defect in the charge was immaterial, and that it was not necessary for the charge to contain the same accurate description of the offence as an indictment, and that the charge must have been considered as importing a guilty knowledge. *R.* v. *Ford R. & R.* 329. But where the defendant took his tools and left his work, saying that "he would do for any constable that offered to stop him," and his master applied to a constable to take the defendant, but made no charge against him, and the master and the constable followed the defendant, and found him in a public privy as if he had occasion there, and the master said, "This is the man, I give you charge of him;" upon which the constable said, "Your master gives me charge of you, you must go with me;" and the defendant immediately stabbed the constable: it was held by a majority of the judges, that, as the actual arrest would have been illegal, the attempt to arrest when the defendant was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to complete the arrest, was such a provocation as reduced the offence to manslaughter only. *R.* v. *Thompson*, 1 *Mood. C. C.* 80. If a constable take a man without warrant, upon a charge which gives him no authority to do so, and the prisoner run away, and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kill J. S., it is manslaughter only, because the arrest was illegal, and J. S. ought to have known it: and therefore the attempt to take the prisoner was illegal also. *R.* v. *Curvan*, 1 *Mood. C. C.* 132. A constable, without warrant, apprehended N. on suspicion of having recently stolen potatoes out of the ground, and called O. to assist him; a rescue was attempted, in the course of which one of the party killed O.; and this was held to be manslaughter only; for, without warrant, the constable could only arrest a person found committing such offence, under 7 & 8 *G.* 4, *c.* 29, *s.* 68 (*rep.*); *R.* v. *Phelps, C. & Mar.* 180. But if a constable, having a charge of felony against a defendant, take him without a warrant, and the defendant, knowing the constable, kill him, it will be murder, even though the constable do not tell him of the charge, and the defendant, in fact, has done nothing for which he is liable to be arrested. *R.* v. *Woolmer*, 1 *Mood. C. C.* 334. So, if a man actually commit a felony, and another, in whose presence he committed it, attempt to arrest him for it, and be resisted and killed; 2 *Hawk. c.* 12, *s.* 1; or if a person present at any affray, interfere for the purpose of restraining the offenders and keeping the peace, and be killed; 3 *Co. Inst.* 52: 1 *Hawk. c.* 31, *ss.* 48, 54: *Fost.* 311, 318; or if a person present when another attempts to commit a treason or felony, lay hold of him in order to prevent him, and be killed; 2 *Hawk. c.* 12, *s.* 19; the killing in these cases would be murder, whether the person arresting or interfering, etc., be a constable or not; for either has power to arrest or interfere, etc., in such a case. *R.* v. *Hunt*, 1 *Mood. C. C.* 93: *R.* v. *Curran*, 3 *C. & P.* 397: *R.* v. *Price*, 8 *C. & P.* 282: *R.* v. *Weir*, 1 *B. & C.* 288. So, where a man seen attempting to commit a felony on fresh pursuit kills his pursuer, it is as much murder as if the party were killed while attempting to take the defendant in the act. *R.* v. *Howarth*, 1 *Mood. C. C.* 207: *see Beckwith* v. *Philby*, 6 *B. & C.* 635. But where an affray, which has taken place out of the constable's view,

is over, and there is no continued pursuit, the constable has no right to arrest the affrayer, unless there is an immediate danger of the affray being renewed. *R.* v. *Walker*, *Dears.* 358; 23 *L. J.* (*M. C.*) 123: *see Timothy* v. *Simpson*, 1 *Cr. M. & R.* 757; 4 *L. J.* (*Ex.*) 81; *Baynes* v. *Brewster*, 2 *Q. B.* 375; 11 *L. J.* (*M. C.*) 5. The prisoner was engaged in a disturbance in the street, when R., a constable, interfered to prevent it. A struggle ensued between R. and the prisoner. R. retired, and the prisoner went into and fastened up his house. After an interval of an hour, R. returned with W. and two other constables to the house, which was then fastened and all quiet. The prisoner from inside the house refused to admit the constables, who spent about a quarter of an hour in trying to get in, and finally burst open the door. They found the prisoner on the top of the stairs with a bill-hook in his hand, which he used against the constables to resist his apprehension, and with which in so doing he wounded W., one of the constables. Under these circumstances it was held that the apprehension was not lawful, as the first disturbance was at an end, and there was no fear of its renewal; nor was there a fresh pursuit by the constables, and the conviction of the prisoner upon an indictment for wounding W., with intent to resist his lawful apprehension, was therefore quashed. *R.* v. *Marsden*, *L. R.*, 1 *C. C. R.* 131; 37 *L. J.* (*M. C.*) 80. Where the constable, standing outside the defendant's house, saw him hold a spade in a threatening attitude over his wife's head, and heard him at the same time say, "If it was not for the policeman outside I would split your head open;" in about twenty minutes afterwards the defendant left his house, after saying he would leave his wife altogether, and after he had proceeded a short distance in the direction of his father's residence, was taken into custody by the constable without warrant; the apprehension was held lawful. *R.* v. *Light*, *Dears. & B.* 332; 27 *L. J.* (*M. C.*) 1. If a person be taken before a magistrate for an assault, and whilst the warrant is being made up for his commitment, escape, a constable may, by verbal directions from the magistrate, pursue and apprehend him; and if in so doing the constable is killed, it is murder. *R.* v. *Williams*, 1 *Mood. C. C.* 387. If a seamen be impressed, and the press-gang be resisted, and any of them be killed; if the press-gang at the time were under the direction of a commissioned officer, and such officer were then acting with them, the killing would be murder, otherwise only manslaughter; *R.* v. *Broadfoot*, *Fost.* 154; for the presence of a commissioned officer is necessary to the due execution of an impress warrant. Where two soldiers not belonging to a recruiting party, who were in a public-house, wished to enlist M., and gave him a shilling for that purpose, and M. afterwards wishing to go away, an altercation ensued, and one of the soldiers stood at the door with his drawn sword, and swore he would stab any person who attempted to come in, and the landlord of the house was stabbed in the scuffle: it was argued that the soldiers had authority to enlist M., and that what was done was merely to prevent his rescue; but the judges held, that they had no authority, and that the offence amounted to murder. *R.* v. *Longden*, *R. & R.* 228. A constable, who had verbal orders from the magistrate to apprehend all thimbleriggers, attempted to apprehend the defendant and his companions, who were playing at thimblerig in a public fair: he succeeded in apprehending one of his companions, whom the defendant rescued, and afterwards, in the evening, seeing the defendant in a public-house, endeavoured to apprehend him, telling him that he did so for what he had been doing in the fair; the defendant escaped into a privy, and the constable, calling others to his assistance, broke open the privy and attempted to apprehend the prisoner, who stabbed one of the party; it

was held that the constable had authority to apprehend the defendant. *R.* v. *Gardener*, 1 *Mood. C. C.* 390. In *R.* v. *Prebble*, 1 *F. & F.* 325, a constable (out of the limits of the Metropolitan Police Acts) was held not to be acting in the execution of his duty in clearing a public-house, unless there be a breach, or danger of a breach, of the public peace therein; *R.* v. *Hems*, 7 *C. & P.* 312: *but see now s.* 18 *of the Licensing Act*, 1872 (35 *& 36 Vict. c.* 94). A constable has no right to arrest a person for mere disorderly conduct, unless he be at least on the point of committing a breach of the peace, and the person so attempted to be arrested, and his companions, may use necessary force to prevent such an arrest. If, however, they use unnecessary violence, and kill the constable, they are guilty of manslaughter; and if the constable has given up his intention of making the arrest, and they know it, and still continue their violence, and the constable is killed, they are guilty of murder. *R.* v. *Lockley*, 4 *F. & F.* 155.

A special constable duly appointed under 1 *& 2 W.* 4, *c.* 41, is appointed for an indefinite time, and retains all the authority of a constable at common law, until his services are suspended or determined under the 9th section of that statute. *R.* v. *Porter*, 9 *C. & P.* 778.

By the *Night Poaching Act*, 1828 (9 *G.* 4, *c.* 69), *s.* 2 (*post*, p. 865), gamekeepers are empowered to apprehend persons "found upon any land committing any such offence as is hereinbefore mentioned," *i.e.*, in *s.* 1; and though this 2nd section appears only to authorize the apprehension for the offences mentioned in *s.* 1, yet they may apprehend the offenders, where three or more are out by night armed, etc., for although that offence is punishable by *s.* 9, it is still an offence under *s.* 1. *R.* v. *Ball*, 1 *Mood. C. C.* 330. To authorize an apprehension under this statute, it is not necessary that the gamekeeper should give notice of his purpose; *R.* v. *Payne*, 1 *Mood. C. C.* 378; nor that he should have a written authority from his master for so doing, provided the poacher be on his master's land or manor; *R.* v. *Price*, 7 *C. & P.* 178: *see R.* v. *Fielding*, 2 *C. & K.* 621; but he could not, under this statute, without authority, apprehend him upon the land or manor of another person; *R.* v. *Davis*, 7 *C. & P.* 785; or even on land on which he has the right to preserve game. *R.* v. *Addis*, 6 *C. & P.* 388. If a keeper, attempting lawfully to apprehend a poacher, be met with violence, and in opposition to such violence and in self-defence strike or lay hands on a poacher, and then be killed by him or one of the gang, it will be murder. *R.* v. *Ball*, 1 *Mood. C. C.* 330: *R.* v. *Whithorne*, 3 *C. & P.* 394. Even an interference by a gamekeeper with persons found armed in the pursuit of game on the lands of an adjoining proprietor, without any attempt forcibly to apprehend, is not a sufficient provocation to reduce a malicious wounding and killing to manslaughter. *R.* v. *Warner*, 1 *Mood. C. C.* 380. A gamekeeper appointed by a person who has only a permission to shoot over lands has no authority to apprehend a poacher in pursuit of game on such land, or to take a gun from him; and where such a gamekeeper endeavoured to do so, and in the struggle which ensued the gun went off and killed the poacher, this was held to be manslaughter. *R.* v. *Wesley*, 1 *F. & F.* 528; *see R.* v. *Wood*, *Id.* 470. By 14 *& 15 Vict. c.* 19, *s.* 11 (*ante*, p. 622), any person whatsoever may apprehend and convey or deliver over to a constable any person found committing *any* indictable offence *in the night*. This section has been held to apply to persons committing an offence against *s.* 9 of the *Night Poaching Act* 1828 (9 *G.* 4, *c.* 69). *R.* v. *Sanderson*, 1 *F. & F.* 598.

2. *As to the legality of the manner in which the authority is exercised.*]—If the constable of the vill of A. attempt without warrant to suppress a

tumult in the vill of B., and be resisted and killed, it is manslaughter only; for he had authority in such a case within the vill of A. alone. 1 *Hale*, 459. So, if a sheriff's officer attempt to execute a writ out of the proper county, and be resisted and killed, it is manslaughter only; 1 *Hale*, 458, *et seq.* A justice's warrant of commitment, directed "To the constable of G.," a parish in the county of L., must be read as directed to the parish constable of G., there being such an officer, who must execute it, and its execution by a county policeman is illegal. *R.* v. *Sanders*, *L. R.* 1 *C. C. R.* 75; 36 *L. J.* (*M. C.*) 87. Therefore a conviction for wounding a county policeman in the execution of such a warrant, with intent to resist the prisoner's lawful apprehension thereunder, was quashed. *Id.* And where the defendant was convicted of an assault on two police constables of the county police of Worcestershire in the execution of their duty, who were apprehending him in the city of Worcester under a warrant issued by two justices of and for the county of Worcestershire for his commitment to prison for default in payment of a fine but not backed by any justice of and for the city of Worcester, which city is a borough having a separate commission of the peace with exclusive jurisdiction, and a separate police force, and the defendant was not pursued from the county, but found in the city, it was held that the constables were not acting in the execution of their duty in so executing such warrant, and therefore that the conviction was wrong. *R.* v. *Cumpton*, 5 *Q. B. D.* 341; 49 *L. J.* (*M. C.*) 41. But by *s.* 10 of the *Indictable Offences Act*, 1848 (11 *& 12 Vict. c.* 42), constables and other peace officers may execute warrants out of their respective precincts, provided the place where the warrant is executed be within the jurisdiction of the magistrate granting or backing the warrant. If an officer were to attempt the arrest of a man on Sunday (unless for treason, felony, or breach of the peace, *see* 29 *Car.* 2, *c.* 7, *s.* 6), and were resisted and killed, it would be manslaughter only. A constable who had a warrant to apprehend A., gave it to his son, who, in attempting to apprehend A. was stabbed with a knife which he happened to have in his hand, the constable being in sight, but a quarter of a mile off; it was held that the son had no authority to apprehend A. *R.* v. *Patience*, 7 *C. & P.* 775. A justice issued a warrant directed to the constable of N., and all peace officers in and for the county of C., commanding him or them to apprehend G. for disobedience to an order in bastardy. A police officer arrested G., but at the time of doing so the warrant was not actually in his possession. It was held, that the arrest was illegal, as the officer ought to have had the warrant ready to be produced at the time of arrest. *Galliard* v. *Laxton*, 2 *B. & S.* 363; 31 *L. J.* (*M. C.*) 123. And in order to justify an arrest by a police officer, under a warrant, for a misdemeanor, it is necessary that he should have the warrant with him at the time of the arrest. *R.* v. *Chapman*, 12 *Cox*, 4: *Codd* v. *Cabe*, 1 *Ex. D.* 352; 45 *L. J.* (*M. C.*) 101; 13 *Cox*, 202. So, where the prisoner against whom a warrant had been issued for his apprehension on a charge of threatening to shoot, was apprehended by a constable who at the time had not the warrant in his possession, and the prisoner drew a revolver, and shot the constable, it was held that the apprehension was unlawful, and the killing merely manslaughter. *R.* v. *Carey*, 14 *Cox*, 214, *Lindley*, J. It seems to have been suggested by the prosecution in that case that the prisoner, who was apprehended early in the morning while passing along a street with something evidently buttoned up in his coat, had been apprehended by the constable not under the warrant, but under the powers of a local act which authorized constables to stop, search, and detain persons reasonably suspected of knowingly having or conveying

anything stolen, and therefore that the apprehension was lawful. It was held, however, that there was no evidence from which the jury could infer that the constable reasonably suspected the prisoner of the possession of stolen goods, and that it lay on the prosecution to give such evidence. *Id.*

[3. *As to the defendant's knowledge of the deceased's authority or intention.*] —When any officer is in the legal execution of his duty, or a private person endeavouring to suppress an affray, or apprehend a felon, and is resisted and killed; if it appear that the slayer knew the officer's business or the intent of the private person, either expressly from the deceased, or impliedly from circumstances, *R.* v. *Howarth*, 1 *Mood.* 1 *C. C.* 207; the killing is murder; if it appear that he was ignorant in this respect, it is manslaughter only. 1 *Hawk. c.* 31, *ss.* 49, 50: *Fost.* 310, 311: 1 *Hale*, 458, *et seq.*: *R.* v. *Gordon*, 1 *East, P. C.* 315; 1 *Leach*, 515. Where a bailiff rushed into a gentleman's bedchamber early in the morning, without giving the slightest intimation of his business, and the gentleman not knowing him, in the impulse of the moment, wounded him with his sword and killed him: this was held to be manslaughter. 1 *Hale*, 470. But where the bailiff or constable shows the warrant, 1 *Hale*, 461; or where it appears that he is known to the defendant to be an officer; as, for instance, when the defendant said, "Stand off, I know you well enough, come at your peril;" *R.* v. *Pew, Cro. Car.* 183; if after this the officer be killed, it will be murder. If the constable interfere to prevent any affray within his own vill, if he be killed by one of the inhabitants, or other person, who knows him to be the constable, it will be murder; if by a stranger who does not know him, it is manslaughter. So, if one of several know him to be a constable, it will be murder in him, manslaughter in the rest. 1 *Hale*, 438. If a constable command the peace, 1 *Hale*, 461, or show his staff of office, *Fost.* 311, this, it seems, is a sufficient intimation of his authority. And in such a case it is not necessary to prove the deceased's appointment as constable; proof that he was accustomed to act as constable is sufficient. 1 *East, P. C.* 315. But private persons when they interfere must expressly intimate their intention, otherwise killing them will be manslaughter only. *Fost.* 310, 311. Where the outer door of a dwelling-house may be broken open, in order to execute process: as, for instance, in the case of a *capias* upon an indictment, 2 *Hawk. c.* 14, *s.* 3, a warrant to search for stolen goods, 2 *Hale*, 151, a *capias utlagatum*, 2 *Hawk. c.* 14, *s.* 4, a warrant of a magistrate for levying a penalty, *Id. s.* 5, a magistrate's warrant to arrest for any specific crime; *Fost.* 320: 2 *Hawk. c.* 14, *s.* 3: 1 *Hale*, 584; or where a person lawfully arrested escapes into a house; 2 *Hawk. c.* 14, *s.* 9; where one known to have committed treason or felony, or to have dangerously wounded another, escapes into a house; *Id. s.* 7; where an affray is made in a house, and the constable wants to suppress it, or take the offender; *Id. s*, 8: 1 *Hale*, 589; where there is disorderly drinking or noise in a house at any unseasonable time of night, particularly in inns, taverns, or ale-houses, and the constable or his watch wish to suppress the disorder; 2 *Hale*, 95; and in the case of forcible entry or detainer; 2 *Hawk. c.* 14, *s.* 6 (but not in the execution of writs in civil cases, *Fost.* 389, excepting writs of seisin, or *habere facias possessionem, Semayne's case*, 5 *Co. Rep.* 91); in all such cases, before the outer door is broken open, there must be a demand of admittance, or something equivalent thereto, and a refusal; *Fost.* 136, 320; *see Launock* v. *Brown*, 2 *B. & Ald.* 592; otherwise, if the officer be killed, it will be manslaughter only.

In all cases, however, above stated to be manslaughter only, if there

be evidence of express malice in the party killing, the homicide will be murder. *See R.* v. *Stockley*, 1 *East, P. C.* 310: *R.* v. *Curtis*, *Fost.* 135.

Killing by officers and others.]—Where an officer of justice (including prison officers: *Prison Act*, 1898, 61 & 62 *Vict.* c. 41, s. 10), in endeavouring to execute his duty, kills a man, this is justifiable homicide, or manslaughter, or murder, according to circumstances.

1. Where an officer of justice is resisted in the legal execution of his duty (*see ante*, p. 809), he may repel force by force; and if, in doing so, he kill the party resisting him, it is justifiable homicide; and this in civil as well as in criminal cases. 1 *Hale*, 494; 2 *Hale*, 118. And the same as to persons acting in aid of such officer. Thus, if a peace officer have a legal warrant against B. for felony, or if B. stand indicted for felony, or if hue and cry be levied against B.; in these cases, if B. resist, and in the struggle be killed by the officer, or any person acting in aid of him, or joining in the hue and cry, the killing is justifiable. *Fost.* 318. So, if a private person attempt to arrest one who commits a felony in his presence, or interfere to suppress an affray, and be resisted, and kill the person resisting, this is also justifiable homicide. 1 *Hale*, 481, 484; *Fost.* 274. And this, not merely on the principle of self-defence (for the officer or private person is not bound to retreat, as in the case of homicide *se defendendo*, 1 *Hale*, 479, *et seq.*; *ante*, pp. 791, 797), but upon that principle, and the necessity of executing the duty the law has imposed upon him, jointly: *see R.* v. *Forster*, 1 *Lewin*, 187: *R.* v. *Daunt*, 1 *Crawf. & Dix* (*Ir. Circ. Rep.*) 166. Still, there must be an apparent necessity for the killing; for if the officer were to kill after the resistance had ceased, 1 *East, P. C.* 297, or if there were no reasonable necessity for the violence used upon the part of the officer, etc., *see R.* v. *Goffe*, 1 *Vent.* 216, the killing would be manslaughter at the least. Also, in order to justify an officer or private person in these cases, it is necessary that they should, at the time, be in the act of legally executing a duty imposed upon them by law, and under such circumstances, that if the officer or private person were killed, it would have been murder (*see ante*, pp. 805–811); for if the circumstances of the case were such, that it would have been manslaughter only to kill the officer or private person, it will be manslaughter at least in the officer or private person to kill the party resisting. *See Fost.* 318; 1 *Hale*, 490.

2. If the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he, in his defence, kill any of them, it is justifiable, for the sake of preventing an escape. 1 *Hale*, 496; *cf.* 61 & 62 *Vict.* c. 41, s. 10.

3. Where an officer or private person, having legal authority to apprehend a man, attempts to do so, and the man, instead of resisting, flies, or resists and then flies, and is killed by the officer or private person in the pursuit; if the offence with which the man was charged were a treason or felony, or a dangerous wound given, and he could not otherwise be apprehended, the homicide is justifiable; 1 *Hale*, 481; 2 *Hale*, 118, 119; 1 *Hawk.* c. 28, ss. 11, 12; *Fost.* 271: *R.* v. *Finnerty* [1830] 1 *Crawf. & Dix* (*Ir. Circ. Rep.*) 167, *n.*; but the killing, if intentional, would be murder if the deceased were charged merely with a breach of the peace, or other misdemeanor, *Fost.* 271; 1 *Hale*, 481; 2 *Hale*, 117: *R.* v. *Forster*, 1 *Lewin*, 187, *Holroyd*, J.: *and see R.* v. *Dadson*, 2 *Den.* 35; 3 *C. & K.* 148; 20 *L. J.* (*M. C.*) 57 (*C. C. R.*); or if the arrest were intended in a civil suit. 1 *Hale*, 481; *Fost.* 271; or if a press-gang kill a seaman or other person flying from them, *R.* v. *Browning*, 1 *East, P. C.* 312; *and see R.* v. *Phillips* [1778] *Id.* 308; 2 *Cowp.* 830: *R.* v. *Borthwick* [1779] 1 *Doug.* 207. But if homicide were occasioned by means not likely or intended to kill, such as tripping up his heels, giving him a blow of an ordinary cudgel, or other

weapon not likely to kill, or the like, it would at most be only manslaughter. *See Fost.* 271.

4. In case of a riot or rebellious assembly, the officers endeavouring to disperse the mob are justified in killing them, both at common law, 1 *Hale*, 495; 1 *East P. C.* 304, and under the *Riot Act*, 1 *G.* 1, *st.* 2, *c.* 5, if the riot cannot otherwise be suppressed. 4 *Bl. Com.* 179, 180: *R.* v. *Pinney*, 3 *St. Tr., N. S.* 11; 37 *R. R.* 599. As to the position of soldiers who fire on a riotous mob and kill rioters, *see Report on Featherstone Riots, Parl. Pap.* 1893–94, *C.* 7234.

5. Where a criminal is executed by the proper officer, in pursuance of his sentence, this is justifiable homicide. 4 *Bl. Com.* 178. But if it be done by any other person, 1 *Hale*, 501, or not done in strict conformity with the sentence, as, for instance, if an officer behead one who is adjudged to be hanged, or the contrary, 3 *Co. Inst.* 52; 1 *Hale*, 501, it is murder.

6. Where in an attempt to impress a person not subject to impressment he resists and is killed, it is murder by the members of the press-gang. *R.* v. *Dixon*, 1 *East, P. C.* 313: *R.* v. *Rokeby*, 1 *East, P. C.* 312.

CONSPIRACY TO MURDER AND INCITING TO MURDER.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 4.]—All persons who shall conspire, confederate and agree to murder any person, whether he be a subject of [his] Majesty or not, and whether he be within the [King's] dominions or not, and whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of [his] Majesty or not, and whether he be within the [King's] dominions or not, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not more than ten . . . years. [*This section was new as statute law in England in* 1861. *Conspiracy to murder was a common law misdemeanor; see Greaves' Crim. Law Cons. Acts* (2nd ed.), p. 34: *R.* v. *Bernard*, 8 *St. Tr., N. S.* 887; 1 *F. & F.* 240.]

Indictment for Conspiracy to Murder. (24 & 25 *Vict. c.* 100, *s.* 4.)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., J. T., and E. T., on the —— day of ——, in the year of our Lord —— [in the parish of —— and within the jurisdiction of the said court], unlawfully and wickedly did conspire, confederate, and agree together one J. N. feloniously, wilfully, and of their malice aforethought, to kill and murder; against the form [*as ante*, p. 465]. [*You may add counts charging the defendants, or any of them, with "soliciting, encouraging, persuading, or endeavouring to persuade, or proposing to any other of the defendants, or any other person, to murder a certain other person, to wit,* J. N.," *if the facts warrant such a charge. If the "solicitation," etc., is made by means of articles in a newspaper it may be alleged to be made to "certain persons whose names are to the jurors aforesaid unknown" and to "all such persons as might read a copy of" the newspaper in question. Cf. R.* v. *Most, post*, p. 814.]

Misdemeanor: penal servitude for not more than ten and not less than

three years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 100, *s.* 4; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender, and requiring him to enter into recognizances and find sureties for keeping the peace, and being of good behaviour,* 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778.)

No indictment can be preferred for conspiracy unless one or other of the preliminary steps required by 22 & 23 *Vict. c.* 17, *s.* 1, *as extended by* 30 & 31 *Vict. c.* 35 *s.* 1, *has been taken.* (*See ante*, p. 7.)

Conspiracy to murder is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove a conspiracy between the defendants, or between them and other persons, as the case may be (*see post, Book II. Part III.*), and that the object of the conspiracy was to murder J. N. It is immaterial whether J. N. be a subject of the King or not, and whether he be within the King's dominions or not. It seems not to be essential that the conspiracy should have been formed in England or Ireland. *Greaves' Crim. Law Cons. Acts* (2nd ed.), 34; 3 *Russ. Cr.* (6th ed.) 274: provided that some overt act be done within the realm or the Admiralty jurisdiction; *but see R.* v. *Bernard*, 8 *St. Tr., N. S.* 887. The publication and circulation of an article in a newspaper may be an encouragement, or endeavour to persuade to murder, within this section, although not addressed to any person in particular. *R.* v. *Most*, 7 *Q. B. D.* 244; 50 *L. J.* (*M. C.*) 113; 14 *Cox*, 583. M. was indicted under 24 & 25 *Vict. c.* 100, *s.* 4. The encouragement and endeavour to persuade to murder proved at the trial, was the publication and circulation by him of an article, written in German in a newspaper published in that language in London, exulting in the recent murder of the Emperor of Russia, and commending it as an example to revolutionists throughout the world. The jury were directed that if they thought that by the publication of the article M. did intend to and did, encourage or endeavour to persuade any person to murder any other person, whether a subject of her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavouring to persuade was the natural and reasonable effect of the article, they should find him guilty. It was held that such direction was correct. *Id.*; *cf. R.* v. *Bourtzeff*, 129 *Cent. Crim. Court, Sess. Pap.*, p. 284. As to the evidence necessary to prove solicitation or incitement to murder, *see R.* v. *Fox*, 19 *W. R.* 109 (*Ir.*): *R.* v. *Ransford*, 13 *Cox*, 9 (*C. C. R.*).

To constitute an offence against *s.* 4, it must be shown that there was some actual communication between the accused and the person solicited; but it is not necessary to show that the latter's mind was affected by the communication. *R.* v. *Krause*, 66 *J. P.* 121, *Alverstone*, L.C.J.; *and see R.* v. *McCarthy* [1903] 2 *Ir. Rep.* 146, 154; 37 *L. J. Newsp.* 494.

ATTEMPTS TO MURDER.

ADMINISTERING POISON, WOUNDING, ETC., WITH INTENT TO MURDER.

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 11.]—Whosoever shall administer to or cause *to be administered to or* to be

taken by any person any poison or other destructive thing, or shall by any means whatsoever wound or cause any grevious bodily harm to any person, with intent, in any of the cases aforesaid, to commit murder, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . [*This section re-enacts* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 2, *with modifications to get rid of the decisions in R.* v. *Jenning*, 2 *Lewin*, 130. *R.* v. *Murrow*, 1 *Mood. C. C.* 456: *R.* v. *Stevens*, 1 *Mood. C. C.* 409: *R.* v. *Harris*, 7 *C. & P.* 446.]

14 *&* 15 *Vict. c.* 19 (*Prevention of Offences Act*, 1851), *s.* 5.—*Conviction for misdemeanor on trial for felony.*]—If, upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding. [*See ante*, p. 218. *This enactment is limited to cases "where the indictment shall allege that the defendant did cut, stab, or wound," and therefore upon an indictment charging a felonious shooting with intent to do grievous bodily harm, and doing grevious bodily harm, with intent to do grievous bodily harm, it is not competent for the jury to convict of unlawful wounding. R.* v. *Miller*, 14 *Cox*, 356, *Bowen*, J. *The words* "cutting or stabbing" *are not used in* 24 *&* 25 *Vict. c.* 100.]

Indictment for administering Poison with intent to Murder.
(24 *&* 25 *Vict. c.* 100, *s.* 11, *supra.*)

Commencement as ante, p. 813]—feloniously did administer to one J. N. ("*administer to or cause to be administered to or to be taken by any person*") a certain poison, to wit, two drachms of a certain poison called white arsenic ("*any poison or other destructive thing*") with intent thereby then feloniously, wilfully, and of his malice aforethought, the said J. N. to kill and murder; against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *Add counts stating that the defendant* "did cause to be administered to J. N." *and* "did cause to be taken by J. N.," "a certain poison," etc.; *and if the description of poison be doubtful, add counts describing it in different ways; and one count stating it to be* "a certain destructive thing to the jurors aforesaid unknown." *The indictment must allege the thing administered to be poisonous or destructive; and therefore an indictment for administering sponge mixed with milk, not alleging the sponge to be destructive, was held bad. R.* v. *Powles*, 4 *C. & P.* 571. *If there be any doubt whether the poison was intended for* J. N., *add a count stating the intent to be "to commit murder" generally. See R.* v. *Ryan*, 2 *M. & Rob.* 213, *post*, p. 816.

Felony: penal servitude for life, or for not less than three years, or imprisonment not exceeding two years, with or without hard labour. 24 *&* 25 *Vict. c.* 100, *s.* 11; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 *&* 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

three years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 100, *s.* 4; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender, and requiring him to enter into recognizances and find sureties for keeping the peace, and being of good behaviour,* 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778.)

No indictment can be preferred for conspiracy unless one or other of the preliminary steps required by 22 & 23 *Vict. c.* 17, *s.* 1, *as extended by* 30 & 31 *Vict. c.* 35 *s.* 1, *has been taken.* (*See ante*, p. 7.)

Conspiracy to murder is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove a conspiracy between the defendants, or between them and other persons, as the case may be (*see post, Book II. Part III.*), and that the object of the conspiracy was to murder J. N. It is immaterial whether J. N. be a subject of the King or not, and whether he be within the King's dominions or not. It seems not to be essential that the conspiracy should have been formed in England or Ireland. *Greaves' Crim. Law Cons. Acts* (2nd ed.), 34; 3 *Russ. Cr.* (6th ed.) 274: provided that some overt act be done within the realm or the Admiralty jurisdiction; *but see R.* v. *Bernard*, 8 *St. Tr., N. S.* 887. The publication and circulation of an article in a newspaper may be an encouragement, or endeavour to persuade to murder, within this section, although not addressed to any person in particular. *R.* v. *Most*, 7 *Q. B. D.* 244; 50 *L. J.* (*M. C.*) 113; 14 *Cox*, 583. M. was indicted under 24 & 25 *Vict. c.* 100, *s.* 4. The encouragement and endeavour to persuade to murder proved at the trial, was the publication and circulation by him of an article, written in German in a newspaper published in that language in London, exulting in the recent murder of the Emperor of Russia, and commending it as an example to revolutionists throughout the world. The jury were directed that if they thought that by the publication of the article M. did intend to and did, encourage or endeavour to persuade any person to murder any other person, whether a subject of her Majesty or not, and whether within the Queen's dominions or not, and that such encouragement and endeavouring to persuade was the natural and reasonable effect of the article, they should find him guilty. It was held that such direction was correct. *Id.*; *cf. R.* v. *Bourtzeff*, 129 *Cent. Crim. Court, Sess. Pap.*, p. 284. As to the evidence necessary to prove solicitation or incitement to murder, *see R.* v. *Fox*, 19 *W. R.* 109 (*Ir.*): *R.* v. *Ransford*, 13 *Cox*, 9 (*C. C. R.*).

To constitute an offence against *s.* 4, it must be shown that there was some actual communication between the accused and the person solicited; but it is not necessary to show that the latter's mind was affected by the communication. *R.* v. *Krause*, 66 *J. P.* 121, *Alverstone*, L.C.J.; *and see R.* v. *McCarthy* [1903] 2 *Ir. Rep.* 146, 154; 37 *L. J. Newsp.* 494.

ATTEMPTS TO MURDER.

ADMINISTERING POISON, WOUNDING, ETC., WITH INTENT TO MURDER.

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 11.]—Whosoever shall administer to or cause *to be administered to or* to be

taken by any person any poison or other destructive thing, or shall by any means whatsoever wound or cause any grevious bodily harm to any person, with intent, in any of the cases aforesaid, to commit murder, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . [*This section re-enacts* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 2, *with modifications to get rid of the decisions in R.* v. *Jenning*, 2 *Lewin*, 130. *R.* v. *Murrow*, 1 *Mood. C. C.* 456: *R.* v. *Stevens*, 1 *Mood. C. C.* 409: *R.* v. *Harris*, 7 *C. & P.* 446.]

14 *&* 15 *Vict. c.* 19 (*Prevention of Offences Act*, 1851), *s.* 5.—*Conviction for misdemeanor on trial for felony.*]—If, upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding. [*See ante*, p. 218. *This enactment is limited to cases "where the indictment shall allege that the defendant did cut, stab, or wound," and therefore upon an indictment charging a felonious shooting with intent to do grievous bodily harm, and doing grevious bodily harm, with intent to do grievous bodily harm, it is not competent for the jury to convict of unlawful wounding. R.* v. *Miller*, 14 *Cox*, 356, *Bowen*, J. *The words* "cutting or stabbing" *are not used in* 24 *&* 25 *Vict. c.* 100.]

Indictment for administering Poison with intent to Murder.
(24 *&* 25 *Vict. c.* 100, *s.* 11, *supra.*)

Commencement as ante, p. 813]—feloniously did administer to one J. N. ("*administer to or cause to be administered to or to be taken by any person*") a certain poison, to wit, two drachms of a certain poison called white arsenic ("*any poison or other destructive thing*") with intent thereby then feloniously, wilfully, and of his malice aforethought, the said J. N. to kill and murder; against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. *Add counts stating that the defendant* "did cause to be administered to J. N." *and* "did cause to be taken by J. N.," "a certain poison," etc.; *and if the description of poison be doubtful, add counts describing it in different ways; and one count stating it to be* "a certain destructive thing to the jurors aforesaid unknown." *The indictment must allege the thing administered to be poisonous or destructive; and therefore an indictment for administering sponge mixed with milk, not alleging the sponge to be destructive, was held bad. R.* v. *Powles*, 4 *C. & P.* 571. *If there be any doubt whether the poison was intended for* J. N., *add a count stating the intent to be* "*to commit murder*" *generally. See R.* v. *Ryan*, 2 *M. & Rob.* 213, *post*, p. 816.

Felony: penal servitude for life, or for not less than three years, or imprisonment not exceeding two years, with or without hard labour. 24 *&* 25 *Vict. c.* 100, *s.* 11; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances, and find sureties for keeping the peace*, 24 *&* 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

The offences mentioned in this section are not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the administering of the poison by the defendant to the prosecutor, as stated in the indictment. *R.* v. *Cadman*, 1 *Mood. C. C.* 114, has been cited as an authority that it is necessary to prove that something more than delivery, such as swallowing, was essential. The case is differently reported in *Car. Supp.* 137 (*see R.* v. *Dale*, 6 *Cox*, 16, *n*), and was dissented from in *R.* v. *Walford, Essex Assizes, Feb.* 1899, 34 *L. J. Newsp.* 116, *Wills*, J. Where a female servant, in preparing breakfast for her mistress, put arsenic into the coffee, and afterwards told her mistress that she had prepared the coffee for her, and she (the mistress) drank the coffee, *Park*, J., held that it was an administering within the meaning of the statute. *R.* v. *Harley*, 4 *C. & P.* 369. So also, where the defendant knowingly gave poison to A. to administer as a medicine to B., but A. neglecting to do so, it was accidentally given to B. by a child, this was held to be an administering by the defendant, as much as if she had given it to B. with her own hands. *R.* v. *Michael*, 2 *Mood. C. C.* 110; 9 *C. & P.* 356. Where the prisoner, having mixed corrosive sublimate with sugar, put it into a parcel, directing it to "Mrs. Daws, Townhope," and left it on the counter of a tradesman, who sent it to Mrs. Davis, who used some of the sugar, *Gurney*, B., held it to be an administering: for that, although it was intended for Mrs. Daws, yet as it found its way to Mrs. Davis, it was as much within the Act as if it had been intended for Mrs. Davis. *R.* v. *Lewis*, 6 *C. & P.* 161. In *R.* v. *Ryan*, 2 *M. & Rob.* 213, however, *Parke*, B., after consulting *Alderson*, B., expressed an opinion that an indictment for causing poison to be taken by A., with intent to murder A., was not sustained by evidence showing that the poison, though taken by A., was intended for another person; and doubted the propriety of the decision in *R.* v. *Lewis*; and accordingly, after the defendant had been convicted, he directed a fresh indictment to be preferred, charging the intent to be generally "to commit murder;" upon which the defendant was again tried, convicted, and sentenced. See, however, *R.* v. *Smith*, *Dears.* 559; 25 *L. J.* (*M. C.*) 29; 7 *Cox*, 51 (*C. C. R.*) (*post*, p. 820). Prove also the intent to murder, by circumstances from which that intent may be implied. *See ante*, pp. 303, 308–312, 340: *R.* v. *Voke*, *R. & R.* 531. Evidence of administering at different times may be given to show the intent. *R.* v. *Mogg*, 4 *C. & P.* 364. The defendant administered to a child two cocculus indicus berries entire in the pod, with intent to murder the child. The kernel is a poison; the pod is not, and will not dissolve in the stomach, and they were therefore harmless. This was held to be an administering of poison, with intent to murder, within this section. *R.* v. *Cluderay*, 1 *Den.* 514; 2 *C. & K.* 907; 19 *L. J.* (*M. C.*) 119; 4 *Cox*, 84 (*C. C. R.*).

Indictment for Wounding with intent to Murder. (24 & 25 *Vict. c.* 96, *s.* 11, *ante*, p. 814.)

Commencement as ante, p. 813]—one J. N. feloniously and unlawfully did wound ("*wound or cause any grievous bodily harm*") with intent, etc., *as in the precedent* (*ante*, p. 815). *Add a count charging the intent to be "to commit murder" and counts for wounding with intent to maim, etc., as post,*

p. 839); *or at all events one for wounding with intent to do grievous bodily harm, under* 24 & 25 *Vict. c.* 100, *s.* 18 (*post*, p. 840).

Felony: 24 & 25 *Vict. c.* 100, *s.* 11. *See the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant wounded J. N. (*See post*, pp. 840, 841.) The instrument or means by which the wound was inflicted need not be stated, and if stated, would not confine the prosecutor to prove a wound, etc., by such means. *R.* v. *Briggs*, 1 *Mood. C. C.* 318. A wounding by any means whatever, whether by stabbing, cutting, or otherwise, will support the indictment under this statute. 24 & 25 *Vict. c.* 100, *s.* 11. Prove the intent as directed (*ante*, pp. 303, 308). *See R.* v. *Jones* (*post*, p. 819). It is not necessary that the prosecutor should be in fact wounded in a vital part; for the question is not what the wound is, but what wound was intended. *R.* v. *Hunt*, 1 *Mood. C. C.* 93: *R.* v. *Griffith*, 1 *C. & P.* 298.

Power to convict of unlawful wounding.]—If the intent be not proved, the defendant may, by virtue of 14 & 15 *Vict. c.* 19, *s.* 5 (*ante*, p. 815), be convicted of unlawfully wounding, and thereupon he may be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of unlawfully wounding: that is, by penal servitude for any period not less than three years, and not exceeding five years, or imprisonment, with or without hard labour, not exceeding two years, 24 & 25 *Vict. c.* 100, *s.* 20 (*post*, p. 839); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). 14 & 15 *Vict. c.* 19, *s.* 5, is to be read as if the word "maliciously," as well as "unlawfully," had been inserted therein, with reference to the wounding of which the jury may convict the prisoner, and it is therefore essential to a conviction under that section that the act done which caused the wound should be done maliciously. The unlawful wounding of which the jury are at liberty to find the prisoner guilty under that section, is the unlawful and malicious wounding referred to in 24 & 25 *Vict. c.* 100, *s.* 20 (*post*, p. 839): *R.* v. *Ward*, *L. R.* 1 *C. C. R.* 356; 41 *L. J.* (*M. C.*) 69. As to what constitutes a malicious wounding under the last-mentioned enactment, *see R.* v. *Ward* (*ubi supra*): *R.* v. *Martin*, 8 *Q. B. D.* 54; 51 *L. J.* (*M. C.*) 36 (*post*, p. 841). The defendant cannot, on an indictment for the felony, *plead guilty* to the misdemeanor; for the acquittal of the felony is to be the act of the jury. *See R.* v. *Calvert*, 3 *C. & K.* 201, *Maule*, J. On an indictment against several for the felony, it seems that some may be convicted of the felony, and another or others of the misdemeanor, under this section (*R.* v. *Cunningham, Bell*, 72; 28 *L. J.* (*M. C.*) 66; *see R.* v. *Archer*, 2 *Mood. C. C.* 283: *R.* v. *Elliott*, 1 *Cox*, 36), on the principle that there may be a joint assault with a felonious intent in some only, *R.* v. *Archer*, *ubi supra.*

ATTEMPTING TO POISON, SHOOT, DROWN, ETC., WITH INTENT TO MURDER.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 14.]—Whosoever shall attempt to administer to *or shall attempt to cause to be*

administered to or to be taken by any person any poison or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid, to commit murder, shall, *whether* any bodily injury be effected *or not*, be guilty of felony; and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This is taken from* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 3, *with modifications.*]

Sect. 19—*Loaded arms, defined.*]—Any gun, pistol, or other arms which shall be loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms within the meaning of this Act, although the attempt to discharge the same may fail from want of proper priming or from any other cause. [*This clause was new law in* 1861, *and was framed to get rid of R.* v. *Williams*, 1 *Den.* 39; 1 *C. & K.* 589: *R.* v. *Carr*, *R. & R.* 377: *R.* v. *Harris*, 5 *C. & P.* 159. *As to the effect of this definition, see post*, p. 820.]

Indictment for attempting to Poison, with Intent, etc. (24 *&* 25 *Vict. c.* 96, *s.* 14, *supra.*)

Commencement as ante, p. 813]—feloniously did attempt to administer ("*attempt to administer to or attempt to cause to be administered to or to be taken by*") to one J. N., a certain poison, to wit, two drachms of a certain poison called white arsenic ("*any poison or other destructive thing*") with intent, etc., *as in the precedent* (*ante*, p. 815). *Add counts charging that the defendant "attempted to cause to be administered to," and that he "attempted to cause to be taken by" J. N. the poison, etc.*

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour (24 *&* 25 *Vict. c.* 100, *s.* 14; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2, *ante*, p. 235). *As to requiring the defendant to enter into recognizances, and find sureties for keeping the peace*, 24 *&* 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the attempt to administer the poison or other destructive thing, as stated in the indictment. As to what is "administering," *see ante*, p. 816. Putting poison where it is likely to be found and taken seems to be an attempt to murder within this enactment. *R.* v. *Dale*, 6 *Cox*, 14. Prove the intent, as in the last case. It is immaterial whether bodily injury be or be not effected.

The delivery of poison to an agent, with directions to him to cause it to be administered to another, under such circumstances that if administered the agent would be the sole principal felon, would doubtless come within the words "shall attempt to cause to be administered to or to be taken by," which are for the first time to be found in the present statute. It was held not an attempt to administer within 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 8 (*rep.*): *R.* v. *Williams*, 1 *C. & K.* 589; 1 *Den.* 39.

Indictment for attempting to Drown, etc., with intent to Murder. (24 & 25 *Vict. c.* 96, *s.* 14, *ante*, p. 817.)

Commencement as ante, p. 813]—feloniously did attempt to drown and suffocate ("*drown, suffocate, or strangle*") one J. N., with intent thereby then feloniously, wilfully, and of his malice aforethought, the said J. N., to kill and murder; against the form [*as ante*, p. 465]. *Add a count charging the intent to be "to commit murder." In former editions of this work prior to the 22nd ed. the indictment for this offence set out the manner in which the attempt was made. The provisions of* 24 & 25 *Vict. c.* 100, *s.* 6 (*ante*, p. 776), *do not apply to attempts; it is, however, now the practice simply to charge the attempt, following the words of the statute: moreover, it is submitted that "with intent to murder the said* J. N." *would be a sufficient averment of the intent in the first count. And see ante*, p. 815.

Felony: 24 & 25 *Vict. c.* 100, *s.* 14. *See the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the attempt to drown, as stated in the indictment, and the intent as directed, *ante*, pp. 303, 308-312, 340. It is immaterial whether bodily injury be or be not proved.

Indictment for Shooting with intent to Murder. (24 & 25 *Vict. c.* 96, *s.* 14, *ante*, p. 817.)

Commencement as ante, p. 813]—a certain gun, then loaded with gunpowder and divers leaden shot, at one J. N. feloniously did shoot, with intent, etc., *as in the last precedent. Add a count charging an intent to commit murder and, if a wound was caused, one for wounding with intent to do grievous bodily harm. Unless wounding is charged the jury cannot convict of unlawful wounding. See R.* v. *Miller*, 14 *Cox*, 356 (*ante*, p. 815). *On an indictment under* 1 *Vict. c.* 84, *s.* 4 (*rep.*), *it seems to have been held unnecessary to state with what the gun was loaded, and sufficient to say "with a certain loaded gun." R.* v. *Cox*, 3 *Cox*, 58, *Platt*, B.

Felony: 24 & 25 *Vict. c.* 100, *s.* 14. *See the last precedent but one.*

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the shooting, as stated in the indictment, and that the gun was loaded in the barrel with gunpowder or some other explosive substance, and with ball, shot, slug, or other destructive material. 24 & 25 *Vict. c.* 100, *s.* 19 (*ante*, p. 818). *See R.* v. *Kitchen*, *R. & R.* 95: *R.* v. *Hughes*, 5 *C. & P.* 126: *R.* v. *Coates*, 6 *C. & P.* 394: *R.* v. *Oxford*, 9 *C. & P.* 525; 4 *St. Tr., N. S.* 497. Prove also the intent as directed *ante*, pp. 303, 308-312, 340. In *R.* v. *Jones*, 9 *C. & P.* 258, *Patteson*, J., appeared to think it doubtful whether, under 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 3 (*rep.*) (which was in the same terms as the present statute), it must not appear, in order to make out the intent to murder, that that intent existed in the mind of the defendant at the time of the offence, or whether it would be sufficient if it would have been murder had death ensued; he said, however, that the circumstance that it would have been murder if death had ensued would be a good ground whence the jury might infer the existing intent, as every man must be taken to intend the necessary consequences of his acts.

Upon an indictment for shooting at H. with intent to murder H., it appeared that the defendant intended to shoot at and kill L., but shot at H. by mistake, and *Littledale*, J., left it to the jury to say whether the defendant intended to murder H.: and upon their finding that he shot at H. intending to murder L., directed an acquittal. *R.* v. *Holt*, 7 *C. & P.* 518. That case arose under 9 *G.* 4, *c.* 31, *ss.* 11, 12 (*rep.*), the words of which were "with intent to murder *such person*." But it would seem, however, from *R.* v. *Ryan*, 2 *M. & Rob.* 213 (*ante*, p. 816), that the intent must still be proved as laid; and therefore that an allegation of an intent to murder A. would not be satisfied if it appeared that, although A. was struck, the shot was intended for another person. But where the defendant was charged with wounding T. with intent to murder him, and it appeared in evidence that the defendant intended to murder M., and that he shot at and wounded T., supposing him to be M., and the jury found that he intended to murder the man at whom he shot, supposing him to be M., the court held the conviction right. *R.* v. *Smith*, *Dears.* 559; 25 *L. J.* (*M. C.*) 29; 7 *Cox*, 51; followed in *R.* v. *Stopford*, 11 *Cox*, 643; *see also post*, p. 842. To avoid such questions, the indictment should always contain a count charging an intent "to commit murder" generally.

Indictment for attempting to Shoot, with Intent, etc. (24 & 25 *Vict. c.* 96, *s.* 14, *ante*, p. 817.)

Commencement as ante, p. 813]—feloniously, by drawing the trigger ("*drawing a trigger, or in any other manner*") of certain loaded arms, to wit, a pistol ("*any kind of loaded arms*"), then loaded in the barrel with gunpowder and one leaden bullet, did attempt to discharge the said pistol at one J. N., with intent, etc., *as in the precedent, ante*, p. 465. *It does not appear essential to state with what the gun is loaded. R.* v. *Cox*, 3 *Cox*, 58. *Add a count charging an intent "to commit murder," and counts for attempting to shoot with intent to maim, etc., as post*, p. 843.

Felony: 24 & 25 *Vict. c.* 100, *s.* 14. *See the punishment, ante*, p. 818.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant presented a pistol (or gun) at J. N., and attempted, by pulling the trigger, to discharge it at him. If the weapon be "loaded in the barrel with gunpowder or other explosive material and ball, etc.," the fact that the prisoner fails to discharge it "from want of proper priming or any other cause" is no defence to an indictment under 24 & 25 *Vict. c.* 100, *s.* 14, by reason of *s.* 19 of that statute (*ante*, p. 818). *R.* v. *Carr*, *R. & R.* 377, and the other decisions on statutes prior to 1861, cited *ante*, p. 818 (the effect of which was that the weapon must be so loaded as to be capable of being discharged), are no longer law. *See Greaves, Cr. Law Cons. Acts* (2nd. ed.), 53. In *R.* v. *Gamble*, 10 *Cox*, 545, an attempt to fire off an unprimed pistol was held not to be within *s.* 14; but in that case the attention of the court was not called to *s.* 19. An attempt to fire a revolver loaded in some chambers, which fails because the hammer falls on a barrel containing an empty cartridge case, is within *s.* 14. *R.* v. *Jackson*, 17 *Cox*, 104, *Charles*, J. So also where the prisoner pulls the trigger of a central-fire revolver loaded with rim-fire cartridges, unless he knows that such cartridges could not be discharged in such a weapon. *R.* v. *Jones*, *Staff. Autumn Assizes* (1901), 36 *L. J. Newsp.* 650, *Kennedy*, J.

If B. draw a loaded pistol from his pocket for the purpose of murdering S., but before he has time to do anything further in pursuance of his purpose the pistol is snatched out of his hand—*semble*, that B. commits an offence within *s.* 14 of 24 & 25 *Vict. c.* 100; *R.* v. *Brown*, 10 *Q. B. D.* 381; 52 *L. J.* (*M. C.*) 49; 15 *Cox*, 199; and at all events, if he puts his finger on the trigger and attempts to pull it, and is only prevented from doing so by the forcible interference of bystanders, he commits that offence. *R.* v. *Duckworth* [1892] 2 *Q. B.* 83; 17 *Cox*, 495; overruling on that point *R.* v. *St. George*, 9 *C. & P.* 483 (*post*, p. 834) and *R.* v. *Lewis*, *Id.* 523. Prove the intent as directed, *ante*, pp. 303, 308–312, 340; *and see* *R.* v. *Lallement*, 6 *Cox*, 204.

DESTROYING BUILDINGS BY EXPLOSIVES WITH INTENT TO MURDER.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 12.]—Whosoever, by the explosion of gunpowder or other explosive substance, shall destroy or damage any building with intent *to commit murder*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 9 & 10 *Vict. c.* 25, *s.* 2, *omitting the words "unlawfully and maliciously," and substituting the words "intent to commit murder" for the words "with intent to murder any person."*]

Sect. 64—*Possessing or making gunpowder, etc., to commit felonies.*]—Whosoever shall knowingly have in his possession or make or manufacture any gunpowder, explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent by means thereof to commit any of the felonies in this Act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, . . . and, if a male under the age of sixteen years, with or without whipping. [*Cf.* 24 & 25 *Vict. c.* 97, *s.* 54, *ante*, p. 664.]

Sect. 65.]—*Search for Explosives.*

38 & 39 *Vict. c.* 75, *s.* 86.]—*Search for Explosives.*

46 & 47 *Vict. c.* 3—*Explosive Substances Act*, 1883.]—*See ante*, p. 665.

Indictment. (24 & 25 *Vict. c.* 100, *s.* 12.)

Commencement as ante, p. 813]—feloniously did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy ("*destroy or damage*") a certain building situate in the parish of ——, in the county aforesaid, with intent to commit murder; against the form [*as ante*, p. 465]. [*The words "with intent to commit murder" generally have been held sufficient.* *R.* v. *Ryan*, 2 *M. & Rob.* 213.] *If there be evidence of an intent to murder any particular person, add a count or counts charging such particular intent, which may be framed from the precedents* (*ante*, pp. 818, 819).

Felony: penal servitude for life, or for not less than three years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 100, *s.* 12; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

As to the proof of the act charged, and of its having been done maliciously, *see ante*, pp. 651, 669, 701.

As to the proof of the intent, *see ante*, pp. 303, 308-312, 340.

DESTROYING SHIPS WITH INTENT TO MURDER.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 13.]—Whosoever shall set fire to any ship or vessel *or any part thereof, or any part of the tackle, apparel, or furniture thereof, or any goods or chattels being therein*, or shall cast away or destroy any ship or vessel, with intent in any of such cases to commit murder, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .

[*This section re-enacts* 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 4, *with the addition of the words in italics and omission of the words "unlawfully and maliciously," and substituting "intent to commit murder" for "intent to murder any person."*]

The indictment may be easily framed from the precedents, ante, pp. 659, 660, *alleging the intent to commit murder, as in the last precedent.*

The punishment is the same as under the last precedent.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

The evidence also will be the same as under the precedents above mentioned, together with proof of the intent, as directed *ante*, pp. 303, 308-312, 340.

OTHER ATTEMPTS TO MURDER.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 15.]—Whosoever shall, by any means other than those specified in any of the preceding sections of this Act, attempt to commit murder, shall be guilty of felony, and being convicted thereof shall be liable to . . . be kept in penal servitude for life. . . .

[*This enactment was new in* 1861.]

Indictment.

Commencement as ante, p. 813]—feloniously did, by then [*state the act*] attempt feloniously, wilfully, and of his malice aforethought, one J. N. to kill and murder; against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. [*Add a count charging the intent to be "to commit murder." It*

would appear that, having regard to the words "by any means other than those specified, etc.," in 24 & 25 *Vict. c.* 100, *s.* 15, *the "means" should be set out in an indictment thereunder, at all events in one set of counts.*]

Felony: punishable by penal servitude for life or not less than three years, or by imprisonment with or without hard labour for not more than two years. 24 & 25 *Vict. c.* 100, *s.* 15: 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235); *as to fine and recognizances, see* 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

No offence against this section is triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant committed or procured the commission of the overt act stated in the indictment; and that it was done with intent to murder, which of course may be implied from the nature of the act itself, or may be proved by other evidence, or by threats or declarations of the defendant to that effect (*see ante*, pp. 303, 308, *et seq.*).

24 & 25 *Vict. c.* 100, *s.* 15, includes every attempt to murder not specified in any preceding section of the Act. Where a woman jumped out of a window to avoid the violence of her husband, it was held that he could not be convicted of an attempt to murder unless it were proved that he intended by his conduct to make her jump out. *R.* v. *Donovan*, 4 *Cox*, 399: *but see R.* v. *Halliday*, 61 *L. T.* 701; 38 *W. R.* 256 (*C. C. R.*), and other cases (*ante*, p. 785). It therefore embraces cases where machinery used in lowering miners into mines has been injured with intent that it may break and precipitate the miners to the bottom of the pit. And cases where steam-engines are injured in order to kill any person, fall within it; and cases of sending or placing infernal machines with intent to murder. *R.* v. *Mountford*, 1 *Mood. C. C.* 441; 7 *C. & P.* 242; 3 *Russ. Cr.* (6th ed.) 280, *n.* This section, however, does not embrace attempts to murder which are *ejusdem generis* with those mentioned in *ss.* 11–14 of 24 & 25 *Vict. c.* 100. *R.* v. *Brown*, 10 *Q. B. D.* 381; 52 *L. J.* (*M. C.*) 49; 15 *Cox*, 199 (*C. C. R.*). Therefore, where the prisoner drew a loaded pistol from his pocket, for the purpose of murdering the prosecutor, but before he had time to do anything further in pursuance of his purpose, the pistol was snatched out of his hand, it was held that the offence was not within *s.* 15, being *ejusdem generis* with the offences mentioned in *s.* 14, even if it did not actually come within *s.* 14, but *semble* that it did come within *s.* 14. *Id.*: *and see now R.* v. *Duckworth* [1892] 2 *Q. B.* 83 (*ante*, p. 821).

An attempt to commit suicide is not an attempt to commit murder within the meaning of 24 & 25 *Vict. c.* 100, *s.* 15, but remains a common law misdemeanor triable at quarter sessions. *R.* v. *Burgess*, *L. & C.* 258; 32 *L. J.* (*M. C.*) 55; 9 *Cox*, 302 (*C. C. R.*).

Sect. 2.

Endeavouring to conceal the birth of children.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 60.]—If any woman shall be delivered of a child, *every person* who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavour to conceal the birth thereof,

shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour: Provided, that if *any person* tried for the murder of *any* child shall be acquitted thereof, it shall be lawful for the jury by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that *the child had recently been born*, and *that such person* did, *by some secret disposition* of the dead body of such child, endeavour to conceal the birth thereof; and thereupon the court may pass such sentence as if *such person* had been convicted upon an indictment for the concealment of the birth. [*This section was taken from* 9 *G.* 4, *c.* 31, *s.* 14; *and* 10 *G.* 4, *c.* 34, *s.* 17 (1), *with the alterations printed in italics. Under the former enactments the mother only could be tried for the offence, and the words, "by any secret disposition" have been substituted for "by secret burying or otherwise disposing of the dead body." For the history of the legislation on this subject, see* 3 *Russ. Cr.* (6th. ed.) 162. *As to indictments for murder, see ante*, p. 778.]

Indictment against a Mother.

Yorkshire, to wit:—The jurors for our lord the King upon their oath present, that A. S., being delivered of a child, unlawfully on the —— day of ——, in the year of our Lord ——, by a certain secret disposition of the dead body of the said child, to wit, by (*describe means of concealment*) did endeavour to conceal the birth thereof; against the form [*as ante*, p. 465]. *The terms of the repealed Act* 9 *G.* 4, *c.* 31, *s.* 14, *under which the precedent given in editions of this work prior to the* 22*nd appears to have been drawn, were "by secret burying or otherwise disposing of the dead body;" and an indictment under that Act for concealing the birth "by secretly disposing of the dead body," etc., without showing the mode of disposing of it, was held bad. R.* v. *Hounsell*, 2 *M.* & *Rob.* 292. *Where the indictment charged that the defendant cast and threw the dead body of the child into the soil in a certain privy, "and did thereby then and there unlawfully dispose of the dead body of the said child, and endeavour to conceal the birth thereof," it was held sufficient; the word "thereby" being referred as well to the endeavour as to the disposing of the body. R.* v. *Coxhead*, 1 *C.* & *K.* 623. *The indictment must state that the child is dead* (*R.* v. *Davis*, 3 *Russ. Cr.* (6th ed.) 167), *but need not state whether the child died before, at, or after its birth. R.* v. *Coxhead, ubi supra. Under the present statute a person assisting the mother in concealing a birth* (*who was formerly only indictable as an aider and abettor*) *is indictable as a principal.*

The proviso extends to a trial on a coroner's inquisition as well as on an indictment. R. v. *Cole*, 2 *Leach*, 1095; 3 *Camp.* 371: *R.* v. *Maynard*, *R.* & *R.* 240: *and see* 14 & 15 *Vict. c.* 100, *s.* 30 (*ante*, p. 55).

Misdemeanor: imprisonment not exceeding two years, with or without hard labour. 24 & 25 *Vict. c.* 100, *s.* 60. *As to fining the offender and requiring her to enter into recognizances and find sureties for keeping the peace and being of good behaviour, Id. s.* 71 (*ante*, p. 778).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant was delivered of a child as stated in the indictment; that the child was dead at the time of the secret disposition of its body. *R.* v. *May*, 10 *Cox*, 448: *R.* v. *Bell*, *Ir. Rep.*, 8 *C. L.* 542 (*C. C. R.*): *R.* v. *Williams*, 11 *Cox*, 684: *and cf. R.* v. *Bate*, *Id.* 686. It is immaterial whether it die before, at, or after its birth, 24 & 25 *Vict.*

c. 100, *s.* 60 (*ante*, p. 823). And prove the concealment, etc., in the mode stated in the indictment. A fœtus not bigger than a man's finger, but having the shape of a child, has been held to be a child within the statute. *R.* v. *Colmer*, 9 *Cox*, 506, *Martin*, B.; *but see R.* v. *Hewitt*, 4 *F. & F.* 1101: *R.* v. *Berriman*, 6 *Cox*, 388, *Erle*, J.

Concealment—Secret Disposition.]—Where a woman was delivered of a child, the dead body of which was found in a bed amongst the feathers, but there was no evidence to show who put it there, and it appeared that the mother had sent for a surgeon at the time of her confinement, and had prepared child's clothes, the judge directed an acquittal of the charge for endeavouring to conceal the birth. *R.* v. *Higley*, 4 *C. & P.* 366. But the fact that the mother had previously allowed the birth to be known to some persons is not *conclusive* evidence negativing concealment. *R.* v. *Douglas*, 1 *Mood. C. C.* 480: *cf. R.* v. *Cornwall*, *R. & R.* 336. On the other hand, the denial of the birth only is not sufficient to convict her; she must be proved to have done some act of disposal of the body after the child was dead. *R.* v. *Turner*, 8 *C. & P.* 755. The putting of the dead body between a bed and the mattress, or under a bolster on which the defendant laid her head, was held to be a sufficient "disposing of" it to constitute an offence within 9 *G.* 4, *c.* 31, *s.* 14 (*rep.*), though the disposition may have been only temporary. *R.* v. *Perry*, *Dears.* 471; 24 *L. J.* (*M. C.*) 137; 6 *Cox*, 531 (*C. C. R.*): following *R.* v. *Goldthorpe*, 2 *Mood. C. C.* 244; *C. & Mar.* 335, which overruled the earlier cases in which it was held that a *final* disposing of the body must be shown. *See R.* v. *Farnham*, 1 *Cox*, 349, *Patteson*, J. Where, however, the prisoner had placed the body of her child in an open box in her bedroom, *Byles*, J., although he left the case to the jury, intimated to them his opinion, that there was no secret disposition of the dead body, and the prisoner was acquitted. *R.* v. *Sleep*, 9 *Cox*, 559. So also where the prisoner put the dead body of her child into a box, and put this box into a larger box (neither of the boxes being locked or fastened, although they were closed), and then placed the boxes in a room much resorted to by the people in the house, and in such a position as to attract attention, *Bovill*, C.J., directed the jury that there was no secret disposition of the dead body. *R.* v. *George*, 11 *Cox*, 41. There may, however, be circumstances attending the deposit by the prisoner of the body of a child in an unlocked box, which may warrant the conclusion that such deposit was a secret disposition of the body. *R.* v. *Cook*, 11 *Cox*, 542, *Lush*, J. Where the prisoner took the body out of the house and placed it in a pinfold or pound, which was open to the sky, although locked, and surrounded by a wall five feet high, along which there was a public footway, *Martin*, B., held that there was no secret disposition of the body. *R.* v. *Nixon*, 4 *F. & F.* 1040, *note* (*a*). *See also R.* v. *Clarke*, *Id.* 1040. And to take the dead body of a child and leave it exposed in a public street does not constitute a concealment within the statute, but is indictable as a nuisance. *R.* v. *Clark*, 15 *Cox*, 171, *Denman*, J. The most open exposure may, however, be a secret disposition, as, for instance, in the middle of Dartmoor, or on the top of a mountain in Scotland in winter. *R.* v. *Brown*, *L. R.*, 1 *C. C. R.* 244; 39 *L. J.* (*M. C.*) 94; 11 *Cox*, 517, *Bovill*, C.J. In that case the following facts were held to be evidence to go to the jury of a secret disposition of the dead body of the child. The prisoner put the dead body of her child over a wall which was four and a half feet high and divided a yard from a field. The yard was at the back of a public-house, and entered from the street by a narrow passage. The prisoner did not live at the public-house, and must have carried the body from

the street up the passage to the yard. The field was grazed by the cattle of a butcher, and the only entrance to it was through a gate leading from the butcher's own yard. There was no path through the field, and a person in the field could only see the body in case he went up to the wall, close against which the body lay. There was nothing on or over the body to conceal it. In *R.* v. *Waterage*, 1 *Cox*, 338, taking the body of a child to the house of a sister of the mother for burial in a churchyard was held not concealment. In *R.* v. *Hughes*, 4 *Cox*, 447, a woman placed a living child in a place of concealment. On her return she found the child dead and left it where it lay, replacing the materials by which the concealment was effected. This was held a concealment within 9 *G.* 4, *c.* 31, *s.* 14 (*rep.*). In *R.* v. *Opie*, 8 *Cox*, 332, the discovery of the dead body of a child three days after birth in a tub covered over, behind the door of the privy of the house in which the mother lived, was held not conclusive evidence of concealment. But in that case *Martin*, B., expressed his dissent from the decision of the C. C. R. in *R.* v. *Perry* (*ante*, p. 825). *Cf. R.* v. *Goode*, 6 *Cox*, 318.

Identification.]—In order to convict a woman of attempting to conceal the birth of her child, a dead body must be found and identified as that of the child of which she is alleged to have been delivered. *R.* v. *Williams*, 11 *Cox*, 684; *and see R.* v. *Bell*, *Ir. Rep.*, 8 *C. L.* 542 (*C. C. R.*). A woman apparently pregnant, while staying at S., received by post, on the 28th August, 1870, an R. newspaper, with the R. postmark upon it. On the same day her appearance and the state of her room indicated that she had been delivered of a child. She left for D. next morning, carrying a parcel. That afternoon a parcel was found in a waiting-room at S. station. It was the dead body of a newly-born child, wrapped in an R. newspaper of 27th August, 1870, bearing the R. postmark. There is a railway from S. to D., but no proof was given of the woman having been at S. station. It was held that this evidence was insufficient to identify the body found as the child of which the woman was said to have been delivered, and would not therefore justify her conviction for endeavouring to conceal the birth of her child. *Id.*, *Montague Smith*, J. Where the only evidence against a prisoner for endeavouring to conceal the birth of her child was that she had been delivered of a child, the body of which was taken away by two other persons, but the prisoner did not know where it was put; this was held not sufficient to warrant a conviction. *R.* v. *Bate*, 11 *Cox*, 686, *Montague Smith*, J.

As to cases when a mother indicted for the murder of her newly-born child can be convicted of *manslaughter*, *see R.* v. *Knights*, 2 *F.* & *F.* 46: *R.* v. *Handley*, 13 *Cox*, 79 (*ante*, p. 785).

Sect. 3.

Attempts to procure Abortion.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 58—*Use of poison or instruments to cause miscarriage.*]—*Every woman being with child who, with intent to procure her own miscarriage, shall unlawfully administer*

to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, *whether she be or be not with child,* shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . [*This section is framed on* 7 *W.* 4 *&* 1 *Vict. c.* 85, *s.* 6, *with the additions and alterations italicized.*]

Sect. 59—*Supplying or procuring poison or instruments with like intent.*]—Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude. . . . [*This section was new law in* 1861.]

Indictment for administering Poison to procure Miscarriage.
(24 *&* 25 *Vict. c.* 100, *s.* 58, *supra.*)

Surrey, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, feloniously and unlawfully did administer to and cause to be taken by one A. N. ("*administer to her or cause to be taken by her*") two ounces of a certain noxious thing called savin ("*poison or other noxious thing*"), with intent thereby then to procure the miscarriage of the said A. N.; against the form [*as ante*, p. 465]. *If there be any doubt as to the thing administered, it will be prudent to state it in different ways, in several counts, and add a count stating it to be* "a certain noxious thing to the jurors aforesaid unknown."

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour. 24 *&* 25 *Vict. c.* 100, *s.* 58; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 *&* 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

To support this indictment it must be proved:—

1. That the defendant *administered to or caused to be taken* by A. N., the poison, etc., mentioned in the indictment: or, perhaps, any other substance or thing *ejusdem generis*. *R.* v. *Phillips*, 3 *Camp.* 73. *R.* v. *Coe*, 6 *C. & P.* 403. In *R.* v. *Cadman*, as reported in 1 *Mood. C. C.* 114, where the defendant gave the prosecutrix a cake containing poison, which she merely put into her mouth and spit out again, and did not swallow any part of it, it was held that the mere delivery to the woman did not constitute an administering within the meaning of the statute; although the judges seemed to think that swallowing it was not essential. But in *R.* v. *Walford* (*Essex Assizes, Feb.* 1899), 34 *L. J. Newsp.* 116, *Wills, J.*, said that that case must be inaccurately reported, and held it unnecessary for proving administration to show that the poison was taken into the stomach (*see ante*, p. 816): and it is not necessary that there should be

an actual delivery by the hand of the defendant. *R.* v. *Harley*, 4 *C. & P.* 309. Where the prisoner gave the prosecutrix the drug for the purpose of procuring abortion, and the prosecutrix took it for that purpose in the prisoner's absence, this was held to be a causing of it to be taken within 9 *G.* 4, *c.* 31, *s.* 14 (*rep.*), of which 24 & 25 *Vict. c.* 100, *s.* 58, is a re-enactment. *R.* v. *Wilson*, *Dears. & B.* 127; *L. J.* (*M. C.*) 18; 7 *Cox*, 190: *R.* v. *Farrow*, *Dears. & B.* 164. It is not sufficient that the defendant merely imagined that the thing administered would have the effect intended; but it must also appear that the substance administered was either a "poison" or a "noxious thing." *See R.* v. *Isaacs*, *L. & C.* 220; 32 *L. J.* (*M. C.*) 52; 9 *Cox*, 228 (*C. C. R.*): *R.* v. *Hollis*, 12 *Cox*, 463 (*C. C. R.*). Where the substance administered is a recognized "poison," then it may be that, although the quantity administered by the defendant is so small as to be incapable of doing harm, that is sufficient to bring him within the statute. *R.* v. *Cramp*, 5 *Q. B. D.* 307; 49 *L. J.* (*M. C.*) 44; 14 *Cox*, 401 (*C. C. R.*). Where the substance is not a "poison," then although if when administered in small quantities it may be innoxious and even useful, yet if the quantity administered by the defendant is noxious, the quantity of the substance so administered by him is a "noxious thing" within the statute. *Id.* On the other hand, if the substance, when administered in large quantities, is noxious, yet if in the quantity administered by the defendant it is innoxious, he is not guilty of the administration of a "noxious thing" within the statute. *R.* v. *Hennah*, 13 *Cox*, 547, *Cockburn*, C.J., and *Hawkins*, J.

As to proof of statement in the absence of the accused by the woman to whom the substance was administered, *see R.* v. *Smith*, 18 *Cox*, 470 (*ante*, p. 323). As to corroboration of her evidence, *see R.* v. *Cramp*, 14 *Cox*, 390, *Denman*, J. (*ante*, p. 391).

2. It must be proved that the substance in question was administered *with intent to procure the miscarriage* of A. N. Whether it were, in fact, a substance likely or calculated to produce that effect, seems to be immaterial, provided the intent be proved, and the substance were a "poison" or "other noxious thing." As to mode of proving intent, *see ante*, pp. 303, 308, 340.

3. The statutes 43 *G.* 3, *c.* 58, and 9 *G.* 4, *c.* 31, *s.* 14, contained provisions applicable to women quick and not quick with child, and therefore clearly showed that, to constitute an offence within those Acts, the woman must have been pregnant at the time. *See R.* v. *Scudder*, 1 *Mood. C. C.* 216; 3 *C. & P.* 605: *R.* v. *Phillips*, 3 *Camp.* 73: *R.* v. *Wycherley*, 8 *C. & P.* 262. But in the present enactment these provisions are omitted, and the offence is to procure the miscarriage of "any woman, whether she be or be not with child." *See R.* v. *Goodall, or Goodchild*, 1 *Den.* 187; 2 *C. & K.* 293; 2 *Cox*, 41. The present Act also applies equally (the repealed statutes did not) to acts done by the woman herself for the purpose of procuring her miscarriage, as to acts done by any other person.

Although under *s.* 58, if a woman with intent to procure her own miscarriage does any of the acts mentioned in that section, she only commits a crime under that section if she is with child, yet she may be convicted of conspiring with other persons to procure her own miscarriage, although she may not in fact be with child. *R.* v. *Whitchurch*, 24 *Q. B. D.* 420; 59 *L. J.* (*M. C.*) 77; 16 *Cox*, 743 (*C. C. R.*).

If the woman die in consequence of the felonious act, the person who committed it is indictable for murder: *see ante*, p. 798, *et seq.*

Indictment for using Instruments to procure Miscarriage. (24 & 25 *Vict. c.* 100, *s.* 58, *ante*, p. 826.)

Commencement as in last precedent]—feloniously and unlawfully did use a certain instrument ("*any instrument or other means whatsoever*") called a ——, by then [*state the mode of using the instrument*], with intent, etc. [*as in the last precedent*].

Felony: 24 & 25 *Vict. c.* 100, *s.* 85. *See the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

The evidence will be the same as in the last case, with this exception, that instead of proving the administration of the poison, etc., it must be proved that the defendant used the instrument mentioned, in the manner described in the indictment. Where the instrument alleged to have been used was a quill, which might possibly have been used for an innocent purpose, evidence was allowed to be given in order to prove the intent, that the prisoner had at other times caused miscarriages by similar means. *R.* v. *Dale*, 16 *Cox*, 703, *Charles*, J. As to the principle upon which this kind of evidence is admissible, *see ante*, p. 308.

As to inciting a person to attempt to commit an offence against this section, *see R.* v. *Brown*, 63 *J. P.* 790, *post*, *Book II. Part III. s.* 8.

Indictment for procuring Poison for the purpose of its being used to cause Miscarriage. (24 & 25 *Vict. c.* 100, *s.* 59, *ante*, p. 827.)

Commencement as ante, p. 827]—unlawfully did procure ("*supply or procure*") two ounces of a certain noxious thing called savin, he the said J. S. then knowing that the same was then intended to be unlawfully used and employed with intent to procure the miscarriage of one A. N.; against the form [*as ante*, p. 465].

Misdemeanor: penal servitude for not less than three years and not exceeding five years, or imprisonment, with or without hard labour, not exceeding two years—24 & 25 *Vict. c.* 100, *s.* 59; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace, and being of good behaviour*, 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

Evidence.

In order to constitute the offence of supplying a noxious thing knowing that the same was intended to be used with intent to procure a miscarriage, the substance supplied must be of a noxious character (in the quantity in which it was supplied). *R.* v. *Cramp*, and *R.* v. *Hennah* (*ante*, p. 828); and it is not sufficient that, being harmless in itself, it might, if taken under a belief that it would procure miscarriage, produce that result by its mere action on the imagination. *R.* v. *Isaacs* (*ante*, p. 828). If, however, the drug administered produces miscarriage, although there be no other evidence of its nature, this is sufficient evidence of its being a noxious thing. *R.* v. *Hollis*, 12 *Cox*, 463 (*C. C. R.*). If the drug supplied by the defendant be noxious, and be supplied with intent to procure miscarriage, the offence is complete, although the woman herself may not have intended to use the drug, and although no

other person than the defendant may have intended that it should be used for the purpose of causing a miscarriage: *R.* v. *Hillman*, *L. & C.* 343; 33 *L. J.* (*M. C.*) 60; 9 *Cox*, 386: and although the woman was not, and never had been, pregnant. *R.* v. *Titley*, 14 *Cox*, 502, *Stephen*, J. (*a*).

Sect. 4.

ASSAULT, BATTERY, WOUNDING, ETC.

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 43—*Aggravated assaults.*]—When any person shall be charged before two justices of the peace with an assault and battery upon a male child whose age shall not, in the opinion of such justices, exceed fourteen years, or on any female, either upon the complaint of the party aggrieved or otherwise, if the assault or battery is of such an aggravated nature that it cannot, in their opinion, be sufficiently punished under the provisions hereinbefore contained (*s.* 42) as to common assaults and batteries, may proceed to hear and determine the same in a summary way; and if the same be proved, may convict the person accused; and every such offender shall be liable to be imprisoned in the common gaol or house of correction, with or without hard labour, for any period not exceeding six months, or to pay a fine not exceeding (together with costs) the sum of 20*l.*, and in default of payment to be imprisoned in the common gaol or house of correction for any period not exceeding six months, unless such fine and costs be sooner paid, and if the justices shall so think fit in any of the said cases, shall be bound to keep the peace and be of good behaviour for any period not exceeding six months from the expiration of such sentence. [*See Godsen* v. *Dartford Justices*, 62 *J. P.* 104. *A person charged under this section cannot elect to be tried on indictment* (42 & 43 *Vict. c.* 49, *s.* 17, *ante*, p. 6), *but may be sent for trial under s.* 46, *infra*. *As to the procedure and evidence under this section, where the person assaulted is under sixteen, see* 4 *Edw.* 7, *c.* 15, *ss.* 12–18, *post*, pp. 882–887.]

Sect. 44—*Certificate of dismissal of charge of assault made to a court of summary jurisdiction.*]—*Ante*, p. 175.

(*a*) The *ratio decidendi* of both these cases has been severely criticized in a colonial case upon an enactment in exactly the same terms as 24 & 25 *Vict. c.* 100, *s.* 59. *R.* v. *Hyland* [1898] 24 *Victoria L. R.* 101. There the police set a trap to catch a supposed abortionist, and wrote him a letter stating that a woman was pregnant and asking for something to cure her. In the mistaken belief that the woman existed, the prisoner sent pills containing a small quantity of a certain drug, and at the trial the question arose, and was reserved, whether the prisoner could be convicted, as the drug had not been supplied for an existing woman. The court of six judges was equally divided in opinion, three accepting *R.* v. *Hillman* as decisive and as correctly defining the word "knowing" so as to include "believing," the other three holding that the word "knowing" could not be so extended, and that the words "intended to be used" applied to the person supplied, and not to the supplier.

In *R.* v. *Sculley* [1903] 23 *N. Z. L. R.* 880, the court followed *R.* v. *Hillman*, but were of opinion that on a charge of "procuring" there must be evidence that the instrument, etc., was obtained for the forbidden purpose, and not merely that it was possessed and used for such purpose.

Sect. 45—*Certificate of conviction, effect, etc.*]—*Ante*, p. 175.

Sect. 46.]—Provided that in case the justices shall find the assault or battery complained of (under *ss.* 42, 43) to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstances, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereon, and shall deal with the case in all respects as if they had no authority finally to hear and determine the same:

Provided also that nothing herein contained shall authorize any justices to hear and determine any case of assault and battery in which any questions shall arise as to the title to any lands, tenements, or hereditaments or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency or any execution under the process of any court of justice. [*See Anon.*, 1 *B. & Ad.* 382: *R.* v. *French*, 20 *Cox*, 200. *The justices can commit for trial even where the person assaulted does not prosecute. R.* v. *Gaunt*, 18 *Cox*, 210; 60 *J. P.* 90 (*C. C. R.*).]

Sect. 47—*Aggravated and common assaults.*]—Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable . . . to be kept in penal servitude. . . .

And whosoever shall be convicted upon an indictment for a common assault shall be liable to be imprisoned for any term not exceeding one year, with or without hard labour. [*The first part of this section re-enacts* 14 *&* 15 *Vict. c.* 100, *s.* 29. *The italicized part was new in* 1861. *For indictment, see post*, p. 832. *Cf. s.* 20, *post*, p. 839.]

58 *&* 59 *Vict. c.* 39 (*Summary Jurisdiction* (*Married Women*) *Act*, 1895), *s.* 4—*Power to make a separation order in favour of a married woman on conviction of her husband of assaulting her.*]—Any married woman whose husband shall have been convicted summarily of an aggravated assault upon her within the meaning of *s.* 43 of the *Offences against the Person Act*, 1861 (*ante*, p. 830), or whose husband shall have been convicted upon indictment of an assault upon her, and sentenced to pay a fine of more than 5*l.*, or to a term of imprisonment exceeding two months, or whose husband shall have deserted her, or whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and shall by such cruelty or neglect have caused her to leave and live separately and apart from him, may apply to any court of summary jurisdiction acting within the city, borough, petty sessional, or other division or district in which any such conviction has taken place, or in which the cause of complaint shall have wholly or partially arisen, for an order or orders under this Act:

Provided that where a married woman is entitled to apply for an order or orders under this section on the ground of the conviction of her husband upon indictment she may apply to the court before whom her husband has been convicted, and that court shall, for the purpose of this section, become a court of summary jurisdiction, and shall have the power without a jury to hear an application, and make the order or orders applied for. [*Where a husband was convicted at assizes upon an indictment for throwing corrosive fluid on his wife with intent to burn, and was sentenced to imprisonment with hard labour for eighteen months, an order was made by Darling, J., on the application of the wife* (*under this and the following sections*), *that she be no longer bound to cohabit with her husband. R.* v. *Knowles*, 65 *J. P.* 27.]

Sect. 5—Provisions which may be included in a separation order.]—The court of summary jurisdiction to which any application under this Act is made may make an order or orders containing all or any of the provisions following, viz.:—

(*a*) A provision that the applicant be no longer bound to cohabit with her husband (which provision while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty):

(*b*) A provision that the legal custody of any children of the marriage between the applicant and her husband while under the age of sixteen years be committed to the applicant:

(*c*) A provision that the husband shall pay to the applicant personally, or for her use, to any officer of the court, or third person on her behalf, such weekly sum not exceeding two pounds as the court shall, having regard to the means of both the husband and wife, consider reasonable:

(*d*) A provision for payment by the applicant or the husband, or both of them, of the costs of the court and such reasonable costs of either of the parties as the court may think fit. [*See note to s.* 4, *supra.*]

24 & 25 *Vict. c.* 100, *s.* 74—*Payment of prosecutor's costs by defendant.*]—Where any person shall be convicted on any indictment of any assault, whether with or without battery and wounding, or either of them, such person may, if the court think fit, in addition to any sentence which the court may deem proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as the court shall by affidavit or other inquiry and examination ascertain to be reasonable; and unless the sum so awarded shall be sooner paid, the offender shall be imprisoned for any term the court shall award, not exceeding three months, in addition to the term of imprisonment (if any) to which the offender may be sentenced for the offence. [*See ante*, p. 260. *This section and s.* 75 *were framed on* 10 *G.* 4, *c.* 34, *ss.* 33, 34 (*Ir.*), *but express the established English practice. See Beeley* v. *Wingfield*, 11 *East*, 46; 10 *R. R.* 431: *Keir* v. *Leeman*, 6 *Q. B.* 308; 9 *Q. B.* 371.]

Sect. 75—*Such costs may be levied by distress.*]—The court may by warrant under hand and seal, order such sum as shall be so awarded to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and that the surplus, if any, arising from such sale, shall be paid to the owner; and in case such sum shall be so levied, the imprisonment awarded until such payment of such sum shall thereupon cease. [*See note to s.* 74.]

Sect. 77—*Costs of prosecutions.*]—The court before which any misdemeanor indictable under the provisions of this Act shall be prosecuted or tried, may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony. [*This was new law in* 1861. *As to costs generally, see ante*, p. 246.]

Indictment for an Assault occasioning actual Bodily Harm. (24 & 25 *Vict. c.* 100, *s.* 47, *ante*, p. 831.)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year

of our Lord ——, at the parish of, or in the county of ——, and within the jurisdiction of the said court, in and upon one J. N., unlawfully did make an assault, and him the said J. N. did then beat, wound, and ill-treat [*thereby then occasioning to the said J. N. actual bodily harm*], [and other wrongs to the said J. N. then did] to the great damage of the said J. N.; against the form [*as ante*, p. 465]. *The words* "and other wrongs to the said J. N. then did" *appear to be surplusage. Att. Gen. for N. S. W.* v. *Macpherson, L. R.* 3 *P. C.* 268; 39 *L. J.* (*P. C.*) 59; 11 *Cox*, 604. *The defendant may be convicted of a common assault on this indictment. R.* v. *Oliver, Bell.* 287; 30 *L. J.* (*M. C.*) 12; 8 *Cox*, 384: *R.* v. *Yeadon, L. & C.* 81; 31 *L. J.* (*M. C.*) 70; 9 *Cox*, 91. *A conviction on a count charging that the defendant assaulted the prosecutor, and thereby unlawfully and maliciously inflicted upon him grievous bodily harm, was held to be warranted by a finding of the jury in the following terms (there being evidence of grievous bodily harm): "Guilty of an aggravated assault, without premeditation; it was done under the influence of passion." R.* v. *Sparrow, Bell*, 298; 30 *L. J.* (*M. C.*) 43; 8 *Cox*, 393.

Misdemeanor: penal servitude for not less than three and not exceeding five years, or imprisonment with or without hard labour, not exceeding two years.—24 & 25 *Vict. c.* 100, *s.* 47; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour, Id. s.* 71 (*ante*, p. 778).

As to adjudging payment by the defendant of the costs of the prosecution in case of conviction, see 24 & 25 *Vict. c.* 100, *ss.* 74, 75 (*ante*, p. 832).

The court will not pass judgment for an assault during the pendency of an action for the same assault. R. v. *Mahon*, 4 *A. & E.* 575.

The court may, with the assent of the prosecutor, if the circumstances appear to be such as to warrant that course, allow the defendant to plead guilty to a charge of assault, and inflict upon him a mere nominal fine, on the understanding that he shall make a compensation to the prosecutor. R. v. *Roxburgh*, 12 *Cox*, 8, *Cockburn*, C.J. *But see post, tit.* "*Compounding Offences.*"

Indictment for Common Assault (Common law).

If the indictment be for a common assault only, omit the words between the * * *and conclude* "against the peace," etc., *instead of* "against the form," etc.

Misdemeanor: imprisonment, with or without hard labour, not exceeding one year; 24 & 25 *Vict. c.* 100, *s.* 47; *or by fine, etc., or order to pay costs, ut supra.*

The indictment may be preferred by any person: and the right to prosecute is not restricted to the person aggrieved, even where the indictment is preferred after summary proceedings, in consequence of the decision of the justices, under 24 & 25 *Vict. c.* 100, *s.* 46, *supra. See R.* v. *Gaunt*, 18 *Cox*, 210; 60 *J. P.* 90 (*C. C. R.*).

Evidence for the Prosecution.

Did make an assault.]—An assault is an attempt to commit a forcible crime against the person of another: such as an attempt to commit a battery, murder, robbery, rape, etc. The present is an indictment for an attempt to commit a battery, and also for a battery actually committed; and if the prosecutor prove either, the defendant must be convicted. Striking at another with a cane, stick or fist, although the party striking

misses his aim; 2 *Roll. Abr.* p. 554, *pl.* 45; drawing a sword or bayonet, or throwing a bottle or glass with intent to wound or strike; presenting a loaded gun at a man who is within the distance to which the gun will carry (*see R.* v. *St. George*, 9 *C. & P.* 483: *R.* v. *Baker*, 1 *C. & K.* 254: *Osborn* v. *Veitch*, 1 *F. & F.* 317: *Read* v. *Coker*, 13 *C. B.* 850): pointing a pitchfork at him, when within reach of it; or any other like act indicating an intention to use violence against the person of another, is an assault. 1 *Hawk, c.* 62, *s.* 1. And if a person presents a firearm which he knows to be unloaded at another who does not know that it is unloaded, and so near that it might produce injury if it was loaded and went off, this is an assault. *R.* v. *St. George*, 9 *C. & P.* 483, *per Parke*, B.; *but see R.* v. *James*, 1 *C. & K.* 530, *contra*. In *Hunter* v. *Johnson*, 13 *Q. B. D.* 225, detention of a child after school hours by the master without lawful authority was held to be an assault. And *see R.* v. *Linsborg*, (*post*, p. 892).

Consent.]—As a general rule, if consent is freely given by a rational and sober person, knowing the nature of the act, it is an answer to the indictment, unless the consent is to bodily injury amounting to mayhem, or to an injury constituting a breach of the public peace. *See Steph. Dig. Cr. L.* (6th ed.) 164–166: *R.* v. *Coney*, 8 *Q. B. D.* 534; 51 *L. J.* (*M. C.*) 66; 15 *Cox*, 46 (*C. C. R.*). A magistrate has no right to order an examination of the person of a prisoner, and therefore an examination by medical men, in pursuance of such an order, of the person of a female, in custody upon the charge of concealing the birth of her illegitimate child, and against her consent, is an assault. *Agnew* v. *Jobson*, 13 *Cox*, 625, *Lopes*, J. For the American authorities on the physical examination of prisoners, *see State of Iowa* v. *Height* [1902] 94 *Amer. State Reports*, 323, *and notes*. If a master take indecent liberties with a female scholar, without her consent, though she does not resist, he may be convicted of a common assault. *R.* v. *Nichol*, *R. & R.* 130: *see R.* v. *Day*, 9 *C. & P.* 722, in which case *Coleridge*, J., drew a distinction between consent and submission. If a medical man unnecessarily strip a female patient naked, under the pretence that he cannot otherwise judge of her illness, it is an assault if he himself take off her clothes. *R.* v. *Rosinski*, 1 *Mood. C. C.* 19. So, where a medical man had connection with a girl fourteen years of age, under the pretence that he was thereby treating her medically for the complaint for which he was attending her, she making no resistance solely from the *bonâ fide* belief that such was the case, this was held to be certainly an assault, and probably a rape. *R.* v. *Case*, 1 *Den.* 580; 19 *L. J.* (*M. C.*) 174; 4 *Cox*, 220. Prior to 48 & 49 *Vict. c.* 69, *s.* 3, *sub-s.* 2 (*post*, p. 920), there seems to have been no doubt that the prisoner under such circumstances as those in *R.* v. *Case*, *ubi supra*, might be indicted for rape. *R.* v. *Flattery*, 2 *Q. B. D.* 410; 46 *L. J.* (*M. C.*) 130. In *R.* v. *O'Shay*, 19 *Cox*, 76, *Ridley*, J., held that the effect of the *Criminal Law Amendment Act*, 1885 (*s.* 3, *sub-s.* 2), is to make *R.* v. *Flattery* no longer law, and that consent, however obtained, is an answer to an indictment for rape except in the cases within the last para. of *s.* 4 of that Act. But the learned judge appears to have directed the jury that if satisfied that the accused had obtained his purpose by fraud, they might convict of indecent assault. *Cf. Steph. Dig. Cr. Law* (6th ed.), p. 207. It was laid down by *Willes*, J., in *R.* v. *Bennett*, 4 *F. & F.* 1105, that assault is within the rule that fraud vitiates consent. Where, therefore, the prisoner, who had venereal disease, induced a girl of thirteen years of age, who was ignorant of his condition, to have connection with him, and he infected her, it was held that he was guilty of an indecent assault. *R.* v. *Bennett*, *ubi supra*. The prisoner

might also, under a similar state of facts, be indicted for an assault occasioning actual bodily harm. *R.* v. *Sinclair*, 13 *Cox*, 28, *Shee*, J.: *and see Hegarty* v. *Shine*, 4 *L. R. Ir.* 288; 14 *Cox*, 145. The cases of *R.* v. *Bennett* and *R.* v. *Sinclair*, and the maxim that fraud vitiates consent, at all events in any wide application of that maxim, were the subjects of unfavourable comment by some among the majority of judges who decided *R.* v. *Clarence*, 22 *Q. B. D.* 23; 58 *L. J.* (*M. C.*) 10; 16 *Cox*, 511. The circumstances of that case were, however, very peculiar (*see post*, p. 845), nor were *R.* v. *Bennett* and *R.* v. *Sinclair* expressly overruled by it. *Pollock*, B., indeed, who was one of the majority, stated that although he saw great difficulty in adopting those cases in their integrity, he was not prepared to say that they should be overruled, as in cases of a similar kind, which might well arise, they were undoubtedly important and useful in the administration of the criminal law. But where there is full consent to the intercourse, it is difficult, since *R.* v. *Clarence*, to contend that concealment of the physical condition of the accused is such a fraud as to create criminal liability. *See per Wills*, J., 22 *Q. B. D.*, 32–36.

If parish officers cut off the hair of a pauper in the poorhouse by force and against her will, it is an assault. *Forde* v. *Skinner*, 4 *C. & P.* 239.

In the case of an indecent assault on children of either sex, under the age of thirteen, consent is no defence. 43 *& 44 Vict. c.* 45, *s.* 2 (*post*, p. 918). Although, as a general proposition, it is true that there can be no assault unless the act charged as such be done without the consent of the person alleged to have been assaulted, this rule does not extend to cases where the alleged assault is of such a nature or is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured, and involves an actual breach of the peace. *R.* v. *Coney*, 8 *Q. B. D.* 534; 51 *L. J.* (*M. C.*) 66; 15 *Cox*, 46. Therefore, in the case of a prize-fight, each of the fighters, and all persons aiding and abetting therein, are guilty of an assault. *Id.* An unlawful imprisonment is also an assault. Where the defendants took a new-born child from the mother, under pretence of taking it to an institution to be nursed, and put it into a bag, and hung the bag with the child in it on some palings by the wayside, this was held to be an assault. *R.* v. *March*, 1 *C. & K.* 496. But in *R.* v. *Renshaw*, 2 *Cox*, 285; 11 *Jur.* 615, abandoning a child in a dry ditch, where it suffered no harm from exposure, and was soon found, was held by *Parke*, B., not to be an assault.

Mere words, however, can never amount to an assault. 1 *Hawk. c.* 62, *s.* 1. So, if a man strike at another, but at such a distance that he cannot by possibility touch him, it is no assault. *Com. Dig. Battery* (*C.*). But if A. advance in a threatening attitude towards B. to strike him, and be stopped just before he is near enough for his blow to take effect, it is an assault. *Stephens* v. *Myers*, 4 *C. & P.* 349. The causing a deleterious drug to be taken by another was held to be an assault in *R.* v. *Button*, 8 *C. & P.* 660; but that decision is now overruled: *see R.* v. *Dilworth*, 2 *M. & Rob.* 531: *R.* v. *Hanson*, 2 *C. & K.* 912: *R.* v. *Walkden*, 1 *Cox*, 282. After an acquittal upon an indictment for rape, the prisoner may be convicted of a common assault. *R.* v. *Dungey*, 4 *F. & F.* 99, *and ante*, p. 170.

As to ill-treatment of lunatics, children, apprentices, and servants, *see post*, pp. 870, 877, *et seq.*

Did beat, wound, and ill-treat.]—A battery, in the legal acceptation of the word, includes beating and wounding. To beat, also in the legal acceptation of the term, means not merely to strike forcibly with the hand, or a stick, or the like, but includes every touching or laying hold

(however trifling) of another's person or clothes, in an angry, revengeful, rude, insolent, or hostile manner; 1 *Hawk. c.* 62, *s.* 2; *see Rawlings* v. *Till*, 3 *M. & W.* 28: *Coward* v. *Baddeley*, 4 *H. & N.* 478; 28 *L. J.* (*Ex.*) 260; as, for instance, thrusting or pushing him in anger: *Cole* v. *Turner*, 6 *Mod.* 142, *Holt*, C.J.; holding him by the arm; spitting in his face; *R.* v. *Cotesworth*, 6 *Mod.* 172; jostling him out of the way; *Cole* v. *Turner*, *ubi supra*; pushing another man against him; *Bull.* (*N. P.*) 16; throwing a squib at him; *Scott* v. *Shepherd*, 2 *W. Bl.* 892; striking a horse upon which he is riding, whereby he is thrown; *Dodwell* v. *Burford*, 1 *Mod.* 24; *Anon.*, *W. Jones*, 444; or the like. If a man strike at another with a cane or fist, or throw a bottle at him, or the like, if he miss him it is an assault; if he hit him it is a battery. A wounding is where the violence is so great as to draw blood, by striking or stabbing with a sword, knife, or other instrument, or by shooting, or by striking with a cudgel or fist, or the like. (*See post*, p. 841.)

Thereby then occasioning actual bodily harm to the said J. N.]—The "actual bodily harm" here mentioned would include any hurt or injury calculated to interfere with the health or comfort of the prosecutor: it need not be an injury of a *permanent* character; nor need it amount to what would be considered to be "*grievous* bodily harm." (*See post*, p. 842.)

And other wrongs.]—Under the *alia enormia*, you may give in evidence any circumstance of aggravation attending the assault and battery, not of itself amounting to a distinct trespass. 2 *Phil. Ev.* 189. But these words are mere surplusage. *Att. Gen. for N. S. W.* v. *Macpherson*, *L. R.* 3 *P. C.* 268; 39 *L. J.* (*P. C.*) 59; 11 *Cox*, 604.

Evidence for the Defendant.

The defendant must prove either that he is not guilty at all, or that the facts of the case do not amount to an assault or battery, or that he was justified or excused in law in what he did; *see R.* v. *Meredith*, 8 *C. & P.* 589; or that the complaint has been already disposed of upon summary application before two justices. 24 & 25 *Vict. c.* 100, *ss.* 44, 45 (*see ante*, p. 175). The first two defences are always given in evidence under the general issue both in civil and criminal cases; matter of justification or excuse is specially pleaded in civil actions, but is always given in evidence under the general issue in criminal cases, except in defamatory libel. The defence at previous acquittal or conviction by justices should be specially pleaded. (*See ante*, pp. 169, 174.)

1. *Misadventure.*]—It is a good defence to prove that the alleged battery happened by misadventure. If a horse run away with his rider, and run against a man, it is no battery. *Gibbon* v. *Pepper*, 2 *Salk.* 637; 1 *Ld. Raym.* 38; *Stanley* v. *Powell* [1891] 1 *Q. B.* 86, 90, *Denman*, J. If a soldier, in his ranks, discharge his gun, and a man unexpectedly pass before him at the time, and be hurt by it, it is no battery. *Weaver* v. *Ward*, *Hob.* 134; *and see R.* v. *Gill*, 1 *Str.* 190. There are many cases of accidents which cannot be set up as a defence in an action for trespass to the person, that would certainly be a good defence upon an indictment. In civil cases, the accident must have been unintentional, and not due to negligence or any want of caution, if the defendant is to be excused. *See Stanley* v. *Powell*, *ubi supra*, and cases there collected, and 2 *Rolle Abr.* 548 (G.): *Wakeman* v. *Robinson*, 1 *Bing.* 213; 25 *R. R.* 618. But in criminal cases, it may be deemed a general rule, that the same facts which would make

a killing homicide by misadventure (*see ante*, p. 782, *et seq.*) will be good defence upon an indictment for a battery.

2. *Consent.*]—It is as a general rule a good defence that the person complaining of assault or battery consented to the acts complained of. (*See ante*, p. 834.)

3. *Lawful sport.*]—It is a good defence to prove that the alleged battery was merely an amicable contest; as, that he wrestled with the prosecutor for a wager. *Com. Dig. Pleader*, 3 *M.* 18. So, that it happened by accident whilst the defendant was engaged in some sport or game which was neither unlawful nor dangerous (*see ante*, pp. 790, 791) is a good defence.

4. *Lawful correction.*]—It is a good defence to prove that the alleged battery was merely the correcting of a child by its parent, the correcting of an apprentice or scholar by his master, or the punishment of the criminal by a proper officer; *Com. Dig. Pleader*, 3 *M.* 19; 1 *Hawk. c.* 60, *s.* 23; *c.* 62, *s.* 2; *and see Watson* v. *Christie*, 2 *B. & P.* 224; provided the correction be moderate in the manner, the instrument, and the quantity of it (*see ante*, p. 795), or that the criminal be punished in the manner appointed by the law. It has been held that the defendant may justify even a mayhem, if done by him as a military officer, for disobedience of orders. *Lane* v. *Hegberg, Bull.* (*N. P.*) 19 *cit.* As to the lawful modes of inflicting corporal punishment on criminals, *see ante*, p. 239.

5. *Self-defence.*]—It is a good defence, in justification even of a wounding or mayhem, to prove that the prosecutor assaulted or beat the defendant first; and that the defendant committed the alleged battery merely in his own defence. *Cockcroft* v. *Smith*, 2 *Salk.* 642; 1 *Ld. Raym.* 177; *and see* 1 *Sid.* 246; 1 *Rolle Rep.* 19; 3 *Salk.* 46: *R.* v. *Knock*, 14 *Cox*, 1 (*ante*, p. 791). If he prove an assault merely, as, for instance, that the prosecutor lifted up his staff and offered to strike him, it is sufficient to justify the defendant's striking him: for he need not, in such a case, stay till the other has actually struck him. *Bull.* (*N. P.*) 18; 2 *Rolle Abr.* 547, *l.* 37. So a husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant, and a servant in defence of his master. 2 *Rolle Abr.* 546 (D.); 1 *Hawk. c.* 60, *ss.* 23, 24. But in all these cases the battery must be such only as was necessary to the defence of the party or his relation; for if it were excessive, if it were greater than was necessary for mere defence, or if it were after all danger from the assailment was passed, and by way of revenge, the prior assault will be no justification. *Bull.* (*N. P.*) 18: *R.* v. *Driscoll, C. & Mar.* 214: *Anon.*, 2 *Lewin*, 48, *Parke*, B. Also it will be a sufficient answer to this defence, to prove that the first assault was justifiable. *Com. Dig. Pleader*, 3 *M.* 15; 1 *Salk.* 407; *Carth.* 280 (*see ante*, p. 791, *et seq.*, 796).

6. *Defence of property.*]—The defendant may justify a battery by proving that he committed it in defence of his possession; as, for instance, to remove the prosecutor out of the defendant's close or house; or to prevent him from entering it; 2 *Rolle Abr.* 548, *l.* 25; to restrain him from taking or destroying his goods, etc.; 2 *Rolle Abr.* 549, *l.* 7; from taking or rescuing cattle, etc., in his custody upon a distress; *Id. l.* 16; 2 *Bro. Ent.* 253; or the like. In the case of a trespass in law merely, without actual force, the owner of the close, etc., must first

request the trespasser to depart, before he can justify laying his hand on him for the purpose of removing him; and, even if he refuse, he can only justify so much force as is necessary to remove him. *Weaver* v. *Bush*, 8 *T. R.* 78. But if the trespasser use force, then the owner may oppose force to force; *Goddard* v. *Green*, 2 *Salk.* 641: *Weaver* v. *Bush, ubi supra: Tully* v. *Reed*, 1 *C. & P.* 6; and in such case, if he be assaulted or beaten, he may justify even a wounding or mayhem in self-defence, as above mentioned. In answer, however, to a justification in defence of his possession, the other party may prove that the battery was excessive; *King* v. *Tebbart*, *Skin.* 387; or justify the alleged trespass on the defendant's possession, by proving that he had a right of way over the close, or the like (*and see ante*, p. 796).

7. *Execution of process.*]—It is a good defence to prove that the defendant, as an officer of justice, arrested the prosecutor by virtue of a certain writ of process, which is the alleged battery complained of. 2 *Rolle Abr.* 547 (A.). A sheriff's officer, however, can only justify laying his hand upon a man, in order to arrest him upon a writ of process; *Harrison* v. *Hodgson*, 10 *B. & C.* 445; 5 *Man. & Ry.* 392; unless he resist, or an attempt be made to rescue him, or to prevent or hinder the arrest; *Williams* v. *Jones*, *Cas.* (*K. B.*) *temp. Hardw.* 298; 2 *Str.* 1049: *Truscott* v. *Carpenter*, 1 *Ld. Raym.* 229, 232: *Levy* v. *Edwards*, 1 *C. & P.* 40; and even then he can justify no greater degree of force than was necessary in order to secure the prisoner. And the same as to officers of justice, and persons acting in their aid, arresting on suspicion of felony, without warrant; and as to private persons arresting men committing felonies in their presence, *see ante*, pp. 805, *et seq.* So a man may justify laying his hand upon another to prevent him from fighting, or committing a breach of the peace; *Com. Dig. Pleader*, 3 *M.* 16; or to prevent him from rescuing goods taken in execution; *Bridgwater* v. *Bythway*, 3 *Lev.* 113; or the like. *See Glover* v. *Hynde*, 1 *Mod.* 168; 2 *Rolle Abr.* 546, *l.* 40. Yet, even in these cases, he must not use more force than is requisite to restrain the other party, otherwise he cannot avail himself of the threatened breach of the peace, etc., as a justification. A coroner has a discretion to decide on the degree of publicity to be allowed in an inquest before him, and may justify the forcible exclusion of any person from his court. *Garnett* v. *Ferrand*, 6 *B. & C.* 611; 30 *R. R.* 466. In *Cox* v. *Coleridge*, 1 *B. & C.* 37; 25 *R. R.* 298, it was held that a magistrate, on a preliminary inquiry into a case of felony, may justify a forcible exclusion of a party from the justice-room, even though he be the attorney of the party accused. 11 & 12 *Vict. c.* 42, *s.* 19, says that such an inquiry is not to be deemed to be held in open court, and that the justices may exclude any person except the counsel or solicitor of the accused. *See s.* 17 (*a*). But if the inquiry be final and of a judicial nature, it must be public. *Daubney* v. *Cooper*, 10 *B. & C.* 237; *see also Willis* v. *Maclachlan*, 1 *Ex. D.* 376; 11 & 12 *Vict. c.* 43, *s.* 12; 42 & 43 *Vict. c.* 49, *s.* 20 (1).

8. *Previous summary trial.*]—It is a good defence to show that the complaint has been disposed of by two justices, either by conviction or dismissal of the case, provided, in the former case, the defendant has paid the penalty, and suffered the imprisonment awarded: and in the

(*a*) In 1884 the Home Office adopted the view, on the advice of the law officers, that *s.* 19 was superseded by 42 & 43 *Vict. c.* 49, *s.* 20 (1). *See Douglas Summary Jurisdiction Procedure* (8th ed.), 355. But in 1894 the Secretary of State came to the conclusion that *s.* 19 remained in full force. *See* 58 *J. P.* 772; *Stone's Justices Manual* (35th ed.) p. 15 (*f*).

latter, the magistrates have dismissed the case, because it was justified, or so trifling as not to merit punishment, or not proved, and this be forthwith certified under their hands. 24 & 25 *Vict. c.* 100, *ss.* 44, 45, (*ante*, p. 175). As to the mode of pleading this defence and its effect, *see ante*, pp. 169, 174. It is to be observed, that these provisions do not prevent the prosecutor from preferring his indictment in the first instance, if he think fit.

SHOOTING, WOUNDING, ETC., WITH INTENT TO MAIM, ETC.

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 18.]—Whosoever shall unlawfully and maliciously *by any means whatsoever* wound *or cause any grievous bodily harm to any person*, or shoot at any person, or, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 4, *with the modifications in italics, and the omission of the words "cut" and "stab." The section extends to three species of the assaults: namely*, 1. *To "wound or cause any grievous bodily harm to any person;"* 2. *To "shoot at" any person;* 3. *To attempt, "by drawing a trigger, or in any other manner," to discharge any kind of loaded arms at any person. And each of these may be done with any one of the following intents: namely*, 1. *To maim;* 2. *To disfigure;* 3. *To disable;* 4. *To do some other grievous bodily harm;* 5. *To resist or prevent the lawful apprehension or detainer of any person. The offence was held not to be one involving bodily injury to a child under sixteen, within* 57 & 58 *Vict. c.* 41, *s.* 12, *and Sched. R.* v. *Roberts*, 18 *Cox*, 580. *That enactment is repealed and re-enacted by* 4 *Edw.* 7, *c.* 15, *post*, p. 877. *It is submitted that R.* v. *Roberts was wrongly decided: see post*, p. 888.

Sect. 19—*Definition of loaded arms.*]—*Ante*, p. 818.

Sect. 20.]—Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude . . . [*This section re-enacts* 14 & 15 *Vict. c.* 19, *s.* 4. *For indictment, see post*, p. 844.]

Indictment for Wounding, with intent to Maim, etc.
(24 & 25 *Vict. c.* 100, *s.* 18.)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, in the parish of ——, and within the jurisdiction of the said court, one J. N. feloniously, unlawfully and maliciously did wound ("*wound or cause any grievous bodily harm*"), with intent in so doing him the said J. N. thereby then to maim; against the form of the statute in

such case made and provided, and against the peace of our lord the King, his crown and dignity. (*2nd Count.*)—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid [*etc., as in the last count*], with intent in so doing him the said J. N. thereby then to disfigure; against the form of the statute, etc. (*3rd Count.*)—*Same as the last;* with intent in so doing him the said J. N. thereby then to disable; against the form, etc. (*4th Count.*)—*Same as the last;* with intent in so doing to him the said J. N. thereby then to do some grievous bodily harm; against the form, etc. (*5th Count.*)—*Same as the last;* with intent in so doing thereby then to prevent ("*resist or prevent*") the lawful apprehension ("*apprehension or detainer*") of the said J. S. ("*any person*"); against the form, etc. *An indictment charging the act to have been done "feloniously, wilfully, and maliciously" was held to be bad, the words of the statute being "unlawfully and maliciously." R.* v. *Ryan*, 2 *Mood. C. C.* 15. *It is no objection to an indictment framed under this section* (18) *that it alleges that the defendant did* "inflict" *grievous bodily harm, not using the statutable word* "cause." *R.* v. *Bray*, 15 *Cox*, 197 (*C. C. R.*). *The word* "inflict" *is used in s.* 20, *supra.*

In practice, the first count of the indictment is generally for wounding with intent to murder, and the second for wounding with intent to do grievous bodily harm; if there be a doubt as to whether a wound was caused, add counts for "causing grievous bodily harm with intent," etc. For indictment for shooting with intent, see post, p. 843. *These counts were allowed to be joined in the same indictment, even when the punishments of the several offences specified in them were different. R.* v. *Strange*, 8 *C. & P.* 172; *and see Campbell* v. *R.*, 11 *Q. B.* 799, 812. *On an indictment for "wounding" with intent, etc., the jury may convict of unlawful wounding.* 14 *& 15 Vict. c.* 19, *s.* 5 (*ante,* p. 815); *and see R.* v. *Miller*, 14 *Cox*, 356 (*ante,* p. 819): *R.* v. *Waudby* [1895] 2 *Q. B.* 482; 64 *L. J.* (*M. C.*) 257; 18 *Cox*, 194.

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour. 24 *& 25 Vict. c.* 100, *s.* 18; 54 *& 55 Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante,* p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 *& 25 Vict. c.* 100, *s.* 71 (*ante,* p. 778).

This offence is not triable at quarter sessions. 5 *& 6 Vict. c.* 38, *s.* 1 (*ante,* p. 126).

Evidence.

Feloniously, unlawfully, and maliciously.]—By 9 *G.* 4, *c.* 31, *s.* 12 (*rep.*), it was necessary that the offence should have been committed under such circumstances that, if death had ensued therefrom, it would have amounted to murder. This proviso was omitted in 7 *W.* 4 *& 1 Vict. c.* 85, *s.* 4 (*rep.*), and is not contained in 24 *& 25 Vict. c.* 100, *s.* 18, which would seem therefore to include every wounding, etc., done without lawful excuse with any of the intents mentioned in the statute, for from the act itself malice will be inferred. The word "maliciously" in the statute does not mean with malice aforethought; for if it did, the offence would be included under s. 14 (*ante,* p. 817). The offence is therefore equally within this section, although if death had ensued it would have been manslaughter only. *R.* v. *Griffiths*, 8 *C. & P.* 248: *R.* v. *Nicholls*, 9 *C. & P.* 267: *Anon.*, 2 *Mood. C. C.* 40.

The instrument or means by which the injury was inflicted need not be stated in the indictment, and if stated, need not be proved as laid. *R.* v. *Briggs*, 1 *Mood. C. C.* 318; 1 *Lewin*, 61.

Did wound.]—Under 43 *G.* 3, *c.* 58 (*rep.*), which used the words "stab, cut, or wound," if the indictment was for cutting, evidence of a stabbing would not support it, the words being in the alternative. *R.* v. *M'Dermot*, *R.* & *R.* 356. Under the words "stab" or "cut," an incised wound must have been proved; a mere contused or lacerated wound was not within those words. The word "wound" in *s.* 18 includes incised wounds, punctured wounds, lacerated wounds, contused wounds, and gun-shot wounds. *See Shea* v. *R.*, 3 *Cox*, 141 (*Ir.*). But to constitute a wound within the statute, the continuity of the skin must be broken: *R.* v. *Wood*, 1 *Mood. C. C.* 278; or, in other words, the outer covering of the body (that is, the *whole skin*, not the mere *cuticle* or upper skin) (*R.* v. *M'Loughlin*, 8 *C.* & *P.* 635), must be divided. *R.* v. *Beckett*, 1 *M.* & *Rob.* 526. But a division of the *internal* skin—*e.g.*, within the cheek or lip—is sufficient to constitute a wound within the statute. *R.* v. *Smith*, 8 *C.* & *P.* 173: *R.* v. *Warman*, 1 *Den.* 183; 2 *C.* & *K.* 195. If the skin be broken, the nature of the instrument with which the injury is inflicted is immaterial. Thus, a wound from a kick with a shoe is within the statute. *R.* v. *Briggs*, 1 *Mood. C. C.* 318. And where a hammer was thrown at a person, which struck him on the nose, and broke the skin, it was held to be a wound within the meaning of 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 4 (*rep.*). *R.* v. *Withers*, 1 *Mood. C. C.* 294. *See R.* v. *Payne*, 4 *C.* & *P.* 558. Where the defendant struck the prosecutor on the outside of his hat violently with an air-gun, and the hat wounded the prosecutor, but the air-gun never came in contact with the prosecutor, it was held to be a wounding. *R.* v. *Sheard*, 2 *Mood. C. C.* 13; 7 *C.* & *P.* 846.

It was held under 9 *G.* 4, *c.* 86, *ss.* 11, 12 (*rep.*), that the "wound" must be made by an instrument, and not by the hands or teeth, because the word "wound" is there used concurrently with "stab" and "cut." But the present statute extends to wounding, etc., "*by any means whatsoever.*" The wound must be given by the act of the defendant; for if in self-defence the prosecutor force a part of his body against an instrument in the defendant's hands, and so cut or wound himself, it is not within the statute. *R.* v. *Beckett*, 1 *M.* & *Rob.* 526.

With intent, etc.]—In order to convict of the felony, the intent must be proved as laid; hence the necessity of several counts charging the offence to have been committed with different intents. The intent as a general rule can be proved by circumstantial evidence only (*vide ante*, pp. 303, 308, 340). If an indictment allege that the defendant cut the prosecutor with intent to murder, to disable, and to do some grievous bodily harm, it will not be supported by proof of an intention to prevent a lawful apprehension; *R.* v. *Duffin*, *R.* & *R.* 365: *R.* v. *Boyce*, 1 *Mood. C. C.* 29; unless, for the purpose of effecting his escape, the defendant also harboured one of the intents stated in the indictment; *R.* v. *Gillow*, 1 *Mood. C. C.* 85; for, where both intents exist, it is immaterial which is the principal and which the subordinate. Therefore, where, in order to commit a rape, the defendant cut the private parts of an infant, and thereby did her grievous bodily harm, it was held that he was guilty of cutting with intent to do grievous bodily harm, notwithstanding his principal object was to commit the rape. *R.* v. *Cox*, *R.* & *R.* 362. So, also, if a person wound another in order to rob him, and thereby inflict grievous bodily harm, he may be convicted on a count charging him with an intent to do grievous bodily harm. *R.* v. *Bowen*, *C.* & *Mar.* 149. Where the defendant struck at A., but B., interposing, received the blow, and was wounded, it was held that the defendant could not be convicted of wounding B. with intent to do him grievous bodily harm, under

7 *W.* 4 & 1 *Vict. c.* 85, *s.* 4 (*rep.*). *R.* v. *Hewlett*, 1 *F.* & *F.* 91; *and cf. R.* v. *Holt*, 7 *C.* & *P.* 518: *R.* v. *Ryan*, 2 *M.* & *Rob.* 213 (*ante*, p. 816). But *R.* v. *Hewlett* was doubted by *Brett*, J., in *R.* v. *Stopford*, 11 *Cox*, 643, on the ground that it was inconsistent with *R.* v. *Hunt*, 1 *Mood. C. C.* 93 (*ante*, p. 798), which was accepted as good law in *R.* v. *Latimer*, 17 *Q. B. D.* 359 (*post*, p. 845); and under the present statute it is sufficient if it be proved that the defendant wounded, etc., shot at, etc., any person, with intent to maim, etc., *any person*; therefore, in the case just cited, the defendant might now be convicted of wounding B. with intent to do grievous bodily harm to A. And an indictment charging the prisoner with wounding A. with intent to do him grievous bodily harm, is supported by evidence that the prisoner intended to do grievous bodily harm to the man he wounded, and who in fact was A., although the prisoner did not think that he was A., but somebody else. *R.* v. *Stopford*, *ubi supra*, *Brett*, J. *See also R.* v. *Smith*, *Dears.* 559; 25 *L. J.* (*M. C.*) 29 (*ante*, p. 820). A person who fires a loaded pistol into a group of persons, not aiming at any one in particular, but intending generally to do grievous bodily harm, and who hits one of them, may be convicted on an indictment charging him with shooting at the person he has hit with intent to do grievous bodily harm to that person. *R.* v. *Fretwell*, *L.* & *C.* 443; 33 *L. J.* (*M. C.*) 118; 9 *Cox*, 471. If it be doubtful whether the act was done by accident or design, other circumstances may be given in evidence to prove the intent (*ante*, pp. 303, 308, 340). In the case of *R.* v. *Woodburn and Coke*, 16 *St. Tr.* 53, 69, the defendants had the effrontery to set up as a defence, that the assault was committed by them with intent, not to maim or disfigure, but to murder; the court, however, held, that if a man attack another with intent to murder him, with an instrument which cannot but endanger the disfiguring of him, and in such attack happen not to kill, but only to disfigure him, it was within *Sir John Coventry's Act*, 22 & 23 *C.* 2, *c.* 1, *s.* 7 (*rep.*), which made it felony to commit any of the offences there mentioned, with intent to maim or disfigure. The defendants were accordingly convicted and executed. 4 *Bl. Com.* 207, *n.* (*k*).

With respect to the intents mentioned in the statute: to *maim*, is to injure any part of a man's body which may render him, in fighting, less able to defend himself, or annoy his enemy. 1 *Hawk. c.* 55, *s.* 1; *see R.* v. *Sullivan*, *C.* & *Mar.* 209. To *disfigure*, is to do some external injury which may detract from his personal appearance; and to *disable*, is to do something which creates a permanent disability, and not merely a temporary injury. *See R.* v. *Boyce*, 1 *Mood. C. C.* 29. It is not necessary that *grievous bodily harm* should be either permanent or dangerous; *R.* v. *Ashman*, 1 *F.* & *F.* 88; if it be such as seriously to interfere with health or comfort, that is sufficient; and therefore where the defendant cut the private parts of an infant, and the wound was not dangerous, and was small, but bled a good deal, and the jury found that it was a grievous bodily harm, it was held that the conviction was right. *R.* v. *Cox*, *R.* & *R.* 362. Where the intent laid is to prevent a lawful apprehension, it must be shown that the arrest would have been lawful (*see ante*, p. 805, *et seq.*); and where the circumstances are not such that the party must know why he is about to be apprehended (*R.* v. *Howarth*, 1 *Mood. C. C.* 207; *Car. Sup.* 231, *ante*, p. 811), it must be proved that he was apprised of the intention to apprehend him. *R.* v. *Ricketts*, 3 *Camp.* 68; 13 *R. R.* 753: *but see R.* v. *Bentley*, 4 *Cox*, 406.

Power to convict of unlawful wounding.]—If the prosecutor fail in proving the intent, the defendant, under 14 & 15 *Vict. c.* 19, *s.* 5 (*ante*,

p. 815), may, on an indictment for felonious wounding (*see R.* v. *Miller*, 14 *Cox*, 356), be convicted of the misdemeanor of unlawfully wounding, and receive sentence of penal servitude for not less than three years and not exceeding five years, or imprisonment not exceeding two years, with or without hard labour. 24 & 25 *Vict. c.* 100, *s.* 20 (*ante*, p. 839); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). (*See post*, p. 844.)

Indictment for Shooting with intent to Maim. (24 & 25 *Vict. c.* 100, *s.* 18, *ante*, p. 839.)

Commencement as ante, p. 839]—a certain gun then loaded with gunpowder and divers leaden shot, at one J. N. feloniously, unlawfully, and maliciously did shoot with intent in so doing the said J. N. thereby then to maim; against the form [*as ante*, p. 839. *Add counts stating the various intents mentioned in the statute, as in the last precedent. In practice the first count is for shooting with intent to murder, as ante*, p. 819].

Felony: 24 & 25 *Vict. c.* 100, *s.* 18. *See the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the shooting as directed, *ante*, p. 819. Prove the intent as laid in some one of the counts (*see ante*, p. 841).

Indictment for attempting to Shoot with intent to Maim, etc. (24 & 25 *Vict. c.* 100, *s.* 18, *ante*, p. 839.)

Commencement as ante, p. 839]—by drawing the trigger ("*drawing a trigger or in other manner*") of certain loaded arms, to wit, of a certain pistol ("*any kind of loaded arms*"), then loaded with gunpowder and one leaden bullet, feloniously, unlawfully, and maliciously did attempt to discharge the said pistol, so loaded as aforesaid, at one J. N., with intent [*etc., as in the last precedent but one*].

Felony: 24 & 25 *Vict. c.* 100, *s.* 18. *See the last precedent but one.*

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the attempt to shoot as directed, *ante*, p. 819; and the intent as under the last two precedents. If a person intending to shoot another, put his finger on the trigger of a loaded firearm, but is prevented from pulling the trigger, this is an attempt to discharge loaded arms within the statute. *R.* v. *Duckworth* [1892] 2 *Q. B.* 83; 17 *Cox*, 495 (*C. C. R.*), which on this point overrules *R.* v. *St. George*, 9 *C. & P.* 483, which had previously been doubted in *R.* v. *Brown*, 10 *Q. B. D.* 381; 52 *L. J.* (*M. C.*) 49 (*ante*, p. 821). In *R.* v. *Jackson*, 17 *Cox*, 104, a revolver loaded with cartridges in some chambers only, was held by *Charles*, J., to be "loaded" within 24 & 25 *Vict. c.* 100, *s.* 14 (*ante*, p. 817). The ruling seems to apply equally to *s.* 18. The presenting of a loaded pistol at another is an assault. *R.* v. *St. George, supra: R.* v. *Baker*, 1 *C. & K.* 254. And *semble*, though the pistol be not in fact loaded, if it be presented so near the person of another as that it would have endangered him had it been loaded and gone off, and he be ignorant that it is not loaded, that is an assault. *Id.: but see R.* v. *James*, 1 *C. & K.* 530, *contra.*

Any gun, pistol or other arms, loaded in the barrel with gunpowder or other explosive substance, and ball, shot, slug, or other *destructive material*, are loaded arms within the meaning of the statute, although the attempt to discharge them may fail from want of proper priming or from any other causes. 24 & 25 *Vict. c.* 100, *s.* 19 (*ante*, p. 818).

Indictment for unlawfully Wounding. (24 & 25 *Vict. c.* 100, *s.* 20, *ante*, p. 839.)

Commencement as ante, p. 839]—one J. N. unlawfully and maliciously did wound ("*wound or inflict any grievous bodily harm upon*"); against the form [*as ante*, p. 839]. *Add a count charging that the defendant "did inflict grievous bodily harm upon J. N." (see ante*, p. 840). *The defendant may be convicted of a common assault upon this indictment. R.* v. *Taylor, L. R.* 1 *C. C. R.* 104; 38 *L. J.* (*M. C.*) 106 (*ante*, p. 217).

Misdemeanor: penal servitude for not less than three years, and not exceeding five years, or imprisonment not exceeding two years, with or without hard labour.—24 & 25 *Vict. c.* 100, *s.* 20 (*ante*, p. 839); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante, p.* 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour*, 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

The defendant may be convicted of unlawfully wounding, and punished under this section, upon an indictment charging a felonious wounding, where the prosecutor fails in proving the felonious intent: 14 & 15 *Vict. c.* 19, *s.* 5 (*ante*, p. 815). *Aiders and abettors in the felony charged may be convicted as aiders and abettors in the misdemeanor. R.* v. *Waudby* [1895] 2 *Q. B.* 482; 64 *L. J.* (*M. C.*) 251; 18 *Cox*, 194.

Evidence.

The evidence will be the same as on an indictment framed on 24 & 25 *Vict. c.* 100, *s.* 18, except as to the proof of the intent. It is, however, necessary to show that the wounding was malicious, but it may be malicious although the prisoner had no spite or ill-feeling against the prosecutor, and although the prisoner did not even intend to wound the prosecutor. It seems quite sufficient to prove that the prisoner intentionally and unlawfully did the act which caused the wound, although he did the act merely for the purpose of frightening the prosecutor, and did not intend to wound him. The prosecutor was using a punt in a creek of a river for the purpose of shooting wild fowl. When slewing the punt round to return home he suddenly heard the report of a gun, and found himself shot and wounded seriously. The prisoner had fired the shot in the direction of the punt with the intention of frightening the prosecutor from again coming into the creek for the purpose of fowling, and not with the intent of doing him bodily harm. It was held that there was evidence on the above facts of a malicious wounding by the prisoner. *Id.* And if the prisoner did the act which caused the wound or grievous bodily harm as a mere piece of foolish mischief, unlawfully and without excuse, he will be held to have done it maliciously within the meaning of the statute. *R.* v. *Ward, L. R.* 1 *C. C. R.* 356; 48 *L. J.* (*M.C.*) 69; 12 *Cox*, 123. Shortly before the conclusion of a performance at a theatre, the prisoner with the intention and with the result of causing terror in the minds of persons leaving the theatre, put out the gaslights on a staircase which a large number of such persons had to descend in order to leave the theatre, and he also, with the intention and with the result of obstructing

the exit, placed an iron bar across a doorway through which they had to pass in leaving. Upon the lights being thus extinguished a panic seized a large portion of the audience, and they rushed in fright down the staircase, forcing those in front against the iron bar. By reason of the pressure and struggling of the crowd thus created on the staircase, several of the audience were severely injured, and amongst them A. and B. It was held that upon these facts the prisoner was rightly convicted of unlawfully and maliciously inflicting grievous bodily harm upon A. and B. *R.* v. *Martin*, 8 *Q. B. D.* 54; 51 *L. J.* (*M. C.*) 36; 14 *Cox*, 633. (See the judgment of *Stephen*, J.) This decision was approved in *R.* v. *Halliday*, 61 *L. T. Rep.* 701; 38 *W. R.* 256 (*C. C. R.*), and it was there held that where a wife to escape from the violence of her husband who had threatened to take her life, got out of a window and in so doing fell and broke her leg, the husband was properly convicted under *s.* 20. This decision seems inconsistent with *R.* v. *Donovan*, 4 *Cox*, 399 (*ante*, p. 823). The prisoner aimed a blow at one person, but, missing his aim, struck and wounded another. He was indicted under *s.* 20 of 24 & 25 *Vict. c.* 100, for unlawfully and maliciously wounding such other person, and, having been convicted, it was held that such conviction was right. *R.* v. *Latimer*, 17 *Q. B. D.* 359; 55 *L. J.* (*M. C.*) 135; 16 *Cox*, 70. The prisoner, a married man, at a time when he knew, but his wife did not know, that he was suffering from gonorrhœa, had connection with her, and the result was that the disease was communicated to her. Had she been aware of his condition, she would not have submitted to the intercourse. Upon these facts it was held that the prisoner could not be convicted of unlawfully and maliciously inflicting grievous bodily harm upon his wife under 24 & 25 *Vict. c.* 100, *s.* 20, nor of an assault occasioning actual bodily harm under *s.* 47. *R.* v. *Clarence*, 22 *Q. B. D.* 23; 58 *L. J.* (*M. C.*) 10; 16 *Cox*, 511. (*Compare R.* v. *Rakma*, 11 *Bombay*, 59, *decided on ss.* 269, 270 *of the Indian Penal Code: and see ante*, p. 834.)

ATTEMPTING TO CHOKE, SUFFOCATE, OR STRANGLE, ETC., WITH INTENT, ETC.

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 21.]—Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall by any means calculated to choke, suffocate, or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This was new law in* 1861.]

26 & 27 *Vict. c.* 44—*Power to award punishment of whipping.*]—*Ante*, p. 521.

Indictment.

Commencement as ante, p. 839]—feloniously did attempt to choke, suffocate, and strangle one J. N. ("*choke, suffocate, or strangle any person,*"

or "*by any means calculated to choke, suffocate, or strangle, attempt to render any person insensible, unconscious or incapable of resistance*"), with intent thereby to enable him the said J. S., the monies, goods, and chattels of the said J. N., from the person of the said J. N., feloniously and unlawfully to steal, take, and carry away ("*with intent to enable himself or any other person to commit,*" or "*to assist any other person in committing any indictable offence*"); against the form [*as ante*, p. 839]. *Add counts varying the statement of the intent, and where the indictment charges an attempt to render insensible, etc., "by means calculated to choke, etc.," set out the means. It is submitted that it is unnecessary to set out the means (as was done in the precedent in former editions of this work) where the indictment is framed under the earlier part of this section for attempting to choke, etc., simply.*

Felony: penal servitude for life or for not less than three years, or imprisonment with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 100, *s.* 21; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *The court before which the prisoner is convicted may also, in addition to the punishment of penal servitude or imprisonment, direct that if a male, he be once, twice or thrice privately whipped, subject to the following provisions:— 1. In the case of an offender whose age does not exceed sixteen years, the number of strokes at each whipping shall not exceed twenty-five, and the instrument used shall be a birch rod. 2. In the case of any other male offender the number of strokes shall not exceed fifty at each whipping. 3. In each case the court in its sentence shall specify the number of strokes and the instrument to be used. The whipping is not to take place after the expiration of six months from the passing of the sentence, and in the case of a person sentenced to penal servitude, is to be inflicted before his removal to a convict prison.* 26 & 27 *Vict. c.* 44 (*ante*, p. 521). *As to requiring the offender to enter into recognizances, and find sureties for keeping the peace,* 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the attempt by the defendant to choke, suffocate, or strangle the prosecutor, by the means stated in the indictment, and the intent as directed, *ante*, p. 841.

ADMINISTERING, ETC., CHLOROFORM, ETC., TO COMMIT INDICTABLE OFFENCES.

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 22.]— Whosoever shall unlawfully apply or administer to *or cause to be taken by*, or attempt to apply or administer to, *or attempt to cause to be administered to or taken by*, any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing *any indictable offence*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 14 & 15 *Vict. c.* 19, *s.* 3, *with the additions italicized.*]

48 & 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 3 (3)—*Administering, etc., drugs to females with a view to unlawful carnal intercourse.*]—*Post*, p. 921.

Indictment.

Commencement as ante, p. 839]—feloniously and unlawfully did apply and administer to one J. N. ("*apply or administer to or cause to be taken by, or attempt to apply or administer to, or attempt to cause to be administered to or taken by*") a certain stupefying and overpowering drug, to wit, chloroform ("*any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing*") with intent thereby then to enable him the said J. S. [*or* one A. B.] the monies, goods, and chattels of the said J. N., from the person of the said J. N., feloniously and unlawfully to steal, take, and carry away ("*with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing any indictable offence*"); against the form [*as ante*, p. 839].

If it be not certain that it was chloroform (*or laudanum*) *that was administered, add a count or counts stating it to be* "a certain stupefying and overpowering drug and matter, to the jurors aforesaid unknown." *Add also counts varying the intent, if necessary.*

Felony : penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, not exceeding two years.—24 & 25 *Vict. c.* 100, *s.* 22; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances, and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant administered or assisted in administering chloroform (or laudanum, or other stupefying or overpowering drug, etc.), as stated in the indictment. If the drug, etc., be not named in the indictment, evidence must be given to show that it was of a stupefying or overpowering nature, calculated to aid the offender in the commission of a felony. Then prove the intent, as directed, *ante*, p. 841. In practice the ordinary evidence of the intent will be that the prosecutor was robbed or otherwise injured while under the influence of the drug, etc.

ADMINISTERING, ETC., POISON, ETC., WITH INTENT TO ENDANGER LIFE, ETC., OR TO INJURE, ETC.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 23.]—Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding ten years . . . [*This section re-enacts* 23 & 24 *Vict. c.* 8, *s.* 1. *This and the succeeding section appear to override the decisions in R.* v. *Hanson*, 2 *C. & K.* 912; 14 *Cox*, 138: *R.* v. *Walkden*, 1 *Cox*, 282: *R.* v. *Dilworth*, 2 *M. & Rob.* 531.]

Sect. 24.]—Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude . . . [*This section re-enacts* 23 & 24 *Vict. c.* 8, *s.* 2.]

Sect. 25.]—If, upon the trial of any person for any felony in the last but one preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any misdemeanor in the last preceding section mentioned, then and in every such case the jury may acquit the accused of such felony, and find him guilty of such misdemeanor, and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanor. [*This section re-enacts* 23 & 24 *Vict. c.* 8, *s.* 3.]

Indictment for administering Poison so as to endanger Life, etc. (24 & 25 *Vict. c.* 100, *s.* 23.)

Commencement as ante, p. 839]—feloniously, unlawfully, and maliciously did administer to one J. N. ("*administer to or cause to be administered to or taken by any person*") certain poison, to wit, two drachms of white arsenic ("*any poison or other destructive or noxious thing*"), so as thereby then to endanger the life of the said J. N.; against the form [*as ante*, p. 839]. *Add a count stating that the defendant* "did cause to be taken by J. N.," etc.; *and if the kind of poison, etc., be doubtful, add counts describing it in different ways, and also stating it to be* "a certain destructive thing," *or* "a certain noxious thing," "to the jurors aforesaid unknown." *See ante*, p. 847. *There should be also a set of counts stating that the defendant thereby "inflicted upon* J. N. *grievous bodily harm."*

An indictment on s. 24, *for administering, etc., poison, etc., with intent to injure, aggrieve, or annoy the prosecutor, may be framed from the precedent* (*ante*, p. 815), *varying the allegation of the intent. Or the defendant may be convicted of and have judgment for the misdemeanor mentioned in s.* 24, *on an indictment under s.* 23, *if the prosecutor fail in proving the felony. Id. s.* 25. *Where the defendant administered cantharides to a woman, and the jury found that it was administered with the intent to excite her sexual passion and desire, in order that the defendant might obtain connection with her, this was held to be an administering with intent to "injure, aggrieve, and annoy" her. R. v. Wilkins, L. & C.* 89; 31 *L. J.* (*M. C.*) 72; 9 *Cox*, 20. *See R. v. Hennah* (*post*, p. 849). *As to charging the intent to "injure, aggrieve, and annoy" in one count, see R. v. Bowen*, 1 *Den.* 22 (*ante*, p. 82).

Felony: penal servitude for not more than ten and not less than three years, or imprisonment not exceeding two years, with or without hard labour. 24 & 25 *Vict. c.* 100, *s.* 23; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2, (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778). *If the defendant be convicted of the misdemeanor only, the punishment is penal servitude for not less than three years and not exceeding five years, or imprisonment not exceeding two years, with or without hard labour*, 24 & 25 *Vict. c.* 100, *s.* 24; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace, and being of good behaviour*, 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

Evidence.

Prove the administering, etc., of the poison, etc., as directed, *ante*, p. 816. Prove also that by means thereof the prosecutor's life was endangered, or grievous bodily harm was done to him (*see ante*, p. 842). If the poison, etc., is administered merely with intent "to injure, aggrieve, or annoy," which in itself would merely amount to a misdemeanor under *s.* 24, yet if it does in fact "inflict grievous bodily harm," this amounts to a felony under *s.* 23. *Tulley* v. *Corrie*, 10 *Cox*, 640. In order to a conviction of the misdemeanor mentioned in *s.* 24, it must be proved that the defendant intended the administration of the poison, etc., to "injure, aggrieve, or annoy" the prosecutor. *See R.* v. *Wilkins* (*ante*, p. 848). Whether the thing administered is a "noxious thing" or not, may depend upon the quantity administered, some drugs being innoxious in small, and noxious in large, quantities. Thus, where the prisoner was indicted under *s.* 24, and the evidence was that he had administered cantharides to the prosecutrix, that a large dose of cantharides is poisonous, but that the quantity administered by the prisoner was insufficient to produce any effect upon the human system, it was held that the prisoner could not be convicted under *s.* 24 of administering a "destructive or noxious thing," notwithstanding the prisoner administered it with intent to injure or annoy. *R.* v. *Hennah*, 13 *Cox*, 547; *Cockburn*, C.J., and *Hawkins*, J. On the other hand, where the prisoner was indicted under *s.* 58 (*ante*, p. 826), for having caused to be taken a certain noxious thing, to wit, half an ounce of oil of juniper, with intent to procure miscarriage, and the evidence was that oil of juniper in considerably less quantities than half an ounce might be taken without ill effects, but that half an ounce produces ill effects, and is to a pregnant woman dangerous, it was held that the half ounce of oil of juniper was a "noxious thing" within the statute. *R.* v. *Cramp*, 5 *Q. B. D.* 307; 49 *L. J.* (*M. C.*) 44; 14 *Cox*, 390. And where the drug administered is a recognized "poison," then it may be that although the quantity administered by the defendant is so small as to be incapable of doing harm that is sufficient to bring him within the statute. *Id.*

INJURING OR ATTEMPTING TO INJURE PERSONS BY EXPLOSIVE OR CORROSIVE SUBSTANCES, ETC.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 28—*Causing bodily injury by explosives.*]—Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section is taken from* 9 & 10 *Vict. c.* 25, *s.* 37.]

Sect. 29—*Using explosives or corrosives with intent to do grievous bodily harm.*]—Whosoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to or cause to be taken or received by any person any explosive substance, or any other dangerous or noxious thing, *or put or lay at any place*, or cast

or throw at or upon or otherwise apply to any person, any corrosive fluid or any destructive or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, *whether* any bodily injury be effected *or not*, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section is taken from* 9 & 10 *Vict. c.* 25, *s.* 4, *and* 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 5, *with the alterations in italics.*]

Sect. 30—*Placing explosives near buildings or ships with intent to do grievous bodily harm.*]—Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any building, ship, or vessel any gunpowder or other explosive substance, with intent to do any bodily injury to any person, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years . . . or to be imprisoned . . . and, if a male under the age of sixteen years, with or without whipping. [*This section is taken from* 9 & 10 *Vict. c.* 25, *s.* 6.]

Sect. 64—*Making gunpowder, etc., to commit felonies against the Act.*]—*Ante*, p. 821.

Indictment for Burning by Gunpowder. (24 & 25 *Vict. c.* 100, *s.* 28, *ante*, p. 850.)

Commencement as ante, p. 839]—feloniously, unlawfully, and maliciously, by the explosion of a certain explosive substance, that is to say, gunpowder, did burn one J. N.; against the form [*as ante*, p. 840]. *Add counts varying the statement of the injury according to the circumstances. An indictment under s.* 30 *for maliciously placing or throwing gunpowder into, etc., any building, etc., with intent to do bodily injury to any person, may easily be framed from the precedents* (*ante*, p. 668).

Felony: penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, not exceeding two years; and, if a male under sixteen years, with or without whipping. 24 & 25 *Vict. c.* 100, *s.* 28; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

As to the punishment of whipping, see ante, p. 216, *and* 24 & 25 *Vict. c.* 100, *s.* 70 (*ante*, p. 778.)

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant, by means of the explosion of gunpowder, burnt the person of J. N., or maimed, disfigured, or disabled him, or did him some grievous bodily harm. (*See ante*, p. 807.) Prove that the act was done maliciously. (*See ante*, pp. 303, 308, 651, 701.)

Indictment for sending an Explosive Substance, with Intent, etc. (24 & 25 *Vict. c.* 100, *s.* 29, *ante*, p. 849.)

Commencement as ante, p. 839]—feloniously, unlawfully, and maliciously did send ("*send or deliver to, or cause to be taken or received by any person*") to one J. N. a certain explosive substance, to wit, two drachms of fulminating silver, and two pounds weight of gunpowder, with intent in so doing him the said J. N. thereby then to burn ("*burn, maim, disfigure, or disable, or do some grievous bodily harm*"); against the form [*as ante*, p. 840]. *Add counts varying the injury and intent, and the description of the thing sent: if that be doubtful describe it as "a certain dangerous* [*or noxious*] *thing to the jurors aforesaid unknown." See also precedents, ante*, pp. 668, 669.

Felony. 24 & 25 *Vict. c.* 100, *s.* 29. *See the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the sending of the explosive substance, and the intent as directed, *ante*, pp. 300, 308–312. Under 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 54 (*rep.*), it was necessary to prove that the prosecutor was actually burnt, etc. But by the present statute the offence is complete by the malicious sending, etc., with intent to burn, etc., any person, whether or not any bodily injury be effected.

Indictment for throwing Corrosive Fluid with Intent. (24 & 25 *Vict. c.* 109, *s.* 29, *ante*, p. 850.)

Commencement as ante, p. 839]—feloniously, unlawfully, and maliciously did cast and throw upon ("*cast or throw at or upon or otherwise apply to any person*") one J. N. a certain corrosive fluid, to wit, one pint of oil of vitriol ("*any corrosive fluid or any destructive or explosive substance*"), with intent in so doing him the said J. N. thereby then to burn; against the form [*as ante*, p. 840]. *Add counts varying the injury and intent and description of substance thrown. See the last precedent.*

Felony: 24 & 25 *Vict. c.* 103, *s.* 29. *See the last precedent but one.*

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant wilfully threw vitriol on (or at) the prosecutor; and prove the intent as directed (*ante*, pp. 300, 308–312). 6 *G.* 1, *c.* 2, *s.* 11 (*rep.*), made it felony to assault any person in the public streets, etc., with intent to cut, etc., and cutting the clothes of such person: upon which it was held in a case where the defendant intending to cut the person of the prosecutrix, struck her with a sharp instrument, and, in doing so, cut her clothes, that the primary intention must be to cut the clothes, and that as the primary intention there was the wounding of the person, the statute did not apply. *R.* v. *Rhenwick Williams*, 1 *Leach*, 529, 533. So here, if it were clearly shown that the intention was only to burn the clothes, it would seem not to be within the statute; but unless the contrary be proved, the intention will be evidenced by the act.

Boiling water was held to be "destructive matter," within the 7 *W.* 4 & 1 *Vict. c.* 85, *s.* 5 (*rep.*). *R.* v. *Crawford*, 1 *Den.* 100; 2 *C. & K.* 129.

CAUSING EXPLOSIONS LIKELY TO ENDANGER LIFE.

Statute.

46 & 47 *Vict.* c. 3 (*Explosives Substances Act*, 1883).]—*Ante*, pp. 664–6.

SETTING SPRING-GUNS, ETC., WITH INTENT, ETC.

Statute.

24 & 25 *Vict.* c. 100 (*Offences against the Person Act*, 1861), s. 31.]—Whosoever shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude . . .; and whosoever shall knowingly and wilfully permit any such spring-gun, man-trap, or other engine which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some other person to continue so set or placed, shall be deemed to have set and placed such gun, trap, or engine with such intent as aforesaid.

Provided that nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as may have been or may be usually set or placed with the intent of destroying vermin:

Provided also, that nothing in this section shall be deemed to make it unlawful to set or place or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring-gun, man-trap, or other engine which shall be set or placed, or caused or continued to be set or placed in a dwelling-house for the protection thereof. [*This section re-enacts* 7 & 8 *G.* 4, c. 18.]

Indictment.

Commencement as ante, p. 839]—unlawfully did set and place and cause to be set and placed, in a certain garden situate at the parish of B., in the county of M., a certain engine calculated to destroy human life (*or inflict grievous bodily harm*), to wit, a spring-gun ("*spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm*"), which was then loaded and charged with gunpowder and divers leaden shot, with intent that the said spring-gun, so loaded and charged as aforesaid, should inflict grievous bodily harm upon ("*destroy or inflict grievous bodily harm upon*") any trespasser ("*any trespasser or other person*") who might come in contact therewith; against the form [*as ante*, p. 840].

Misdemeanor: penal servitude for not less than three years and not exceeding five years; or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict.* c. 100, s. 31; 54 & 55 *Vict.* c. 69, s. 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties keeping the peace, and being of good behaviour,* 24 & 25 *Vict.* c. 100, s. 71 (*ante*, p. 778).

Evidence.

Prove that the defendant placed, or continued (*see* 24 & 25 *Vict. c.* 100, *s.* 31, *supra*) the spring-gun loaded in a place where persons might come in contact with it; and if any injury was in reality occasioned, state it in the indictment and prove it as laid.

The intent can only be inferred from circumstances (*see ante*, pp. 303, 308, 339), as the position of the gun, the declarations of the defendant, and so forth. Any injury actually done will, of course, be some evidence of the intent.

This statute applies only to instruments set with an intention to do grievous bodily harm thereby to human beings, or whereby grievous bodily harm is actually done to a human being; not, therefore, to *dog-spears* set by a man in his own land. *Jordin* v. *Crump*, 8 *M. & W.* 782; 11 *L. J.* (*Ex.*) 74: *cf. Wootton* v. *Dawkins*, 2 *C. B.* (*N. S.*) 412. If death was caused by setting a spring-gun, the setter is guilty of manslaughter. *R.* v. *Heaton*, 60 *J. P.* 508, *Kennedy*, J.; *and see ante*, p. 804.

The prisoners were indicted under *s.* 31 for causing to be set or placed in a field a spring-gun or engine calculated, etc. The gun in question was an alarm gun stuck in the ground and was loaded with a cartridge containing shot, but there was no evidence to show that the prisoners knew that the gun contained shot. It was contended that the evidence disclosed no offence because the engine must be calculated, etc., and the gun was merely intended to give an alarm, and the fact of its being loaded did not alter its character or the object with which it was set. These contentions were overruled: *R.* v. *Smith and York* [1902] *Northamptonshire Assizes*, 37 *L. J. Newsp.* 89, *Bruce*, J.

ENDANGERING THE SAFETY OF RAILWAY PASSENGERS.

Statutes.

3 & 4 *Vict. c.* 97, *ss.* 13, 14—*Neglect or misconduct by railway servants.*]—*See ante*, p. 688.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 32.]—Whosoever shall *unlawfully* and maliciously put or throw upon or across any railway, any wood, stone, or other matter or thing, or shall *unlawfully* and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall *unlawfully* and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall *unlawfully* and maliciously make or show, hide or remove, any signal or light upon or near to any railway, or shall *unlawfully* and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to endanger the safety of any person travelling or being upon such railway, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life . . . or to be imprisoned, . . . and, if a male under the age of sixteen years, with or without whipping. [*This section re-enacts* 14 & 15 *Vict. c.* 19, *s.* 6, *with the substitution of "unlawfully" for "wilfully."*]

Sect. 33.]—Whosoever shall *unlawfully* and maliciously throw, or cause

to fall or strike, at, against, into, or upon any engine, tender, carriage, or truck used upon any railway, any wood, stone, or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage or truck, *or in or upon any other engine, tender, carriage, or truck of any train of which such first-mentioned engine, tender, carriage, or truck shall form part*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 14 & 15 *Vict. c.* 19, *s.* 7, *with the substitution of "unlawfully" for "wilfully," and the addition of the other words italicized, to get rid of R. v. Court*, 6 *Cox*, 202: *and see R. v. Rooke*, 1 *F. & F.* 107: *R. v. Sanderson, Id.* 37.]

Sect. 34.]—Whosoever, by *any unlawful act, or by any wilful omission or neglect*, shall endanger *or cause to be endangered* the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. [*This section re-enacts* 3 & 4 *Vict. c.* 97, *s.* 15, *with the alterations italicised. As to the meaning of "wilful," see R. v. Holroyd*, 2 *M. & Rob.* 339; *and R. v. Senior* [1899] 1 *Q. B.* 283, *ante*, p. 803; *post*, p. 890.]

54 & 55 *Vict. c.* 69, *s.* 1—*Minimum term of penal servitude, and term of imprisonment.*]—*Ante*, p. 235.

Indictment for endangering by Wilful Neglect the Safety of Railway Passengers. (24 & 25 *Vict. c.* 100, *s.* 34.)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the —— day of ——, in the year of our Lord —— [in the parish of ——, and within the jurisdiction of the said Court], unlawfully did, by a certain wilful omission and neglect of him the said J. S., that is to say, by then wilfully omitting and neglecting to turn certain points in and upon a certain railway called the —— railway, in the parish of B., in the county of M., which points it was then the duty of him the said J. S. to turn, endanger the safety of certain persons then conveyed and being in and upon the said railway; against the form [*as ante*, p. 840]. (*It is not necessary to state that the railway is worked under statutory authority: R. v. Bowray*, 10 *Jur.* 211.) *Indictments on ss.* 32 *and* 33 (*ante*, p. 853) *may be framed from this precedent, varying the statement of the intent. For another and fuller precedent of an indictment against an engine driver and stoker, see* 10 *Cox, App. xl.–xlix.*

Misdemeanor: imprisonment not exceeding two years, with or without hard labour. 24 & 25 *Vict. c.* 100, *s.* 34. *As to finding the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour, Id. s.* 71 (*ante*, p. 778).

Evidence.

Prove that it was the duty of the defendant to turn the points; that he wilfully (*see* note to *s.* 34, *supra*) omitted and neglected to do so; and that by reason of such omission and neglect the safety of the passengers or other persons conveyed or being on the railway (which words will include not only passengers but officers and servants of the railway company) was endangered.

Throwing a stone at engines or carriages appears to be an offence within the section. *R.* v. *Bowray*, 10 *Jur.* 211, *Alderson*, B. So in playing with a cart on railway premises with the result of letting it run within a dangerous distance of the track. *R.* v. *Monaghan*, 11 *Cox*, 608. Neglect by an engine driver to keep a good look out for signals was held not to be within 3 & 4 *Vict. c.* 97, *s.* 15 (*rep.*): *R.* v. *Pardenton*, 6 *Cox*, 247; but it appears to be within the italicized words of 24 & 25 *Vict. c.* 100, *s.* 34.

An acquittal on an indictment framed under *s.* 32 is no bar to a subsequent indictment upon the same facts for a misdemeanor under *s.* 34. *R.* v. *Gilmore*, 15 *Cox*, 85, *Huddleston*, B. As to cases where death is caused by act or defaults within *ss.* 33, 34, *see ante*, p. 802.

INJURIES ARISING FROM THE FURIOUS DRIVING OF CARRIAGES.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 35.]—Whosoever, having the charge of *any* carriage *or vehicle*, shall, by wanton or furious driving or racing, or other wilful misconduct, *or by wilful neglect*, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. [*This section re-enacts* 1 *G.* 4, *c.* 4, *with the additions italicized. It applies to all carriages and vehicles, public or private; also to bicycles. R.* v. *Parker*, 59 *J. P.* 793, *Hawkins*, J. *A bicycle is a "carriage" within* 5 & 6 *W.* 4, *c.* 50 (*Highway Act*, 1835), *s.* 78: *Taylor* v. *Goodwin*, 4 *Q. B. D.* 228; *cf. Cannan* v. *Earl of Abingdon* [1900] 2 *Q. B.* 66. *A motor bicycle is a "carriage" within* 51 & 52 *Vict. c.* 8 (*Customs and Inland Revenue Act*, 1888), *s.* 4, *O'Donoghue* v. *Moon*, 68 *J. P. Rep.* 349.]

Indictment.

Commencement as ante, p. 854]—then having charge of a certain carriage and vehicle called an omnibus, unlawfully did, by the wanton and furious driving of the said carriage and vehicle by him the said J. S., cause certain bodily harm to be done to one J. N.; against the form [*as ante*, p. 840].

Misdemeanor: imprisonment with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 100, *s.* 35. *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour, Id. s.* 71 (*ante*, p. 778).

Evidence.

Prove that the defendant was coachman of the carriage, as stated in the indictment; prove the furious driving, and that by means of it a personal injury was done to J. N. As to homicide by furious driving, *see ante*, p. 801, *et seq.*

OBSTRUCTING, ETC., MINISTERS OF RELIGION IN DISCHARGE OF THEIR DUTIES.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 36.]—Whosoever shall, by threats or force, obstruct or prevent, or endeavour to obstruct or prevent, any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or shall strike or offer any violence to, or shall, upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender is about to engage in, any of the rites, or duties in this section aforesaid, or who to the knowledge of the offender shall be going to perform the same or returning from the performance thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. [*This section is based on* 9 *G.* 4, *c.* 31, *s.* 23, *but is framed to include ministers, and places of worship and burial not belonging to the Established Church of England.*]

Indictment for Obstructing a Clergyman in the Discharge of his Duty.

Commencement as ante, p. 839]—unlawfully did by force ("*threats or force*") obstruct and prevent one J. N., a clergyman, then being the vicar of the parish of B., in the county of M., from celebrating divine service in the parish church of the said parish [*or* "in the performance of his duty in the lawful burial of the dead in the churchyard of the parish church of the said parish"]; against the form [*as ante*, p. 840]. *In an indictment at common law for obstructing a parson in his duty by threats, it was held necessary to set out the threats. See R.* v. *Cheere*, 4 *B. & C.* 902; 7 *D. & R.* 461. *But semble, that this would not be necessary in an indictment under this section. Cf.* 24 & 25 *Vict. c.* 96, *s.* 45 (*ante*, p. 521).

Misdemeanor: imprisonment with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 100, *s.* 36. *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour. Id. s.* 71 (*ante, p.* 778).

Evidence.

Prove that J. N. is a clergyman and vicar of the parish of B., as stated in the indictment; that the defendant by force obstructed and prevented him from celebrating divine service in the parish church, etc., or assisted in doing so.

ASSAULTS ON OFFICERS, ETC., SAVING WRECK.

Statutes.

24 & 25 *Vict. c.* 100, *s.* 37.]—Whosoever shall assault and strike or wound any magistrate, officer, or other person whatsoever lawfully authorized, *in or* on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded or cast on shore, or lying under water, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years . . . [*This section re-enacts* 9 *G.* 4, *c.* 31, *s.* 24, *with the addition of the words in italics.*]

Indictment for Assaulting a Magistrate, etc., on account of the Exercise of his Duty in preserving Wreck.

Sussex, to wit:—The jurors for our lord the King upon their oath present, that before and at the time of the committing of the offence hereinafter mentioned, to wit, on the first day of June, in the year of our Lord ——, one J. N., then being a magistrate ("*magistrate, officer, or other person whatsoever lawfully authorized*") was engaged in the exercise of his duty as such magistrate, in and concerning the preservation of a certain vessel ("*of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water*"), then wrecked, stranded, and cast on shore, the said J. N. being then lawfully authorized thereunto: and that J. S., well knowing the premises, on the day and year aforesaid, in and upon the said J. N. unlawfully did make an assault, and him the said J. N. then unlawfully did strike and wound ("*strike or wound*"), in and on account of the exercise of the said duty of him the said J. N. in and concerning the preservation of the said vessel so wrecked, stranded, and cast on shore as aforesaid; against the form [*as ante*, p. 840].

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 100, *s.* 37; 54 & 55 *Vict. c.* 69, *s.* 1, *sub.-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour,* 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

Evidence.

Prove that J. N. was a magistrate, etc., as stated in the indictment (*see ante*, p. 344); that a vessel was wrecked, etc.; that J. N. was engaged endeavouring to preserve the vessel; that J. S. knew he was a magistrate, etc. (*see ante*, p. 811), and struck [and wounded] him as stated; and that he did so on account of his doing his duty in the preservation of the vessel. This may be proved by the declarations or acts of the defendant, or by circumstances from which his motive may be inferred.

IMPEDING PERSONS ENDEAVOURING TO ESCAPE FROM WRECKS.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 17.]—Whosoever shall unlawfully and maliciously prevent or impede any person, being on board of or having quitted any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, in his endeavour to save his *life, or shall unlawfully and maliciously prevent or impede any person in his endeavour to save the life of any such person as in this section first aforesaid*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life . . . [*This section re-enacts* 7 *W.* 4 & 1 *Vict. c.* 89, *s.* 7, *with the additions italicized.*]

Indictment. (24 & 25 *Vict. c.* 100, *s.* 71.)

Sussex, to wit:—The jurors for our lord the King upon their oath present, that before and at the time of the committing of the felony hereinafter mentioned, to wit, on the first day of June, in the year of our Lord ——, a certain vessel ("*ship or vessel*") was stranded and cast on shore ("*in distress, or wrecked, stranded, or cast on shore*"); and that J. S. on the day and year aforesaid feloniously, unlawfully, and maliciously did prevent and impede ("*prevent or impede*") one J. N. in his endeavour to save his life; the said J. N. then having quitted ("*being on board of or having quitted*") the said vessel so stranded and cast on shore as aforesaid; against the form [*as ante*, p. 840].

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour. 24 & 25 *Vict. c.* 100, *s.* 17; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the vessel was stranded and cast on shore, as stated in the indictment; prove that J. N. was endeavouring to save his life after the ship was stranded; it is immaterial whether he was on board or had quitted the vessel. 24 & 25 *Vict. c.* 100, *s.* 17. Prove that the defendant impeded or prevented him from so doing, and that the act was done maliciously, that is, wilfully (*see ante*, pp. 651, 701).

FORCING SEAMEN ON SHORE, ETC.

Statute.

57 & 58 *Vict. c.* 60 (*Merchant Shipping Act*, 1894), *s.* 187—*Forcing on shore seamen or apprentices.*]—The master of or any other person

belonging to any British ship shall not wrongfully force on shore and leave behind, or otherwise wilfully and wrongfully leave behind, in any place, on shore or at sea, in or out of [his] Majesty's dominions, a seaman or apprentice to the sea service before the completion of the voyage for which such person was engaged, or the return of the ship to the United Kingdom, and if he does so he shall for each such offence be deemed guilty of a misdemeanor.

Sect. 188—*Discharging abroad seamen and apprentices.*]—(1) The master of a British ship shall not discharge any seaman or apprentice to the sea service abroad, or leave him behind abroad, ashore, or at sea, unless he previously obtains endorsed on the agreement with the crew, or in case of leaving behind the certificate: (*a*) at any place in a British possession, of a superintendent (*see s.* 742, *post*, p. 860) (or in the absence of any such superintendent, of the chief officer of customs at or near the place); and (*b*) at any place elsewhere of the British consular officer at the place, or in the absence of any such officer, of two merchants resident at or near the place, or if there is only one merchant so resident of that merchant. But nothing in this section shall require such sanction when the discharge is in the British possession where the seaman was shipped. (2) The certificate shall state in writing the fact and the cause of the seaman being left behind, whether the cause be unfitness or inability to proceed to sea, desertion, or disappearance. (3) The person to whom an application is made for a sanction or certificate under this section may, and, if not a merchant, shall, examine into the grounds on which a seaman or apprentice is to be discharged or left abroad, and for that purpose may, if he thinks fit, administer oaths, and may grant or refuse the sanction or certificate as he thinks just. (4) If a master acts in contravention of this section, he shall be guilty of a misdemeanor, and in any legal proceeding for the offence it shall lie on the master to prove that the sanction or certificate was obtained, or could not be obtained.

Sect. 680—*Hard labour.*]—(1) Subject to the special provisions of this Act and to the provisions hereafter contained with respect to Scotland: (*a*) An offence under this Act declared to be a misdemeanor shall be punishable by fine or by imprisonment not exceeding two years, with or without hard labour (*see ante*, pp. 237, 238); but may, instead of being prosecuted as a misdemeanor, be prosecuted summarily in manner provided by the *Summary Jurisdiction Acts*, and if so prosecuted, shall be punishable by imprisonment for a term not exceeding six months, with or without hard labour, or by a penalty not exceeding one hundred pounds. (*b*) An offence under this Act made punishable by imprisonment for a term not exceeding six months, with or without hard labour, or by any penalty not exceeding one hundred pounds, shall be prosecuted summarily in manner provided by the *Summary Jurisdiction Acts*. . . . [*As to the right of a person proceeded against under sub-s.* 2 *to elect to be tried on indictment, see* 42 *&* 43 *Vict. c.* 49, *s.* 17 (*ante*, p. 6).]

Sect. 684—*Jurisdiction—Venue.*]—For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be. [*This section has been explained in a colonial case* (*R.* v. *Hinde* [1902] 22 *N. Z. L. R.* 436) *as meaning that when an offence against the Act is committed in any part of the King's dominions, it may be tried in any other part of those dominions in*

which the offender is. In the particular case the colonial court asserted its jurisdiction to try an offence committed in London against s. 180 *of the Act.*]

Sect. 685—*Jurisdiction over ships lying off the coasts.*

Sects. 686, 687—*Venue.*]—*Ante*, p. 42.

Sect. 742.]—"Seaman" includes every person (except master, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity, on board any ship.

* * * * * * *

"Superintendent" shall, so far as respects a British possession, include any shipping master or other officer discharging in that possession the duties of a superintendent.

* * * * * * *

Indictment for forcing on Shore and leaving behind a Seaman.
(57 & 58 *Vict. c.* 60, *s.* 187, *ante*, p. 859.)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, then being master of a certain British ship called the "Rattler," unlawfully and wrongfully did force on shore and leave behind at a certain place out of his Majesty's dominions, that is to say, at New York, in the United States of America, one J. N., the said J. N. then being a seaman (*a seaman or apprentice to the sea service*) before the completion of the voyage of the said ship for which he the said J. N. had been engaged; against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. [And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S. now is at the parish of ——, in the county of ——.] *Add a count (or a separate indictment) under the second part of the section (if the facts so warrant) charging the defendant for that he did "unlawfully, wilfully and wrongfully leave behind," etc. The allegation that it is a British ship is a material allegation, and must be proved as laid. See R.* v. *Dunnett*, 1 *C. & K.* 425. *The last averment in square brackets seems superfluous. See R.* v. *Whiley*, 1 *C. & K.* 150. *The word "wilfully" is not in the first part of s.* 187 *and is in the second part.*

Misdemeanor: fine or imprisonment, with or without hard labour, or both. 57 & 58 *Vict. c.* 60, *ss.* 187, 680. *For the examination of witnesses abroad, see* 57 & 58 *Vict c.* 60, *ss.* 689, 691 (*ante*, pp. 877, 411). *As to costs of prosecution, see ante*, p. 258.

Evidence.

Prove that the defendant was or acted as master of the vessel, and that it was, at the time of the commission of the offence, a British ship; *see R.* v. *Dunnett*, 1 *C. & K.* 425: *R.* v. *Bjornsen, L. & C.* 545 (*ante*, p. 40): *R.* v. *Seberg, L. R.* 1 *C. C. R.* 264 (*ante*, p. 40); prove that J. N. was then "seaman" as defined in *s.* 742 (*supra*): it is immaterial whether he was one of the *original* crew of the ship or not; that the voyage for which he was engaged was not then completed; and that the defendant forced him on shore, and left him behind at the place mentioned in the indictment.

If the defendant be proved to have wilfully left the prosecutor behind, the only defence he can set up is the production of a certificate obtained

under *s.* 187, or the impossibility of obtaining such certificate under the circumstances therein mentioned. *R.* v. *Dunnett*, 1 *C. & K.* 425.

ASSAULTS WITH INTENT TO COMMIT FELONY, OR ON PEACE OFFICERS, POOR LAW OFFICERS, ETC.

Statutes.

7 *& 8 Vict. c.* 19, *s.* 7.]—*Assaults on bailiffs of inferior civil courts in execution of duty, summary conviction.*

13 *& 14 Vict. c.* 101 (*Poor Law Amendment Act*, 1850), *s.* 9—*Assaults on poor law officers.*]—Where any person shall be charged with and convicted of any assault upon any officer of a workhouse or relieving officer in the due execution of his duty, or upon any person acting in aid of such officer, the court may sentence the offender to the same punishment as is provided by law for an assault upon a peace officer or revenue officer in the due execution of his duty, and shall have the same power, as in the case of such last-mentioned assault, to order payment of the costs and expenses of the prosecution.

14 *& 15 Vict. c.* 105 (*Poor Law Amendment Act*, 1851), *s.* 18—*Assaults on poor law officers.*]—The provision in the *Poor Law Amendment Act*, 1850, *s.* 9 (*supra*), relative to assaults upon certain poor law officers in the execution of their duties, or upon persons acting in their aid, shall extend to an assault upon any person included under the word "officer" in the *Poor Law Amendment Act*, 1834 (4 *& 5 W.* 4, *c.* 76, *see s.* 109), or upon any other person acting in his aid.

24 *& 25 Vict. c.* 100, *s.* 38—*Assaults, with intent to commit felony or on a peace officer.*]—Whosoever shall assault any person with intent to commit felony, or shall assault, *resist or wilfully obstruct* any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. [*This section re-enacts* 9 *G.* 4, *c.* 31, *s.* 75, *with the addition of the words italicized, and the omission of revenue officers, as to whom, see s.* 11 *of the Inland Revenue Regulation Act*, 1890 (53 *& 54 Vict. c.* 21). *For indictment, see post*, p. 862].

34 *& 35 Vict. c.* 112 (*Prevention of Crimes Act*, 1871), *s.* 12—*Assaults on peace officers.*]—Where any person is convicted of an assault on any constable in the execution of his duty, such person shall be guilty of an offence against this Act, and shall, in the discretion of the court, be liable either to pay a penalty not exceeding 20*l.*, and in default of payment to be imprisoned, with or without hard labour, for a term not exceeding six months, or to be imprisoned for any term not exceeding six months, or in case such person has been convicted of a similar assault within two years, nine months, with or without hard labour. [*The prisoner cannot elect to be tried on indictment. See* 42 *& 43 Vict. c.* 49, *s.* 17 (1) (*ante*, p. 6). *The section is not affected by* 45 *& 46 Vict. c.* 50, *s.* 188. *See* 46 *& 47 Vict. c.* 44.]

48 & 49 *Vict. c.* 75 (*Prevention of Crimes Amendment Act*, 1885), *s.* 1—This Act shall be construed as one with the "*Prevention of Crimes Act*, 1871." . . .

Sect. 2—*Assaulting or obstructing peace officer.*]—The provisions of the 12th section of the said recited Act shall apply to all cases of resisting or wilfully obstructing any constable or peace officer when in the execution of his duty. Provided that in cases to which the said Act is extended by this Act the person convicted shall not be liable to a greater penalty than 5*l.*, or in default of payment to be imprisoned, with or without hard labour, for a greater term than two months.

50 & 51 *Vict. c.* 55 (*Sheriffs Act*, 1889), *s.* 8 (2).]—*Resistance to execution of writ by sheriff a misdemeanor.*

51 & 52 *Vict. c.* 43 (*County Courts Act*, 1888), *s.* 48.]—*Assaults on county court officer in execution of his duty, summarily punishable. See Lewis* v. *Owen* [1894] 1 *Q. B.* 102: *Broughton* v. *Wilkerson*, 44 *J. P.* 781.

Indictment, under 24 & 25 *Vict. c.* 100, *s.* 38 (*ante*, p. 861).

Commencement as ante, p. 839]—in and upon one J. N. unlawfully did make an assault, and him the said J. N. did beat, wound, and ill-treat, with intent [*here state the felony intended, thus:* him the said J. N. feloniously, wilfully, and of his malice aforethought, to kill and murder], and other wrongs to the said J. N. then did, to the great damage of the said J. N.; against the form [*as ante*, p. 840]. *As to adding a count for a common assault, see note to next precedent.*

Misdemeanor: imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 100, *s.* 38. *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour, Id. s.* 71 (*ante*, p. 778).

Evidence.

Every attempt to commit a felony against the person of an individual without his consent involves an assault. Prove an attempt to commit such a felony, and prove it to have been done under such circumstances that, had the attempt succeeded, the defendant might have been convicted of the felony. If you fail in proving the intent, but prove the assault, the defendant may be convicted of the common assault.

Indictment for Assaulting a Peace Officer in the Execution of his Duty.
(24 & 25 *Vict. c.* 100, *s.* 38, *ante*, p. 861.)

Commencement as ante, p. 839]—in and upon one J. N. then being a peace officer, to wit, a constable ("*any peace officer in the execution of his duty or any person acting in aid of such officer*"), and then being in the due execution of his duty as such constable, unlawfully did make an assault and him the said J. N., so being in the execution of his duty as aforesaid, did then beat, wound, and ill-treat, and other wrongs to the said J. N. then did, to the great damage of the said J. N.; against the form [*as ante*, p. 840]. *Counts may be added for resisting or wilfully obstructing; also counts under*

s. 47 (*ante*, p. 831), *and s.* 20 (*ante*, p. 839). *It is submitted that on this indictment a conviction for a common assault can be sustained, thus rendering unnecessary the direction contained in editions of this work prior to the* 22*nd, to add a count for a common assault. See ante*, p. 215, *et seq.*

Misdemeanor: 24 *&* 25 *Vict. c.* 100, *s.* 38. *See the last precedent.*

Summary punishment is provided for assaults on special constables, 1 *&* 2 *W.* 4, *c.* 41, *s.* 11: *R. v. Porter*, 9 *C. & P.* 778: *on metropolitan constables*, 2 *&* 3 *Vict. c.* 47, *s.* 18; 24 *&* 25 *Vict. c.* 51, *s.* 53: *on county police*, 2 *&* 3 *Vict. c.* 93, *s.* 8: *on borough police*, 45 *&* 46 *Vict. c.* 50, *s.* 188; 46 *&* 47 *Vict. c.* 44, *s.* 2: *and on urban police*, 10 *&* 11 *Vict. c.* 89, *s.* 20; 46 *&* 47 *Vict. c.* 44, *s.* 2.

Evidence.

Prove that J. N. was a peace officer, etc., as stated in the indictment, by showing that he had acted as such (*see ante*, p. 844); or if the indictment be for assaulting J. N., acting in aid of an officer, prove that the officer acted as such, and that J. N. was acting in his aid. Prove that J. N. was in the due execution of his duty (*see ante*, p. 805), and prove the assault as directed (*ante*, p. 833, *et seq.*). The fact that the defendant did not know that the person assaulted was a peace officer, or that he was acting in the execution of his duty, furnishes no defence. *R. v. Forbes*, 10 *Cox*, 362, *Russell Gurney*, Recorder.

Parish constables are not now appointed except under resolution of quarter sessions. As to the mode of appointment and their present duties, *see* 5 *&* 6 *Vict. c.* 109; 35 *&* 36 *Vict. c.* 92. They have for most purposes been superseded, in the metropolitan police district by the metropolitan police; 10 *G.* 4, *c.* 44; 2 *&* 3 *Vict. cc.* 47, 71; and in counties and boroughs, by the county and borough police: 2 *&* 3 *Vict. c.* 93; 3 *&* 4 *Vict. c.* 88; 19 *&* 20 *Vict c.* 69. The metropolitan police have all the powers, authorities, privileges, advantages, duties, and responsibilities which a constable has at common law or by statute, within the counties of London, Middlesex, Surrey, Hertford, Essex, Kent, Berks, Bucks, and on the Thames adjoining all but the last two counties, and adjoining the city, and on creeks, docks, etc. 10 *G.* 4, *c.* 44, *s.* 4; 2 *&* 3 *Vict. c.* 47, *s.* 5. County police have the like duties, etc., in their county, and also the duties, etc., of special constables. 2 *&* 3 *Vict. c.* 93, *s.* 8. So have borough police within, or within seven miles, of their borough. 45 *&* 46 *Vict. c.* 50, s. 191. The result of this Act is to bring all these officers within the protection of 24 *&* 25 *Vict. c.* 100, *s.* 38. A justice's warrant of commitment directed "To the constable of G.," a parish in the county of L., must be read as directed to the parish constable of G., there being such an officer, who must execute it, and its execution by a county policeman is illegal. Therefore a conviction for wounding a county policeman in the execution of such a warrant, with intent to resist the prisoner's lawful apprehension thereunder, was quashed. *R. v. Sanders, L. R.* 1 *C. C. R.* 75; 36 *L. J.* (*M. C.*) 87; 10 *Cox*, 445. C. was convicted of an assault on two police constables of the county police of Worcester in the execution of their duty, who were apprehending him in the city of Worcester under a warrant issued by two justices of and for the county of Worcester for his commitment to prison in default in payment of a fine, but which warrant was not backed by any justice of and for the city of Worcester. Worcester is a borough having a separate commission of the peace with exclusive jurisdiction and a separate police force. C. was not pursued from the county, but found in the city. It was held that the constables were not acting in the execution

of their duty in so executing the warrant, and therefore that the conviction was wrong. *R.* v. *Cumpton*, 5 *Q. B. D.* 341; 49 *L. J.* (*M. C.*) 41. When a warrant has been issued to apprehend a person for an offence less than felony for which there is no statutory authority to arrest without warrant, the police officer who executes it must have the warrant in his possession at the time of attempting the arrest; and if he has it not, and is assaulted by the person whom he is endeavouring to arrest, such person cannot be convicted of an assault upon the police officer in the execution of his duty, nor of a common assault, unless he used more force than was necessary to prevent his apprehension. *Codd* v. *Cabe*, 1 *Ex. D.* 352; 45 *L. J.* (*M. C.*) 101; 13 *Cox*, 202. *See also Galliard* v. *Laxton*, 2 *B. & S.* 363; 31 *L. J.* (*M. C.*) 123 (*ante*, p. 810): *R.* v. *Phelps*, *C. & Mar.* 180 (*ante*, p. 807): *R.* v. *Chapman*, 12 *Cox*, 4 (*ante*, p. 810): *R.* v. *Carey*, 14 *Cox*, 214 (*ante*, p. 810). Although a police constable may not be bound, in the execution of his duty, to assist the occupier of a house in putting out an intruder, yet he may lawfully do so, and if he is assaulted by the intruder while so doing, the latter, though he may not be indictable for assaulting a peace officer in the execution of his duty, will be liable to a conviction for an assault, as he cannot justify resistance to the force lawfully used to eject him. *R.* v. *Roxburgh*, 12 *Cox*, 8. If the police are exceeding their authority, resistance is not an assault within this section. *R.* v. *Marsden*, *L. R.* 1 *C. C. R.* 131; 37 *L. J.* (*M. C.*) 80; 11 *Cox*, 90: *R.* v. *Mabel*, 9 *C. & P.* 474, though it may be a common assault; *and see Broughton* v. *Wilkerson*, 44 *J. P.* 781, as to justifiable resistance to a county court bailiff.

Refusing to aid and assist a constable in the execution of his duty, in order to preserve the peace, is an indictable misdemeanor at common law. In order to support such indictment, it must be proved that the constable saw a breach of the peace committed; that there was a reasonable necessity for calling upon the defendant for his assistance; and that when duly called on to do so, the defendant, without any physical impossibility or lawful excuse, refused to do so. And it is no defence that the single aid of the defendant could have been of no avail. *R.* v. *Brown*, *C. & Mar.* 314; 4 *St. Tr., N. S.* 1369. An indictment for refusing to assist a constable in the execution of his duty, and prevent an assault made upon him by persons in his custody on a charge of felony, with intent to resist their lawful apprehension, is sufficient without stating how the apprehension became lawful; and if it state a refusal to assist, without the further allegation that the defendant did not, in fact, assist. *R.* v. *Sherlock*, *L. R.* 1 *C. C. R.* 20; 35 *L. J.* (*M. C.*) 92; 10 *Cox*, 170.

Indictment for an Assault to prevent Arrest. (24 & 25 *Vict. c.* 100, *s.* 38, *ante*, p. 861.)

Commencement as ante, p. 839]—in and upon one J. N. did make an assault, and him the said J. N. did then beat, wound, and ill-treat with intent in so doing to resist and prevent ("*resist or prevent*") the lawful apprehension ("*apprehension or detainer*") of him the said J. S. ("*of himself or of any other person*") for a certain offence, that is to say, for [*state the offence generally*]; against the form [*as ante*, p. 840]. *As to adding a count for a common assault, see ante*, p. 863.

Misdemeanor: 24 & 25 *Vict. c.* 100, *s.* 38. *See the precedent, ante*, p. 862.

Evidence.

Prove the assault as directed (*ante*, p. 833, *et seq.*), and the intent, as directed (*ante*, pp. 303, 308, 340). It must be stated and proved that the apprehension was lawful. (*See ante*, p. 805.) If you fail in proving the intent, the defendant may be convicted of the common assault.

ASSAULTS BY POACHERS ON GAMEKEEPERS.

Statutes.

9 *G.* 4, *c.* 69 (*Night Poaching Act*, 1828), *s.* 2.]—Where any person shall be found upon any land committing any such offence as is hereinbefore mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him, as soon as may be, into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court, to be transported beyond seas for seven years (*now penal servitude, see post*, p. 886), or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner. [*For the rest of the Act, see post, Chap. VI. Sect.* 4, *tit.* "*Poaching.*"]

7 & 8 *Vict. c.* 29, *s.* 1.]—*Post, Chap. VI. Sect.* 4, *tit.* "*Poaching.*"

Indictment.

Essex, to wit:—The jurors for our lord the King upon their oath present, that, at the time of the committing of the assault hereinafter charged and stated, to wit, on the first day of November, in the year of our Lord ——, in the night-time, to wit, about the hour of ten in the night of the same day, J. S. was unlawfully in certain land ("*any land*") [in the occupation] of one J. W., situate in the parish of ——, in the county of Essex, armed with a gun for the purpose of then, and by night as aforesaid, unlawfully taking and destroying game; and that he the said J. S. was then, so being in the said land by night as aforesaid, found armed with the said gun for the purpose aforesaid, by one J. N. ("*the owner or occupier of such land, or any person having a right or reputed right of free warren or free chase thereon, or the lord of the manor or reputed manor wherein such land may be situate, or any gamekeeper or servant of the persons herein mentioned, or any person assisting such*

gamekeeper or servant") the servant of the said J. W., the said J. N. then having lawful authority to seize and apprehend the said J. S. found: and that* he the said J. S., with the gun aforesaid ("*any gun, cross-bow, fire-arms, bludgeon, stick, club, or other offensive weapon whatsoever*") did then unlawfully assault and beat the said J. N. ("*assault or offer violence towards*"), the said J. N. then having lawful authority to seize and apprehend the said J. S.; against the form [*as ante*, p. 840].

* *If the defendant escaped from the land and was pursued, here add,* "the said J. S. then escaped from the said land into a certain other close there situate, and the said J. N. did thereupon then pursue the said J. S. into the said last-mentioned close, for the purpose of seizing and apprehending him the said J. S. as aforesaid, and that he the said J. S.," etc., etc. *The precedents in editions of this work before the 22nd edition contained an averment that "J. N. was then about to seize and apprehend J. S." It is submitted that the words are unnecessary as they do not appear in the section. This count may be joined with one on the 9th section, post, Book II. Chap. VI. Sect. 4, and with one for common assault. R.* v. *Finacane*, 5 *C. & P.* 551. *An indictment which stated only that the defendant "was then and there, in the said land, by night as aforesaid, etc., found," was held bad, as not sufficiently showing that he was found committing the offence charged in the previous part of the indictment. R.* v. *Curnock*, 9 *C. & P.* 730. *If the indictment contains* (1), *a count in the form above given: and* (2), *a count charging a common assault, and the prosecution at the trial elect to abandon the count charging the common assault, the defendant cannot after such abandonment be convicted of a common assault upon the first count. R.* v. *Day*, 11 *Cox*, 505 (*C. C. R.*).

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment with or without hard labour for not more than two years. 9 *G.* 4, *c.* 69, *s.* 2; 20 *&* 21 *Vict. c.* 3 (*ante*, p. 235); 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235).

Evidence.

Prove that the defendant entered certain land in the parish described, belonging to or in the occupation of J. W. (*See ante*, pp. 67, 298. It is not necessary to state the name of the close; but it has been held that if stated, it must be proved. *R.* v. *Owen*, 1 *Mood. C. C.* 118 (*ante*, p. 299). Formerly, a variance as to the parish or other local description was fatal, but it can now be amended under 14 *&* 15 *Vict. c.* 100, *s.* 1 (*ante*, pp. 52, 53). Prove that the defendant entered the land in the night-time, that is, some time between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise. 9 *G.* 4, *c.* 69, *s.* 12, *post, tit.* "*Poaching*": *see R.* v. *Tomlinson*, 7 *C. & P.* 183. It is not necessary to state the hour (*ante*, pp. 67, 297); nor, if stated, need it be proved, provided that the hour proved be within the period above mentioned. Prove that the defendant was armed with a gun, etc., and that he was on the land for the purpose of destroying game there. *See R.* v. *Barham*, 1 *Mood. C. C.* 151; *R.* v. *Davis*, 8 *C. & P.* 759. Prove also that the defendant was found on the land in the commission of the offence. The words of the statute are "*found* upon any land." Under 57 *G.* 3, *c.* 90, *s.* 3 (*rep.*), the words of which were "enter into or be found in any forest," etc., where the defendant was not found in the close, but was seen in an adjoining close, and, shortly before he was seen, shots were heard in the close, and the jury found that he had been firing in the close, it being reserved for the judges whether it was necessary to prove that the defendant was seen in the close where the indictment stated him to have been found; they held

that, as the jury were satisfied that the defendant had been in the close armed, it was sufficient. *R.* v. *Worker*, 1 *Mood. C. C.* 165. (*See post, tit.* "*Poaching.*") Prove that J. N. was servant to J. W., the owner or occupier of the land (or, if the offence was committed on any public road, highway, or path, or the sides thereof, or at any gate, outlet, or opening from any land to such road, etc., the owner or occupier of land adjoining either side of that part of the road, etc., where the offender was, 7 & 8 *Vict. c.* 29, *s.* 1) and prove the assault as directed (*ante*, p. 833, *et seq.*). Proof of a common intent of several prisoners to poach is not evidence of a common intent to wound. *R.* v. *Doddridge*, 8 *Cox*, 335, *Martin*, B. If J. N. escaped and was pursued, it must be stated; and if stated, it must be proved. Lastly, it must be proved that the offence was committed within twelve calendar months next before the prosecution. 9 *G.* 4, *c.* 69, *s.* 4, *post tit.* "*Poaching.*"

A gamekeeper, or other person lawfully authorized, may apprehend poachers without giving notice of his purpose. *R.* v. *Payne*, 1 *Mood. C. C.* 378: *R.* v. *Fielding*, 2 *C. & K.* 621; and without a written authority so to do; *R.* v. *Price*, 7 *C. & P.* 178; provided they are upon the land or manor of his master, or other place mentioned in 7 & 8 *Vict. c.* 29; but without authority he may not apprehend them upon the lands of others. *R.* v. *Davis*, 7 *C. & P.* 785. A person who has only the right of shooting over the land of another, has no authority to authorize a gamekeeper to apprehend persons trespassing on such land in pursuit of game; consequently, resistance to such apprehension, if not excessive, is lawful. *R.* v. *Wood*, 1 *F. & F.* 470. Although *s.* 2 is confined to offences mentioned in *s.* 1, still an offender under *s.* 9 may be apprehended under the powers given by *s.* 2; for though a greater punishment is inflicted by *s.* 9 where several are out armed together, it is still an offence within *s.* 1. *R.* v. *Ball*, 1 *Mood. C. C.* 330: *see R.* v. *Lines* [1902] 1 *K. B.* 199, 203 (*C. C. R.*); 20 *Cox*, 142. And under 14 & 15 *Vict. c.* 19, *s.* 11 (*ante*, p. 622), *any person* may apprehend persons committing offences against *s.* 9 of this Act in the night-time. *R.* v. *Sanderson*, 1 *F. & F.* 598. As to homicide by poachers, *see ante*, p. 809.

SHOOTING AT OFFICERS OF THE CUSTOMS, OR KING'S SHIPS.

Statutes.

39 & 40 *Vict. c.* 36 (*Customs Consolidation Act*, 1876), *s.* 193—*Shooting at customs officers, or King's ships.*]—If any person shall maliciously shoot at any vessel or boat belonging to [his] Majesty's navy, or in the service of the revenue, or shall maliciously shoot at, maim, or wound any officer of the army, navy, marines, or coastguard, being duly employed in the prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the execution of his office or duty, every person so offending, and every person aiding, abetting, or assisting therein, shall, upon conviction, be adjudged guilty of felony, and shall be liable, at the discretion of the court, to penal servitude for any term not less than five years [*now three years*, 54 & 55 *Vict. c.* 69, *s.* 1, *ante*, p. 235], or to be imprisoned for any term not exceeding three years. (*See post*, p. 869.)

Sect. 229—*Offences on the water.*]—Where any offence shall be committed in any place upon the water, not being within any county of the U. K., or where the officers have any doubt whether such place is within the boundaries or limits of any such county, such offence shall, for the purposes of the Customs Acts, be deemed, and taken to be, an offence committed on the high seas, and for the purpose of giving jurisdiction under such Acts every such offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same was actually committed or arose, or in any place on land where the offender or person complained against may be or be brought (*see ante*, pp. 39–43, 46).

Sect. 255—*In whose name indictments to be preferred.*]—All indictments or suits for any offences or the recovery of any penalties or forfeitures under the Customs Acts shall, except in the cases where summary jurisdiction is given to justices, be preferred or commenced in the name of [his] Majesty's Attorney-General for England or Ireland, or of the Lord Advocate of Scotland, or of some officer of customs or inland revenue.

Sect. 257—*Limitation of proceedings.*]—All suits, indictments, or informations brought or exhibited for any offence against the Customs Acts in any court, or before any justice, shall be brought or exhibited within three years next after the date of the offence committed. (*See ante*, p. 95.)

Sect. 258—*Venue.*]—Any indictment, prosecution, or information which may be instituted or brought under the direction of the Commissioners of Customs for offences against the Customs Acts shall and may be inquired of, examined, tried, and determined in any county of England when the offence is committed in England, and in any county of Scotland when the offence is committed in Scotland, and in any county in Ireland when the offence is committed in Ireland, in such manner and form as if the offence had been committed in the said county where the said indictment or information shall be tried. (*See ante*, p. 47.)

Sect. 260—*Averments in smuggling cases.*]—The averment that the Commissioners of Customs or Inland Revenue have directed or elected that any information or proceedings under the Customs Acts shall be instituted, or that any ship or boat is foreign or belonging wholly or in part to [his] Majesty's subjects, or that any person detained or found on board any ship or boat liable to seizure is or is not a subject of [his] Majesty, or that any goods thrown overboard, staved, or destroyed were so thrown overboard, staved, or destroyed to prevent seizure, or that any goods thrown overboard, staved, or destroyed during chase by any ship or boat in [his] Majesty's service or in the service of the Revenue were so thrown overboard, staved, or destroyed to prevent seizure, or that any person is an officer of Customs or Excise, or that any person was employed for the prevention of smuggling, or that the offence was committed within the limits of any port, or where the offence is committed in any port of the United Kingdom, the naming of such port in the information or proceedings shall be deemed to be sufficient, unless the defendant in any such case shall prove to the contrary. (*See ante*, p. 344.)

Sect. 261—*Proof of commission, and competency of witnesses.*]—If upon any trial a question shall arise whether any person is an officer of the army, navy, marines, or coastguard, duly employed for the prevention of smuggling, or an officer of customs or excise, his own evidence thereof,

or other evidence of his having acted as such, shall be deemed sufficient without production of his commission or deputation; and every such officer and any person acting in his aid or assistance shall be deemed a competent witness upon the trial of any suit or information on account of any seizure or penalty as aforesaid, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty, or to any reward upon the conviction of the party charged in such suit or information. [*As to this section, see ante*, pp. 344, 390.]

Indictment for Shooting at an Officer of the Customs. (39 & 40 *Vict. c.* 36, *s.* 193, *ante*, p. 867.)

Commencement as ante, p. 839]—with a certain pistol loaded with gunpowder and one leaden bullet, at and against one J. N., the said J. N. then being an officer of the customs ("*any officer of the army, navy, marines, or coastguard, being duly employed in the prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling*"), and then being in the due execution of his office and duty as such officer, feloniously and maliciously did shoot; against the form [*as ante*, p. 840]. *As to the venue, see ante*, pp. 47, 868.

Felony: penal servitude for any term not less than three years, or imprisonment, with or without hard labour. It is submitted that the maximum term of imprisonment, three years, specified in 39 & 40 *Vict. c.* 36, *s.* 193, *should be treated as reduced to two years by* 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that J. N. was an officer of the customs, etc., in the due exercise of his office. His own evidence thereof, or other evidence of his acting as such, will be sufficient, without producing his commission or appointment (39 & 40 *Vict. c.* 36, *ss.* 260, 261, *supra, and see ante*, p. 344). The statute only applies to such officers of the army, navy, marines, or coastguard, as are on full pay, and employed for the prevention of smuggling. Prove that the defendant wilfully fired at J. N. If he fired wilfully, it will be sufficient evidence of his doing so maliciously, *see ante*, pp. 651, 701.

Indictment for Maiming or Wounding Officers of the Customs. (39 & 40 *Vict. c.* 36, *s.* 193, *ante*, p. 867.)

Commencement as ante, p. 839]—one J. N., then being an officer of the customs [*see the last precedent*], and then being in the due execution of his office and duty as such officer, feloniously and maliciously did wound ("*maim or wound*"); against the form [*as ante*, p. 840]. *As to the venue, see ante*, pp. 39–43, 47, 868.

Felony: 39 & 40 *Vict. c.* 36, *s.* 193. *See the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

This is proved in the same manner as the last case, except that, instead of proving the shooting, it must be proved that the defendant wounded (or maimed) J. N.

Indictment for Shooting at Vessels belonging to the Navy, etc.
(39 & 40 *Vict.* c. 36, s. 193, *ante*, p. 867.)

Kent, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, on the high seas, feloniously and maliciously did shoot at a certain vessel ("*vessel or boat*") belonging to his said Majesty's navy ("*belonging to his Majesty's navy, or in the service of the revenue*"), to wit, at (*here describe the vessel*); against the form [*as ante*, p. 840]. And the jurors aforesaid, upon their oath aforesaid, do further present, that the parish of F., in the county of Kent, was the place on land into which the said J. S. was next, after the commission of the offence by him the said J. S. as aforesaid, to wit, on the day and year aforesaid, brought. 39 & 40 *Vict.* c. 36, s. 229 (*ante*, p. 868).

Felony: 39 & 40 *Vict.* c. 36, s. 193. *See the last precedent*, p. 869.

This offence is not triable at quarter sessions. 5 & 6 *Vict.* c. 38, s. 1 (*ante*, p. 126).

Evidence.

Prove that the defendant wilfully shot at the vessel, etc., mentioned in the indictment; the malice will be presumed, until the contrary be shown upon the part of the defendant (*see ante*, p. 701). Where a custom-house vessel chased a smuggler and fired into her without hoisting such a pendant as required (56 *G.* 3, c. 104, s. 8 (*rep.*)), the returning the fire was considered not to be malicious. *R.* v. *Reynolds*, *R.* & *R.* 465. Prove, also, that the vessel in question belonged at the time to his Majesty's navy, or was in the service of the revenue, as stated in the indictment; which may be done, it should seem, by parol testimony without any documentary evidence.

The pendants and ensigns to be worn by ships in the preventive service and merchant vessels are regulated by proclamation of January 1, 1801, and February 1, 1817 (*Statutory Rules and Orders Revised* (ed. 1904), vol. i., *tit.* "*Arms*," *etc.*, p. 6), and by s. 73 of the *Merchant Shipping Act*, 1894 (57 & 58 *Vict.* c. 60).

NEGLECTING TO PROVIDE FOOD, ETC., FOR, AND ASSAULTING, ETC., APPRENTICES OR SERVANTS.

Statute.

24 & 25 *Vict.* c. 100 (*Offences against the Person Act*, 1861), s. 26.]—Whosoever, being legally liable, either as a master or mistress, to provide for any apprentice or servant necessary food, clothing or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or

servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude. . . .

Sect. 73—*Prosecutions by guardians of poor—Costs.*]—Where any complaint shall be made of any offence against s. 26 of this Act, or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount, in point of law, to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace before whom such complaint is heard shall certify under their hands that it is necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or place, or, where there are no guardians, by the overseers of the poor of the place, in which the offence shall be charged to have been committed, such guardians or overseers, as the case may be, upon personal service of such certificate or a duplicate thereof upon the clerk of such guardians or upon any one of such overseers, shall conduct the prosecution, and shall pay the costs reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of any court) out of the common fund of the union, or out of the funds in the hands of the guardians or overseers, as the case may be; and, where there is a board of guardians, the clerk or some other officer of the union or place, and, where there is no board of guardians, one of the overseers of the poor, may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute. [*This section re-enacts* 14 *&* 15 *Vict. c.* 19, *ss.* 6, 7. *See also ante*, p. 258, and 4 *Edw.* 7 *c.* 15, *s.* 21 (*post*, p. 885).]

38 *&* 39 *Vict. c.* 86 (*Conspiracy and Protection of Property Act*, 1875), *s.* 6—*Neglect to supply apprentice or servant with food or medical aid.*]—Where a master, being legally liable to provide for his servant or apprentice necessary food, clothing, medical aid, or lodging, wilfully and without lawful excuse, refuses or neglects to provide the same, whereby the health of the servant or apprentice is or is likely to be seriously or permanently injured, he shall on summary conviction be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding six months, with or without hard labour. [*The defendant can elect to be tried on indictment.* 38 *&* 39 *Vict. c.* 86, *s.* 9; 42 *&* 43 *Vict. c.* 49, *s.* 17 (*ante*, p. 6).]

4 *Edw.* 7, *c.* 15 (*Prevention of Cruelty to Children Act*, 1904), *s.* 1—*Assaults, etc., by persons over sixteen on persons under sixteen.*]—*See post*, p. 877.

Indictment for not providing an Apprentice with necessary Food.
(24 *&* 25 *Vict. c.* 100, *s.* 26, *supra.*)

Surrey, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, then being the master of one J. N., his apprentice ("*apprentice or servant*"), and then being legally liable to provide for the said J. N., as his apprentice as aforesaid, necessary food ("*necessary food, clothing or lodging*"), unlawfully, wilfully, and without lawful excuse, did refuse and neglect to provide the same [so that the life of the same J. N. was thereby

endangered; *as to the insertion of these words, vide infra*] ("*so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured*"); against the form [*as ante*, p. 840]. *Add counts varying the statement of the injury sustained.*

Misdemeanor: penal servitude for not less than three years and not exceeding five years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 100, *s.* 26; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour,* 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

Evidence.

To prove the apprenticeship, if it was by deed, produce, and prove the execution of the deed, or, in case it be in the possession of the defendant, and there be no counterpart, by secondary evidence of its contents, after due notice given to the defendant to produce it (*see ante*, pp. 315, 316).

Legally liable.]—The legal liability of a master to provide his apprentice with necessary food, clothing or lodging will be inferred, even if it be not expressly stipulated for, from the apprenticeship itself. But in the case of neglect of a servant, an indictment against a master at common law for neglecting to provide sufficient food for his servant (*see ante*, p. 2) must allege that the servant was of tender years and under the dominion and control of the defendant. *R.* v. *Ridley*, 2 *Camp.* 650. There is a distinction between the cases of children, apprentices of tender years, and lunatics under the care of persons bound to provide for their wants and the case of a mistress and a servant of full age able to take care of herself and to withdraw herself from the service of her mistress; *R.* v. *Jane Charlotte Smith*, *L. & C.* 607, *at* p. 620; 34 *L. J.* (*M. C.*) 153 (*C. C. R.*), *per Montague Smith*, J.; and when a person, having free control of her actions and able to take care of herself, remains in a service where she is starved and badly lodged the mistress is not criminally responsible for any consequences that may ensue. *Id.*, *per Erle*, C.J., *L. & C.* p. 625.

Prove the wilful refusal or neglect of the defendant to provide the prosecutor with necessary food, etc., as stated in the indictment. Whether it be necessary to prove that by such refusal or neglect the prosecutor's life was endangered, or his health was or was likely to be permanently injured, depends upon the construction which is to be put upon the statute. If the words "so that the life of such person shall be endangered," etc., apply to all the preceding matter, such proof will be necessary; if only to the branch of the section which relates to the actual doing of bodily harm to the apprentice or servant, such proof will be unnecessary. Until there has been some decision on the subject, it will be safer to introduce the allegation between square brackets (*supra*), and to be prepared with evidence to sustain it. It would seem, indeed, to be the better opinion, that the words "so that the life of such person shall be endangered, etc.," override all the preceding matter, otherwise a mere single wilful refusal to provide a dinner would be within the clause. Upon an indictment for unlawfully and maliciously assaulting an apprentice or servant, it is clear that such allegation and proof are necessary.

Medical aid.]—"By the general law a master was not bound to provide medical advice for his servant; yet the case was different with respect to an apprentice." *R.* v. *Smith*, 8 *C. & P.* 153, *Patteson*, J.; *and see Sellen*

v. *Norman*, 4 *C. & P.* 80: *Wennall* v. *Adney*, 3 *B. & P.* 247; 6 *R. R.* 780 (*ante*, p. 2): *Eversley, Dom. Rel.* (2nd ed.) 868. Cruelty to apprentices under sixteen can also be dealt with under 4 *Edw.* 7, *c.* 15, *s.* 1 (*post*, p. 877).

ILL-TREATMENT OF LUNATICS IN ASYLUMS, ETC.

Statutes.

23 *& 24 Vict. c.* 75 (*Criminal Lunatic Asylums Act*, 1860), *s.* 13.]—Any superintendent, officer, nurse, attendant, servant, or other person employed in any asylum for criminal lunatics, who strikes, wounds, ill-treats or wilfully neglects any person confined therein, shall be guilty of a misdemeanor, and shall be subject to indictment for every such offence, and on conviction under the indictment to fine or imprisonment, with or without hard labour, or to both fine and imprisonment, at the discretion of the court, or to forfeit for every such offence on summary conviction thereof before two justices any sum not exceeding twenty pounds, nor less than two pounds.

53 *& 54 Vict. c.* 5 (*Lunacy Act*, 1890), *s.* 322.]—If any manager, officer, nurse, attendant, servant, or other person employed in an institution for lunatics [*which by s.* 341 *means an asylum, hospital, or licensed house*], or any person having charge of a lunatic, whether by reason of any contract, or of any tie of relationship, or marriage, or otherwise, ill-treats or wilfully neglects a patient, he shall be guilty of a misdemeanor, and, on conviction on indictment, shall be liable to fine or imprisonment, or to both fine and imprisonment, at the discretion of the court, or be liable on summary conviction for every offence to a penalty not exceeding twenty pounds, nor less than two pounds. [*This section was framed on* 8 *& 9 Vict. c.* 100, *s.* 56; 16 *& 17 Vict. c.* 96, *s.* 5; *and* 16 *& 17 Vict. c.* 97, *s.* 123. *As to its effect, see Wood Renton on Lunacy*, 680.

Sects. 207–229.]—*Define what are licensed houses and prescribe rules for their conduct.*

Sect. 324—*Abuse of female lunatic.*]—*Post*, p. 906.

Sect. 325.]—*Prosecution only by consent of the attorney-general, or order of the commissioners of lunacy, or visitors of the asylum, etc.*

Sect. 341—*Definitions.*]—In this Act, if not inconsistent with the context:

"Asylum" means an asylum for lunatics, provided by a county or borough, or by a union of counties or boroughs.

"Hospital" means any hospital or part of a hospital, or other house or institution (not being an asylum) wherein lunatics are received and supported wholly or partly by voluntary contributions, or by any charitable bequest or gift, or by applying the excess of payments of some patients for or towards the maintenance, provision, or benefit of other patients.

"Institution for lunatics" means "asylum," "hospital," or "licensed house."

"Lunatic" means an idiot, or person of unsound mind.

Indictment. (53 & 54 *Vict.* c. 5, s. 322, *ante*, p. 872.)

An indictment for this offence can be framed on the precedents (*ante*, p. 871, *and post*, p. 888).

Evidence.

As to the evidence necessary to support an indictment for misusing a lunatic, *see R.* v. *Pelham*, 8 *Q. B.* 959; 15 *L. J.* (*M. C.*) 105. As to what may constitute wilful neglect, *see Dent's case* [1874], *cited Wood Renton on Lunacy*, p. 682: *R.* v. *Hill*, 50 *J. P.* 137. In *R.* v. *Rundle*, *Dears.* 482; 24 *L. J.* (*M. C.*) 129; 6 *Cox*, 549, it was held under 16 & 17 *Vict.* c. 96, s. 9 (*rep.*), that a husband having the care and charge of his wife, a lunatic, was not "a person having the care or charge" of a lunatic within the meaning of that enactment, which it was held did not apply to persons whose care or charge was purely of a domestic character. This case was distinguished in *R.* v. *Porter*, *L. & C.* 394; 9 *Cox*, 449 (*C. C. R.*); and was questioned in *Buchanan* v. *Hardy*, 18 *Q. B. D.* 486; 56 *L. J.* (*M. C.*) 42, and seems to be no longer an authority under the wider language of s. 322 of 53 & 54 *Vict.* c. 5. On a charge under this section, the lunatic is admissible as a witness if the judge considers him competent. *R.* v. *Hill*, 2 *Den.* 254; 20 *L. J.* (*M. C.*) 222 (*see ante*, p. 388; *and Wood Renton on Lunacy*, 683, *n.*). Imbecility and loss of mental power, whether arising from natural decay or paralysis, softening of the brain, or other natural cause, although unaccompanied by frenzy or delusion of any kind, was held to constitute unsoundness of mind amounting to lunacy, within 8 & 9 *Vict.* c. 100 (*rep.*). *R.* v. *Shaw*, *L. R.* 1 *C. C. R.* 145; 37 *L. J.* (*M. C.*) 112; 11 *Cox*, 109.

ABANDONING OR EXPOSING CHILDREN UNDER TWO YEARS OF AGE WHEREBY LIFE IS ENDANGERED.

Statute.

24 & 25 *Vict.* c. 100 (*Offences against the Person Act*, 1861), s. 27—*Abandoning, etc., child under two years.*]—Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable . . . to be kept in penal servitude. . . . [*This section was new law in* 1861. *In practice it is superseded by the Prevention of Cruelty to Children Act*, 1904 (4 *Edw.* 7, *c.* 15), s. 1, *post*, p. 877.]

4 *Edw.* 7, *c.* 15, *ss.* 12–18, *sched.* 1—*Procedure and evidence.*]—*See post*, pp. 882–885, 887.

Indictment.

Commencement as ante, p. 871]—unlawfully did abandon and expose ("*abandon or expose*") a certain child called J. N., then being under the age of two years, whereby the life of the said child was endangered [*or* "whereby the health of such child was likely to be permanently injured"]; against the form [*as ante*, p. 840]. *Add counts under* 4 *Edw.* 7, *c.* 15, *s.* 1 (*post*, p. 877).

If the offence is continuous it is not necessary to specify the date of the acts alleged to constitute the offence. 4 *Edw.* 7, *c.* 15, *s.* 18 (4) (*post*, p. 885). "*Abandoning*" *seems to be a continuous offence. See R. v. White* (*infra*).

Misdemeanor: penal servitude for not less than three years and not exceeding five years, or imprisonment, with or without hard labour, not exceeding two years. 24 *&* 25 *Vict. c.* 100, *s.* 27; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour,* 24 *&* 25 *Vict. c.* 100, *s.* 71 (*ante, p.* 778).

Evidence.

In order to sustain an indictment under this section it is only necessary to prove that the defendant wilfully abandoned or exposed the child mentioned in the indictment; that the child was then under two years of age (*as to presumption of age, see* 4 *Edw.* 7, *c.* 15, *s.* 17, *and sched.* 1 (*post*, pp. 884, 887); and that its life was thereby endangered, or its health had been or then was likely to be permanently injured. The following facts were held to warrant a conviction on an indictment framed on this section charging the prisoners with abandoning and exposing a child under the age of two years, whereby its life was endangered. One of the prisoners was the mother of a weakly bastard child. When it was about five weeks old, both the prisoners put the child in a hamper at S., wrapped up in a shawl and packed with shavings and cotton wool, and the mother took the hamper from S. to the booking-office of the railway station at M. (a distance of about four miles) and there left it, having paid the carriage of the hamper to G. The hamper was addressed to the lodgings of the child's father at G., and he had told the mother, previous to the child's birth, that if she sent it to him he would keep it. The mother told the clerk at the station to be very careful of the hamper, and to send it by the next train, which was done in ten minutes from the time of its delivery at the station. Upon the address were the words "With care; to be delivered immediately." The hamper was, as above mentioned, duly sent by train, and was delivered at its address in G. in little less than an hour from the time of its being despatched from M. On its being opened the child was alive and lived for three weeks afterwards, when it died from causes not attributable to the conduct of the prisoners or either of them. *R. v. Falkingham*, *L. R.* 1 *C. C. R.* 222; 39 *L. J.* (*M. C.*) 47; 11 *Cox*, 475.

A woman who was living apart from her husband, and who had the actual custody of their child, under two years of age, brought the child, on the 19th October, and left it outside the father's door, telling him she had done so. He knowingly allowed it to remain lying outside his door from about 7 p.m. till 1 a.m., when it was removed by a constable, being then cold and stiff. Upon this state of facts, it was held, that although the father had not the actual custody and possession of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him, whereby its life was endangered, within the meaning of 24 *&* 25 *Vict. c.* 100, *s.* 27. *R. v. White*, *L. R.* 1 *C. C. R.* 311; 40 *L. J.* (*M. C.*) 134; 12 *Cox*, 83.

As to the cases in which an indictment for murder or manslaughter will lie, where death ensued from the abandonment or exposure, *see ante*, pp. 783, 803.

See also ante, pp. 1, 2, as to the cases in which an indictment for a misdemeanor of this nature would lie at common law.

ACTUAL BODILY HARM TO CHILD OR YOUNG PERSON ENGAGED IN DANGEROUS PERFORMANCE.

Statutes.

42 & 43 *Vict.* c. 34 (*Children's Dangerous Performances Act*, 1879), *s.* 3—*Offence punishable on summary conviction.*]—Any person who shall cause any child under the age of fourteen years to take part in any public exhibition or performance whereby, in the opinion of a court of summary jurisdiction, the life or limbs of such child shall be endangered, and the parent or guardian, or any person having the custody of such child, who shall aid or abet the same, shall severally be guilty of an offence against this Act, and shall on summary conviction be liable for each offence to a penalty not exceeding ten pounds.

Indictable misdemeanor.]—And where in the course of a public exhibition or performance which in its nature is dangerous to the life or limb of a child under such age as aforesaid taking part therein, any accident causing actual bodily harm occurs to any such child, the employer of such child shall be liable to be indicted as having committed an assault; and the court before whom such employer is convicted on an indictment shall have the power of awarding compensation not exceeding twenty pounds, to be paid by such employer to the child, or to some person named by the court on behalf of the child, for the bodily harm so occasioned: Provided that no person shall be punished twice for the same offence.

Sect. 4—*Evidence of age of child.*]—Whenever any person is charged with an offence against this Act in respect of a child who in the opinion of the court trying the case is apparently of the age alleged by the informant, it shall lie on the person charged to prove that the child is not of that age. [*Cf.* 4 *Edw.* 7, c. 15, *s.* 17, *post*, p. 884.]

60 & 61 *Vict.* c. 52 (*Dangerous Performances Act*, 1897), *s.* 1—*Extension of the Act of* 1879.]—The *Children's Dangerous Performances Act*, 1879, shall apply in the case of any male young person under the age of sixteen years, and any female young person under the age of eighteen years, in like manner as it applies in the case of a child under the age of fourteen years.

Sect. 2—*Limitation on prosecution.*]—(1) Except where an accident causing actual bodily harm occurs to any child or young person, no prosecution or other proceeding shall be instituted for an offence against the *Children's Dangerous Performances Act*, 1879, as amended by this Act, without the consent in writing of the chief officer of the police area in which the offence is committed. (2) For the purposes of this section the expression "chief officer of police," (*a*) with respect to any place in England other than the City of London, has the meaning assigned by the *Police Act*, 1890; (*b*) with respect to the City of London means the Commissioners of City Police.

[*Apparently the consent must be given before any proceedings are taken. See Thorpe* v. *Priestnall* [1897] 1 *Q. B.* 159.]

4 *Edw.* 7, *c.* 15 (*Prevention of Cruelty to Children Act*, 1904), *ss.* 12–18 *and sch.* 1—*Procedure and evidence under above Acts of* 1879 *and* 1897].—*See post*, pp. 882–885, 887.

ASSAULT, ILL-TREATMENT, NEGLECT, ABANDONMENT, OR EXPOSURE OF CHILDREN UNDER SIXTEEN BY PERSONS OVER SIXTEEN.

Statute.

4 *Edw.* 7, *c.* 15 (*Prevention of Cruelty to Children Act*, 1904), *s.* 1—*Punishment for cruelty to children.*]—(1) If any person over the age of sixteen years, who has the custody, charge, or care of any child under the age of sixteen years, wilfully assaults, ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause such child unnecessary suffering, or injury to its health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanor; and

(*a*) on conviction on indictment, shall be liable, at the discretion of the court, to a fine not exceeding one hundred pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding two years; and

(*b*) on summary conviction, shall be liable, at the discretion of the court, to a fine not exceeding twenty-five pounds, or alternatively, or in default of payment of such fine, or in addition thereto, to imprisonment, with or without hard labour, for any term not exceeding six months.

(2) A person may be convicted of an offence under this section either on indictment or by a court of summary jurisdiction notwithstanding the death of the child in respect of whom the offence is committed. [*Sub-sects.* 1 *&* 2 *re-enact* 57 *&* 58 *Vict. c.* 41, *s.* 1 (1) (2), *without alteration.*]

(3) *Upon the trial of any person over the age of sixteen indicted for the manslaughter of a child under the age of sixteen, of which he has had the custody, charge, or care, it shall be lawful for the jury, if they are satisfied that the accused has been guilty of an offence under this section in respect of such child, to find the accused guilty of such offence.* [*This provision was new in* 1904. *As to manslaughter, see ante*, p. 779, *et seq.*]

(4) If it is proved that a person indicted under this section was *directly or indirectly* interested in any sum of money accruable or payable in the event of the death of the child, and had knowledge that such sum of money was accruing or becoming payable, the court, in its discretion, may—

(*a*) increase the amount of the fine under this section so that the fine does not exceed two hundred pounds; or

(*b*) in lieu of awarding any other penalty under this section, sentence the person indicted to penal servitude for any term not exceeding five years. [*See note to sub-s.* 5.]

(5) A person shall be deemed to be *directly or indirectly* interested in a sum of money under this section if he has any share in or any benefit from the payment of that money, though he is not a person to whom it is legally payable. [*Sub-sects.* 4 *and* 5 *re-enact* 57 *&* 58 *Vict. c.* 41, *s.* 1 (3), *with the addition of the words in italics.*]

(6) *A copy of a policy of insurance, certified by an officer or agent of the insurance company granting the policy, to be a true copy, shall, in any proceedings under this Act, be primâ facie evidence that the child therein stated to be insured has been in fact so insured, and that the person in whose favour the said policy has been granted is the person to whom the money thereby insured is legally payable.* [*This provision was new in* 1904.]

(7) An offence under this section is in this Act referred to as an offence of cruelty.

Sect. 2.]—*Restrictions on employment of children.*

Sect. 3.]—*Licences for employment of children.*

Sect. 4—*Power to take offenders into custody.*]—(1) Any constable may take into custody, without warrant, any person—

(*a*) who within view of such constable commits an offence under this Act, or any of the offences mentioned in the First Schedule to this Act, where the name and residence of such person are unknown to such constable and cannot be ascertained by such constable; or

(*b*) who has committed, or who he has reason to believe has committed, any offence of cruelty within the meaning of this Act, or any of the offences mentioned in the First Schedule to this Act, if he has reasonable ground for believing that such person will abscond, or if the name and address of such person are unknown to and cannot be ascertained by the constable.

(2) Where a constable arrests any person without warrant in pursuance of this section, the inspector or constable in charge of the station to which such person is conveyed shall, unless in his belief the release of such person on bail would tend to defeat the ends of justice, or to cause injury or danger to the child against whom the offence is alleged to have been committed, release the person arrested on his entering into such a recognizance, with or without sureties, as may in his judgment be required to secure the attendance of such person upon the hearing of the charge.

[*This section is a re-enactment of* 57 *&* 58 *Vict. c.* 41, *s.* 4.]

Sect. 5—*Detention of child in place of safety.*]—(1) A constable, or any person authorized by a justice of the peace, may take to a place of safety any child in respect of whom an offence under paragraph (*a*) of section 2 of this Act has been committed, or in respect of whom an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the First Schedule to this Act, has been, or there is reason to believe has been, committed.

(2) A child so taken to a place of safety, and also any child under the age of sixteen years who seeks refuge in a place of safety, may there be detained until it can be brought before a court of summary jurisdiction, and that court may make such order as is mentioned in the next following sub-section, or may cause the child to be dealt with as circumstances may admit and require, until the charge made against any person in respect of any offence as aforesaid with regard to the child has been determined by the conviction or discharge of such person.

(3) Where it appears to a court of summary jurisdiction or any justice that an offence of cruelty within the meaning of this Act or any of the offences mentioned in the First Schedule to this Act has been committed in the case of any child that is brought before such court or justice, and

that it is expedient in the interests of the child that an order should be made under this sub-section, the court or justice may, without prejudice to any other power under this Act, make such order as circumstances require for the care and detention of the child until a reasonable time has elapsed for a charge to be made against some person for having committed the offence, and, if a charge is made against any person within that time, until the charge has been determined by the conviction or discharge of that person, *and in case of conviction for such further time not exceeding twenty-one days as the court may direct*, and any such order may be carried out notwithstanding that any person claims the custody of the child.

(4) Boards of guardians, and, in Scotland, parish councils shall provide for the reception of children brought to a workhouse in pursuance of this Act, and, where the place of safety to which a constable *or any person authorized by a justice of the peace* takes a child is a workhouse, the master shall receive the child into the workhouse if there is suitable accommodation therein for the same, and shall detain the child until the case is determined, *and any expenses incurred in respect of the child shall be deemed to be expenses incurred in the relief of the poor.*

[*This section is a re-enactment of* 57 & 58 *Vict. c.* 41, *s.* 5, *with the addition of the words in italics and certain omissions in sub-sections* 2 *and* 3.]

Sect. 6—*Disposal of child by order of court.*]—(1) Where a person having the custody, charge, or care of a child under the age of sixteen years has been—

(*a*) convicted of committing in respect of such child an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the *First* Schedule to this Act; or

(*b*) committed for trial for any such offence; or

(*c*) bound over to keep the peace towards such child,

by any court, that court, either at the time when the person is so convicted, committed for trial, or bound over, and without requiring any new proceedings to be instituted for the purpose, or at any other time, and also any petty sessional court before which any person may bring the case, may, if satisfied on inquiry that it is expedient so to deal with the child, order that the child be taken out of the custody, *charge, or care* of the person so convicted, committed for trial, or bound over, and be committed to the custody of a relation of the child, or some other fit person, *including any society or body corporate established for the reception of poor children, or the prevention of cruelty to children*, named by the court (such relation or other person being willing to undertake such custody), until it attains the age of sixteen years, or for any shorter period, and may of its own motion, or on the application of any person, from time to time by order renew, vary, and revoke any such order; but no order shall be made under this section unless a parent of the child has been convicted of or committed for trial for the offence, or is under committal for trial for having been, or has been proved *to the satisfaction of the court making the order* to have been, party or privy to the offence, or has been bound over to keep the peace towards such child.

(2) Every order under this section shall be in writing, and any such order may be made by the court in the absence of the child; and the consent of any person to undertake the custody of a child in pursuance of any such order shall be proved in such manner as the court may think sufficient to bind him.

(3) Where an order is made under this section in respect of a person who has been committed for trial, then, if that person is acquitted of the

charge, or if the charge is dismissed for want of prosecution, the order shall forthwith be void, except with regard to anything that may have been lawfully done under it.

(4) A Secretary of State in England, and in Scotland the Secretary for Scotland, and in Ireland the Lord Lieutenant of Ireland, may at any time in his discretion discharge a child from the custody of any person to whose custody it is committed in pursuance of this section, either absolutely or on such conditions as such Secretary of State, Secretary, or Lord Lieutenant approves, and may, if he thinks fit, make rules in relation to children so committed to the custody of any person, and to the duties of such persons with respect to such children.

(5) A Secretary of State, in any case where it appears to him to be for the benefit of a child who has been committed to the custody of any person in pursuance of this section, may empower such person to procure the emigration of the child, but, except with such authority, no person to whose custody a child is so committed shall procure its emigration.

[*This section is a re-enactment of* 57 *&* 58 *Vict. c.* 41, *s.* 6, *with the addition of the words italicized.*]

Sect. 7—*Maintenance of child when committed to custody of any person under order of court.*]—(1) Any person to whose custody a child is committed under this Act shall, whilst the order is in force, have the like control over the child as if he were its parent, and shall be responsible for its maintenance, and the child shall continue in the custody of such person, notwithstanding that it is claimed by its parent.

(2) Any court having power so to commit a child shall have power to make the like orders on the parent of the child to contribute to its maintenance during such period as aforesaid as if the child were detained under the *Industrial Schools Acts*; but the limit on the amount of the weekly sum which the parent of a child may be required, under this section, to contribute to its maintenance shall be one pound a week, instead of the limit fixed by the *Industrial Schools Acts* (*defined, post,* p. 887).

(3) Any such order may be made on the complaint or application of the person to whose custody the child is for the time being committed, and either at the time when the order for the child's committal to custody is made, or subsequently, and the sums contributed by the parent shall be paid to such person as the court may name, and be applied for the maintenance of the child.

(4) If a person fails to pay any sum payable by him in pursuance of any such order, he may be dealt with in like manner as if the sum were due from him in pursuance of an order under the *Bastardy Law Amendment Act,* 1872 (35 *&* 36 *Vict. c.* 65), or, in Scotland, were a sum decerned for aliment, or, in Ireland, were a sum ordered to be paid by him under the *Summary Jurisdiction* (*Ireland*) *Acts.*

(5) Where an order under this Act to commit a child to the custody of some relation or other person is made in respect of a person who has been committed for trial for an offence, the court shall not have power to order the parent of the child to contribute to its maintenance prior to the trial of that person.

(6) *Any court making an order under this section for contribution by a parent may in any case where there is any pension or income payable to such parent and capable of being attached, after giving the person by whom the pension or income is payable an opportunity of being heard, further order that such part as the court may see fit, of the pension or income be attached and be paid to the person named by the court. Such further order shall be an authority to the person, authority, or body by whom such pension or other*

income is payable, to make the payment herein stated, and the receipt of the payee shall be a good discharge to such person, authority, or body.

(7) *An order under this section may be made by any court before which a person is charged with an offence under this Act, and without regard to the place in which the person to whom it is made payable may reside.*

[*Sub-sects.* 1–5 *of this section re-enact* 57 & 58 *Vict. c.* 41, *s.* 7; *the sub-sects. in italics* (6, 7) *are new.*]

Sect. 8—*Religious persuasion of person to whom child is committed.*]—(1) In determining on the person to whose custody the child shall be committed under this Act, the court shall endeavour to ascertain the religious persuasion to which the child belongs, and shall, if possible, select a person of the same religious persuasion, or a person who gives such undertaking as seems to the court sufficient that the child shall be brought up in accordance with its own religious persuasion, and such religious persuasion shall be specified in the order.

(2) In any case where the child has been placed pursuant to any such order with a person who is not of the same religious persuasion as that to which the child belongs, or who has not given such undertaking as aforesaid, the court shall, on the application of any person in that behalf, and on its appearing that a fit person, who is of the same religious persuasion, or who will give such undertaking as aforesaid, is willing to undertake the custody, make an order to secure his being placed with a person who either is of the same religious persuasion or gives such undertaking as aforesaid.

(3) Where a child has been placed with a person who gives such undertaking as aforesaid, and the undertaking is not observed, the child shall be deemed to have been placed with a person not of the same religious persuasion as that to which the child belongs, as if no such undertaking had been given.

[*This section re-enacts* 57 & 58 *Vict. c.* 41, *s.* 8.]

Sect. 9—*Interchange of powers under Industrial Schools Acts and this Act.*]—(1) Where any child under the age of sixteen years is brought before a petty sessional court under circumstances authorizing the court to deal with the child under the *Industrial Schools Acts* [*defined in s.* 29, *post*, p. 887], the court, if it thinks fit, in lieu of ordering that the child be sent to an industrial school, may make an order for the committal of the child to the custody of a relation or person named by the court, *and the provisions of s.* 6 *of this Act shall, so far as applicable, apply as if the order were an order under that section.*

(2) Where a court orders a child to be sent to an industrial school, the order may, at the discretion of the court, be made to take effect either immediately or at any later time specified therein, regard being had to the age or health of the child; and, if the order is not made to take effect immediately, or if at the time specified for the order to take effect the child is deemed unfit to be sent to an industrial school, the court may commit the child to the custody of a relation or person named by the court, as provided by this Act, until the time so specified, or the time when the order actually takes effect.

[*This section re-enacts* 57 & 58 *Vict. c.* 41, *s.* 9, *with the additions italicized.*]

Sect. 10—*Warrant to search for or remove a child.*]—(1) If it appears to any stipendiary magistrate or to any two justices of the peace, on information made before him or them on oath by any person who, in the opinion of the magistrate or justices, is *bonâ fide* acting in the interests of a child

under the age of sixteen years, that there is reasonable cause to suspect that such a child has been or is being assaulted, ill-treated, or neglected in any place within the jurisdiction of such magistrate or justices, in a manner likely to cause the child unnecessary suffering, or to be injurious to its health, or that any offence mentioned in the First Schedule to this Act has been or is being committed in respect of such a child, such magistrate or justices may issue a warrant authorizing any person named therein to search for such child, and, if it is found to have been or to be assaulted, ill-treated, or neglected in manner aforesaid, or that any such offence as aforesaid has been or is being committed in respect of the child, to take it to and detain it in a place of safety, until it can be brought before a court of summary jurisdiction, or authorizing any person to remove the child with or without search to a place of safety and detain it there until it can be brought before a court of summary jurisdiction; and the court before whom the child is brought may cause it to be dealt with in the manner provided by *s.* 5 of this Act:

Provided that—

(*a*) the powers hereinbefore conferred on any two justices may be exercised by any one justice, if upon the information it appears to him to be a case of urgency; and

(*b*) in the case of Scotland the jurisdiction hereby conferred on a magistrate or two justices shall be exercised only by a sheriff or sheriff substitute.

(2) Any person issuing a warrant under this section may by the same warrant cause any person accused of any offence in respect of the child to be apprehended and brought before a justice, and proceedings to be taken for punishing such person according to law.

(3) Any person authorized by warrant under this section to search for any child, or to remove any child with or without search, may enter (if need be by force) any house, building, or other place specified in the warrant, and may remove the child therefrom.

(4) Every warrant issued under this section shall be addressed to and executed by some superintendent, inspector, or other superior officer of police, who shall be accompanied by the person making the information, if such person so desire, unless the persons by whom the warrant is issued otherwise direct, and may also, if the persons by whom the warrant is issued so direct, be accompanied by a registered medical practitioner.

(5) It shall not be necessary in any information or warrant under this section to name the child.

[*This section re-enacts* 57 *&* 58 *Vict. c.* 41, *s.* 10.]

Sect. 11—*Powers as to habitual drunkards.*]—*See post, tit.* "*Offences by Habitual Drunkards.*"

Sect. 12—*Evidence of defendant or husband or wife of defendant.*]—In any proceeding against any person for an offence under this Act, or for any of the offences mentioned in the *First* Schedule to this Act, such person shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case, and shall be competent but not compellable to give evidence.

[*This section re-enacts* 57 *&* 58 *Vict. c.* 41, *s.* 12, *without any alteration except that made by the changes in the first schedule, post*, p. 887.

The effect of the re-enactment is to make it clear that the husband or wife is not a compellable witness. As to the Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *see ante*, pp. 392–397.

A person jointly indicted and tried together with another for an offence against 53 & 54 *Vict. c.* 44 *(rep.), but against whom no case was made out, was held not entitled to be discharged at the close of the case for the prosecution, if the other person charged elected to give evidence under this section, but was required to remain in the dock and take his chance of his fellow-prisoner's evidence making against him. R.* v. *Martin* [1889] 17 *Cox*, 36, *Wills*, J.]

Sect. 13—*Extension of power to take deposition of child.*]—(1) Where a justice is satisfied by the evidence of a registered medical practitioner that the attendance before a court of any child, in respect of whom an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the *First* Schedule to this Act, is alleged to have been committed, would involve serious danger to its life or health, the justice may take in writing the deposition of such child on oath, and shall thereupon subscribe the same and add thereto a statement of his reason for taking the same, and of the day when and place where the same was taken, and of the names of the persons (if any) present at the taking thereof.

(2) The justice taking any such deposition shall transmit the same with his statement—

(*a*) if the deposition relates to an offence for which any accused person is already committed for trial, to the proper officer of the court for trial at which the accused person has been committed; and

(*b*) in any other case, to the clerk of the peace of the county or borough in which the deposition has been taken;

and the clerk of the peace to whom any such deposition is transmitted shall preserve, file, and record the same.

[*This section re-enacts* 57 & 58 *Vict. c.* 41, *s.* 13, *without any alteration except that made by the changes in schedule* 1, *post*, p. 887.]

Sect. 14—*Admission of deposition of child in evidence.*]—Where, on the trial of any person on indictment for any offence of cruelty within the meaning of this Act, or any of the offences mentioned in the *First* Schedule to this Act, the court is satisfied by the evidence of a registered medical practitioner that the attendance before the court of any child in respect of whom the offence is alleged to have been committed would involve serious danger to its life or health, any deposition of the child taken under the *Indictable Offences Act*, 1848 (11 & 12 *Vict. c.* 42), or the *Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict. c.* 93), or this Act, shall be admissible in evidence either for or against the accused person without further proof thereof—

(*a*) if it purports to be signed by the justice by or before whom it purports to be taken; and

(*b*) if it is proved that reasonable notice of the intention to take the deposition has been served upon the person against whom it is proposed to use the same as evidence, and that that person or his counsel or solicitor had, or might have had if he had chosen to be present, an opportunity of cross-examining the child making the deposition.

[*This section re-enacts* 57 & 58 *Vict. c.* 41, *s.* 14, *without any alteration except that effected by the changes in schedule* 1, *post*, p. 887. *Semble, the notice must be in writing: see R.* v. *Shurmer*, 17 *Q. B. D.* 323.]

Sect. 15—*Evidence of child of tender years.*]—(1) Where, in any proceeding against any person for an offence under this Act, or for any of the offences mentioned in the *First* Schedule to this Act, the child in respect of whom

the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not in the opinion of the court understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and the evidence of such child, though not given on oath, but otherwise taken and reduced into writing in accordance with the provisions of s. 17 of the *Indictable Offences Act*, 1848 (11 & 12 *Vict.* c. 42), or of s. 14 of the *Petty Sessions (Ireland) Act*, 1851 (14 & 15 *Vict.* c. 93), or of s. 13 of this Act, shall be deemed to be a deposition within the meaning of those sections respectively:

Provided that—

(*a*) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused; and

(*b*) Any child whose evidence is received as aforesaid and who shall wilfully give false evidence shall be liable to be indicted and tried for such offence, and on conviction thereof may be adjudged such punishment as is provided for by s. 11 of the *Summary Jurisdiction Act*, 1879 (42 & 43 *Vict.* c. 49), in the case of juvenile offenders, or in Ireland by s. 4 of the *Summary Jurisdiction over Children (Ireland) Act*, 1884 (47 & 48 *Vict.* c. 19), in the case of children.

(2) This section shall not apply to Scotland.

[*This section re-enacts* 57 & 58 *Vict.* c. 41, s. 15, *without any alteration, except that effected by the changes in the first schedule, post*, p. 887.]

Sect. 16—*Power to proceed with case in absence of child.*]—Where in any proceedings with relation to an offence of cruelty within the meaning of this Act, or any of the offences mentioned in the First Schedule to this Act, the court is satisfied that the attendance before the court of any child in respect of whom the offence alleged to have been committed is not essential to the just hearing of the case, the case may be proceeded with and determined in the absence of the child.

[*This section re-enacts* 57 & 58 *Vict.* c. 41, s. 16, *with certain omissions which have the effect of dispensing with medical evidence.*

In R. v. *Hale* [1905] 1 *K. B.* 126 (*C. C. R.*), *it was decided that the repealed enactment only applied to attendance for the purpose of giving evidence, and that, quite apart from the enactment, the court could dispense with the presence of a child not required as a witness.*]

Sect. 17—*Presumption of age of child.*]—Where a person is charged with an offence under this Act, or any of the offences mentioned in the *First* Schedule to this Act, *or any offence under the Employment of Children Act*, 1903 (3 *Edw.* 7, *c.* 45), in respect of a child who is alleged in the charge or indictment to be under any specified age, and the child appears to the court to be under that age, such child shall for the purposes of this Act, and the *Employment of Children Act*, 1903, be deemed to be under that age, unless the contrary is proved. [*This section re-enacts* 57 & 58 *Vict.* c. 41, s. 17, *with the alterations italicized.*]

Sect. 18—*Mode of charging offences and limitation of time.*]—(1) Where a person is charged with committing an offence under this Act, or any of the offences mentioned in the *First* Schedule to this Act in respect of two

or more children, the same information or summons may charge the offence in respect of all or any of them, but the person charged shall not be liable to a separate penalty for each child unless upon separate informations.

(2) The same information or summons may also charge *any person as having the custody, charge, or care, alternatively or together, and may charge him* with the offences of assault, ill-treatment, neglect, abandonment, or exposure, together or separately, *and may charge him with committing all or any of these offences in a manner likely to cause unnecessary suffering or injury to health, alternatively or together*, but when those offences are charged together the person charged shall not be liable to a separate penalty for each.

(3) A person shall not be summarily convicted of an offence under this Act, or of an offence mentioned in the First Schedule to this Act, unless the offence was wholly or partly committed within six months before the information was laid; but, subject as aforesaid, evidence may be taken of acts constituting, or contributing to constitute, the offence, and committed at any previous time.

(4) When an offence under this Act, or any offence mentioned in the *First* Schedule to this Act, charged against any person is a continuous offence, it shall not be necessary to specify in the information, summons, or indictment, the date of the acts constituting the offence.

[*This section re-enacts* 57 & 58 *Vict. c.* 41, *s.* 18, *with the alterations italicized in sub-s.* 2, *and those effected by the additions to schedule* 1 (*post*, p. 887). *In R. v. Miller*, 65 *J. P.* 313, *where dates were specified, Phillimore, J., refused to admit evidence of acts on other dates.*]

Sect. 19.—*Appeal for summary conviction to quarter sessions.*

Sect. 20—*Expenses of prosecution.*]—(1) Where a misdemeanor under this Act is tried on indictment, the expenses of the prosecution shall be defrayed in like manner as in the case of a felony.

(2) This section shall not apply to Scotland.

[*This section re-enacts* 57 & 58 *Vict. c.* 41, *s.* 20. *As to costs, see ante*, p. 246].

Sect. 21—*Guardians may pay costs of proceedings.*]—A board of guardians, or in Scotland the *parish council* of any parish or combination, may, out of the funds under their control, pay the reasonable costs and expenses of any proceedings which they have directed to be taken under this Act in regard to the assault, ill-treatment, neglect, abandonment, or exposure of any child, and in the case of a union, shall charge such costs and expenses to the common fund. [*This section re-enacts* 57 & 58 *Vict. c.* 41, *s.* 21. *For definition of guardians, see* 52 & 35 *Vict. c.* 63, *s.* 16 (1): *and see ante*, p. 258].

Sect. 22.—*Bye-laws by local authorities.*

Sect. 23—*Provision as to parents and as to meaning of "custody, charge, or care."*]—(1) The provisions of this Act relating to the parent of a child shall apply to the step-parent of the child and to any person cohabiting with the parent of the child, and the expression "parent," when used in relation to a child, includes guardian and every person who is by law liable to maintain the child. [*It was decided in Butler v. Gregory*, 18 *T. L. R.* 370; 87 *L. J. Newsp.* 131; 46 *Sol. J.* 310, *that the father of a bastard who had not actual custody, charge, or care of a child, and*

against whom no bastardy proceedings had been taken, was not a parent within 57 & 58 *Vict.* c. 41.]

(2) This Act shall apply in the case of a parent who, being without means to maintain a child, fails to provide for its maintenance under the Acts relating to the relief of the poor, in like manner as if the parent had otherwise neglected the child. [*This clause seems to overrule the decisions in R.* v. *Chandler*, 24 *L. J.* (*M. C.*) 109; 6 *Cox*, 519: *R.* v. *Ryland*, *L. R.* 1 *C. C. R.* 99: *and R.* v. *Rugg*, 12 *Cox*, 16: *and see Cole* v. *Pendleton*, 60 *J. P.* 359 (*post*, p. 890): *R.* v. *Mabbett*, 5 *Cox*, 339.]

(3) For the purposes of this Act—

Any person who is the parent of a child shall be presumed to have the custody of the child; and

Any person to whose charge a child is committed by its parent shall be presumed to have charge of the child; and

Any other person having actual possession or control of a child shall be presumed to have the care of the child.

[*This section is a re-enactment of* 57 & 58 *Vict.* c. 41, *s.* 23. *As to the liability of a wife living with her husband, see R.* v. *Forsyth, Chester Summer Assizes, July* 25, 1899, *Kennedy*, J., *ante*, p. 784.]

Sect. 24—*Evidence of wages of defendant.*]—In any proceedings under this Act a copy of an entry in the wages book of any employer of labour, or, if no wages book be kept, a written statement signed by such employer, or by his foreman, shall be *primâ facie* evidence that the wages therein entered, or stated as having been paid to any person, have in fact been so paid: Provided that such copy or statement has been signed by such employer, or his foreman, and that the signature of such employer, or foreman, has been witnessed by the person producing the said copy or statement. [*This provision was new in* 1904.]

Sect. 25—*Vexatious Indictments Act to apply.*]—Every misdemeanor under this Act shall in England and Ireland be deemed to be an offence within, and subject to, the provisions of the *Vexatious Indictments Act*, 1859 (22 & 23 *Vict.* c. 17), and any Act amending the same. [*This provision was new in* 1904. *See ante*, p. 7.]

Sect. 26.—*Amends s.* 10 *of the Poor Law Act*, 1879 (42 & 43 *Vict.* c. 54).

Sect. 27.—*Amends s.* 5 *of the Criminal Law Amendment Act*, 1885, *post*, p. 913.

Sect. 28—*Right of parent, etc., to administer punishment.*]—Nothing in this Act shall be construed to take away or affect the right of any parent, teacher, or other person having the lawful control or charge of a child to administer punishment to such child. [*This section re-enacts* 57 & 58 *Vict.* c. 41, *s.* 24. *See Cleary* v. *Booth* [1893] 1 *Q. B.* 465, *and ante*, p. 795.]

Sect. 29—*General definitions.*]—In this Act, unless the context otherwise requires—

The expression "local authority" has the same meaning as in the *Employment of Children Act*, 1903:

[*In the Employment of Children Act*, 1903 (3 *Edw.* 7, c. 45), "*The expression 'local authority' means in the case of the City of London, the Mayor, Aldermen, and Commons of the City or Common Council assembled, in the case of a municipal borough with a population according to the census of* 1901 *of over* 10,000, *the borough council, and in the case of any other*

urban district with a population according to the census of 1901 *of over* 20,000, *the district council, and elsewhere the county council"* (*s.* 13).]

The expression "chief officer of police" means—

in the city of London and the liberties thereof, the commissioner of city police;

in the metropolitan police district, the commissioner of police of the metropolis;

elsewhere in England, the chief constable, or head constable or other officer, by whatever named called, having the chief local command of the police in the police district in reference to which such expression occurs:

The expression "street" includes any highway or other public place whether a thoroughfare or not:

The expression "place of safety" includes any place certified by the local authority under this Act for the purposes of this Act, and also includes any workhouse or police station, or any hospital surgery, or place of the like kind:

The expression "*Industrial Schools Acts*" means as regards England and Scotland the *Industrial Schools Act*, 1866 (29 & 30 *Vict. c.* 118), and the Acts amending the same. (*See ante*, p. 241.)

Sect. 30.—*Application of Act to Scotland.*

Sect. 31.—*Application of Act to Ireland.*

Sect. 32.—*Expenses of local authority.*

Sect. 33—*Short title, repeals, and commencement.*]—(1) This Act may be cited as the *Prevention of Cruelty to Children Act*, 1904.

(2) The enactments mentioned in the Second Schedule to this Act shall be repealed from the date of the commencement of this Act to the extent specified in the third column to that schedule.

[*By s.* 38 (1) *of the Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), "*where . . . any Act passed after the commencement of this Act repeals and re-enacts with or without modification any provisions of a former Act, references in any other Act to the provisions so repealed shall unless the contrary intention appears, be construed as reference to the provisions so re-enacted.*" *Quære, as to the effect of this provision upon s.* 12 *of the present Act. By virtue of s.* 38 (2) *of the same Act* (*ante*, p. 7), *proceedings for offences committed before Oct.* 1, 1904, *against the repealed enactments may be instituted or continued notwithstanding their repeal. R.* v. *Parsons* [1904] *Lewes Autumn Assizes, Bigham*, J.: *cf. R.* v. *Webb*, 197 *Cent. Crim. Ct. Sess. Pap.* 627, *Walton*, J.]

(3) This Act shall come into operation on the first day of October, one thousand nine hundred and four.

FIRST SCHEDULE.

Any offence under sections twenty-seven (*ante*, p. 874), fifty-five (*post*, p. 899), or fifty-six (*post*, p. 903), of the *Offences against the Person Act*, 1861 (24 & 25 *Vict. c.* 100), and any offence against a child under the age of sixteen years, under sections *five* (*ante*, p. 776), forty-two, forty-three (*ante*, p. 830), fifty-two (*post*, p. 918), or *sixty-two* (*post*, p. 925) of that Act, *or section eleven* (*post*, p. 925) *of the Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69).

Any offence under the *Dangerous Performances Acts*, 1879 *and* 1897 (42 & 43 *Vict. c.* 34; 60 & 61 *Vict. c.* 52) (*ante*, p. 876).

Any other offence involving bodily injury to a child under the age of sixteen years.

[*This schedule is a re-enactment of the schedule to* 57 & 58 *Vict. c.* 41, *with the additions italicized. The addition to this schedule of* 24 & 25 *Vict. c.* 100, *s.* 62, *overrides R. v. Beer*, 62 *J. P.* 120. *In R. v. Roberts*, 18 *Cox*, 530, *Cave*, J., *refused to admit the evidence of the prisoner's husband on a charge of feloniously causing grievous bodily harm to a child under sixteen* (24 & 25 *Vict. c.* 100, *s.* 18, *ante*, p. 839) *on the ground that the words "other offence involving bodily injury to a child under the age of sixteen years" were limited to cases in which it was an essential part of the definition of the offence that the child should be under sixteen. It is submitted that this ruling was erroneous. In Lord Advocate v. Fraser*, 3 *Fraser* (*Justiciary*), 67, *it was held by the Lord Justice General of Scotland* (*Lord Kinross*) *that "culpable homicide" fell within the words.*]

Second Schedule.

Enactments Repealed.

The Prevention of Cruelty to Children Act, 1894 (57 & 58 *Vict. c.* 41).

The Employment of Children Act, 1903 (3 *Edw.* 7, *c.* 45), *s.* 4, *sub-s.* 6, *and s.* 11.

Indictment for Ill-treating a Child under Sixteen. (4 *Edw.* 7, *c.* 15, *s.* 1 (1), *ante*, p. 877.)

Commencement as ante, p. 839]—that A. B., then being a person over the age of sixteen years, having the custody ("*custody, charge, or care*") of C. D., a child [or, "*a certain child whose name to the jurors is unknown, being the illegitimate child of* A. B. *and*"] under the age of sixteen years, to wit, of the age of —— years, on the —— day of —— and on divers days thereafter between that date and the —— day of —— (4 *Edw.* 7, *c.* 15, *s.* 18 (4), *ante*, p. 877) unlawfully and wilfully did ill-treat ("*assault, ill-treat, neglect, abandon, or expose*") the said child, and did cause and procure (*see ante*, p. 304) the said child to be ill-treated ("*assaulted, ill-treated, neglected, abandoned, or exposed*") in a manner likely to cause such child unnecessary suffering ("*unnecessary suffering or injury to its health*"); against the form, etc. [*as ante*, p. 840]. *Add other counts charging neglect, abandonment, or exposure, and charging* "charge" *or* "care" of —— *or* "injury to the health" *of the child if the depositions so warrant, as the case requires. The provisions of s.* 18 (1), (2), (3), *ante*, p. 884, *permitting the inclusion in one information or summons of charges for more than one offence under s.* 1, *do not apply to indictments. If assault can be proved, it would seem that a specific date should be given for each assault except such as are parts of the same transaction. When the offence charged is continuous, it is not necessary to specify in the indictment the date of the acts alleged to constitute the offence* (*s.* 18 (4), *ante*, p. 885).

Misdemeanor: punishable by fine not exceeding 100*l.*, *or alternatively or in default of payment of such fine or in addition thereto imprisonment, with or without hard labour, for any term not exceeding two years.* 4 *Edw.* 7, *c.* 15, *s.* 1, *sub-s.* 1 (*a*) (*ante*, p. 877).

The Vexatious Indictments Act, 1859 (*ante*, p. 7), *applies to this offence.* 4 *Edw.* 7, *c.* 15, *s.* 25 (*ante*, p. 886).

Indictment for Ill-treatment of a Child under Sixteen by a Person interested in Money payable on the Death of a Child. (4 *Edw.* 7, *c.* 15, *s.* 1, *sub-ss.* (1), (4), *ante*, p. 877.)

Charge the offence as in the last precedent, and add the following further averment: and the jurors aforesaid, on their oath aforesaid, do further present that before and at the time of the commission of the misdemeanor in this count before charged and stated, the said A. B. was interested ("*directly or indirectly interested*") in a sum of money accruable and payable ("*accruable or payable*") in the event of the death of the said C. D., to wit, in the sum of £ —— (*specify the policy or contract under which the sum is alleged to be accruable or payable*), and had knowledge that the said sum was accruable or payable in the event of the death of the said C. D. [*Conclude as ante*, p. 840.]

In 52 & 53 *Vict. c.* 44, *s.* 2 (*rep.*), *it was provided that "such interest as aforesaid in any sum of money accruable or payable in the event of the death of the child shall be charged in the indictment and put to the jury in the same way, as far as may be, as a previous conviction is now charged and put." This provision prevented the interest of the accused in the death of the child being given in evidence before he had been convicted of the offence, although the proof of such interest would be strong evidence on the hearing of the charge to show that the ill-treatment, etc., was "wilful," which is an express element of the offence.*

It is submitted that it is necessary in indictments under 57 & 58 *Vict. c.* 41, *s.* 1, *and the present enactment, in order to justify the increased punishment provided for by* 4 *Edw.* 7, *c.* 15, *s.* 1 (4), *to aver specifically the existence of such interest as is mentioned in that sub-section. If this were not done, the increased punishment might be open to question by writ of error* (*ante*, p. 282), *or in a case reserved* (*ante*, p. 275) *on the ground that there did not appear in the indictment the averments necessary to warrant the punishment imposed.*

Misdemeanor: punishable as under the last precedent: but the court may increase the fine to an amount not exceeding 200*l.*, *or in lieu of awarding any other penalty, may sentence the person indicted to penal servitude for not more than seven nor less than three years.* 4 *Edw.* 7, *c.* 15, *s.* 1, *sub-s.* (1), (4) (*ante*, p. 877); 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

Evidence.

Over the age of sixteen.]—*Sect.* 17 of the Act does not apply to the age of the accused, which should be proved to exceed sixteen where the appearance of the accused is such as to leave no possibility of doubt; and the jury may decide for the appearance of the accused whether he is over sixteen. *R.* v. *Cox*, 18 *Cox*, 672, 674 (*C. C. R.*).

Having the custody, charge or care.]—The term "custody" applies to the parent, or any person cohabiting with the parent, and to a step-parent, or guardian, and to any person who is by law liable to maintain the child. But a putative father who has not been adjudged so is not a parent within the Act. *Butler* v. *Gregory*, *ante*, p. 885. Where evidence is given that a person is a parent, he is presumed to have custody of the child (*s.* 23).

Where evidence is given that the child was committed to the charge of the defendant, he is presumed to have charge of the child (*s.* 23 (3)). And where evidence is given that the defendant had actual possession or control of the child, he is presumed to have "care" of the child. The

word "actual" appears to be used to include cases of constructive position and questions of the legality of the possession.

Under the age of sixteen.]—The effect of s. 17 (*ante*, p. 884) is that where the child appears to the court to be under sixteen, it is for the defence to prove that the child is older. Notwithstanding the section, the prosecutor should be prepared to prove the age of the child in all cases in which it is not absolutely clear on the view that it is under sixteen. A certificate of birth, coupled with evidence of identity, is legal evidence of the age of the child mentioned in the certificate; but the age may be proved by any other lawful evidence, such as that of persons who have seen the child, or that it attended a public elementary school. *R.* v. *Cox* [1898] 1 *Q. B.* 179; 67 *L. J. Q. B.* 293; 18 *Cox*, 672 (*C. C. R.*); *and see ante*, p. 352.

Wilfully.]—The term "wilfully" "means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act went with it." *R.* v. *Senior* [1899] 1 *Q. B.* 283, 290; 67 *L. J. Q. B.* 175; 19 *Cox*, 219, *Russell*, L.C.J. And it includes deliberate omission on religious grounds to provide medical attendance for a child. *Id.*

Did assault.]—As to evidence of assault, *see ante*, p. 833.

"*Ill-treat.*"]—It seems not to be necessary to prove actual assault or battery (as to which, *see ante*, p. 835), and that bullying or frightening will suffice, or any course of conduct calculated to cause unnecessary suffering or injury to health.

"*Neglect.*"]—This includes failure by a parent to resort to the poor law authorities for the means of maintaining his child where he cannot do so out of his own means. *See* s. 23 (2) *and note, ante*, p. 886. Where a father who earned a sufficient wage did not pay over to his wife enough to clothe and feed the children properly, it was held no answer to a prosecution of the father for neglect to say that by resort to the poor law the mother might have obviated the effect of the father's neglect. *Cole* v. *Pendleton*, 60 *J. P.* 359. Evidence of the possession by the prisoner of such means at a date prior to the neglect as would presumably not be exhausted at the date of the neglect, is some evidence of the possession of means at the date of such neglect. *R.* v. *Jones*, 19 *Cox*, 678, *Kennedy*, J.

"*Expose or abandon.*"]—As to the evidence necessary to prove this, *see ante*, p. 875.

In a manner likely to cause unnecessary suffering or injury to health.]—Deliberate omission to supply medical or surgical aid to a child is within these words. *R.* v. *Senior* [1899] 1 *Q. B.* 283 (*see ante*, p. 803). Direct proof does not seem to be required that the neglect caused, or was likely to cause, unnecessary suffering, and the jury may determine the question on the circumstances proved. *R.* v. *Brenton*, 111 *Cent. Cr. Ct. Sess. Pap.* 309, *Day*, J. But a registered medical practitioner should be called to prove the condition of the child. The unsworn evidence of any child of tender years may be given. *See* 4 *Edw.* 7 c. 15, *s.* 15 (*ante*, p. 883), *and ante*, p. 368. Where a justice is satisfied by the evidence of a registered medical practitioner that the attendance at court of the injured child would involve serious danger to its life or health, the justice may take

its deposition (4 *Edw.* 7 *c.* 15, *s.* 13), which is admissible in evidence at the trial if reasonable notice (in writing, *see note to s.* 14, *ante*, p. 883) was served on the person against whom it was taken, and that person has had an opportunity of cross-examining the child. The court may dispense with the attendance of the child at the trial if satisfied that such attendance is not essential to the just hearing of the case (*s.* 16). The defendant is a competent but not a compellable witness; 4 *Edw.* 7 *c.* 15, *s.* 12 (*ante*, p. 882); and the husband or wife of the defendant may be required to attend to give evidence as an ordinary witness in the case, and is competent but not compellable to give evidence. *Id.*

It is a defence that the alleged ill-treatment consisted in reasonable correction by parent, teacher, or other person having lawful control of the child (*s.* 28, *ante*, p. 886).

As to the Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *see ante*, pp. 392–397; *and see also Charnock* v. *Merchant* [1900] 1 *K. B.* 474, *and s.* (38 (1) *of the Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63, *ante*, p. 887).

Sect. 5.

False Imprisonment.

Indictment for Assault and False Imprisonment (Common Law).

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, at the parish of A., in the county of L., and within the jurisdiction of the said court, in and upon one J. N. did make an assault, and him the said J. N. did then beat, wound, and ill-treat, and him the said J. N. then unlawfully and injuriously, and against the will of the said J. N., and also against the laws of this realm, and without any legal warrant, authority or reasonable or justifiable cause whatsoever, did imprison and detain so imprisoned for a long space of time, to wit, for the space of ten hours then next following,* and other wrongs to the said J. N. did, to the great damage of the said J. N., and against the peace of our lord the King, his crown and dignity. *If any money were extorted from the prosecutor for setting him at liberty, add an averment of it immediately after the above asterisk, as thus:* then next following, and until he the said J. N. had paid the said J. S. the sum of five pounds and five shillings of the moneys of the said J. N. for his enlargement; and other wrongs, etc., *as above* (*see* 3 *Chit. Cr. L.* 835). *A count for a common assault* (*see ante*, p. 833), *may be added, but is unnecessary, as the jury can convict of common assault on the first count. See ante*, p. 215, *et seq.*

False imprisonment is a misdemeanor at common law, punishable by fine or imprisonment without hard labour, or both (*ante*, pp. 238, 240).

Kidnapping.]—There is a form of false imprisonment known as kidnapping, consisting in the stealing or carrying away any person from his own country into another. 1 *East, P. C.* 429. It is indictable at common law (*see R.* v. *Lesley, Bell*, 220; 29 *L. J.* (*M. C.*) 97; 8 *Cox*, 269: *Phillips* v. *Eyre, L. R.* 4 *Q. B.* 225, 240); and where the person kidnapped is taken abroad, is specially punishable under the *Habeas Corpus Act* (31 *C.* 2. *c.* 2), *s.* 11. *Designy's case, Sir T. Raymond*, 474: *and see* 3 *Russ. Cr.* (6th ed.) 269. As to kidnapping Pacific Islanders, *see* 35 & 36 *Vict. c.* 19; *Steph. Dig. Cr. L.* (6th ed.) 85; 2 *Steph. Hist. Cr. L.* 58; and for

instance of a trial under the Act and the mode of proving jurisdiction, *see R.* v. *Vos* [1895] 6 *Queensland, L. J.* 215.

Evidence for the Prosecution.

All the prosecutor has to prove is the imprisonment: it is for the defendant to show that he was justified in what he did, and that the imprisonment was lawful.

Every confinement of the person is an imprisonment, whether it be in a common prison or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. 2 *Co. Inst.* 482, 589; *Cro. Car.* 209; *Com. Dig. Imprisonment* (G.); 2 *Selw.* (*N. P.*) 915 (11th ed.). But merely preventing a man from proceeding along a particular way, when he may go where he desires to go without going along it, is not an imprisonment. *Bird* v. *Jones*, 7 *Q. B.* 742. When a person sends for a constable and gives another person in charge for felony and the constable tells the party charged that he must go with him, on which the other, without further compulsion, actually does go to a police-office this is an imprisonment. *Pocock* v. *Moore, Ry. & M.* 321. But where the warrant is used merely as a summons, and no arrest is made thereon, and the party voluntarily goes before the magistrate, this, it seems, is not an imprisonment. *Arrowsmith* v. *Le Mesurier*, 2 *B. & P.* (*N. R.*) 211: *Berry* v. *Adamson*, 6 *B. & C.* 528. Where a man who had an idiot brother bedridden in his house kept him in a dark room without sufficient warmth or clothing, it was held not to be an imprisonment. *R.* v. *Smith*, 2 *C. & P.* 449. Detention of a prisoner after expiry of his sentence is false imprisonment. *Migotti* v. *Colvill*, 4 *C. P. D.* 233; *and see Moone* v. *Rose*, *L. R.* 4 *Q. B.* 486. So is detention of a prisoner after acquittal. *Mee* v. *Cruikshank*, 20 *Cox*, 210, *Wills*, J.; *and see ante*, p. 223. But detention in obedience to a specific order of court is not actionable if the exigency of the order or warrant is obeyed (*Greaves* v. *Keene*, 4 *Ex. D.* 73), and the order is valid on the face of it. *Henderson* v. *Preston*, 21 *Q. B. D.* 362. The offence would seem to be committed by mere detention without violence: *see R.* v. *Linsberg, Cent. Crim. Ct., Feb.* 9, 1905, *Bosanquet*, Common Serjeant, not yet reported: *Hunter* v. *Johnson*, 13 *Q. B. D.* 225.

If the prosecutor fail in proving the imprisonment, he may still prove the assault and battery, as directed *ante*, p. 833, *et seq.*

Evidence for the Defendant.

The defendant must either prove that he did not imprison J. N. at all, or justify the imprisonment. The grounds upon which an imprisonment can be justified may be considered under the following heads:—

1. *Arrest under civil process.*]—Arrest under civil process is now abolished, except (1) under the circumstances and subject to the restrictions set forth in the *Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 4–10, and the *Debtors Act*, 1870 (33 & 34 *Vict. c.* 76); (2) for contempt of court of a civil nature. The following rules were established under the former law:—

An imprisonment in a civil case cannot be justified except under a writ or order of a court.

An arrest upon a *capias ad satisfaciendum*, out of a superior court, if regular and regularly executed, may be justified by the officer who executed it, whether there be a judgment to warrant it or not (1 *Lev.* 95; 3 *Lev.* 20; 1 *Salk.* 409); but if the plaintiff or his attorney would justify under it, he must show such a judgment as would warrant it (*per Holt*,

C.J., *Carth.* 443: *Barker* v. *Braham*, 3 *Wils.* 368; 2 *W. Bl.* 866: *Smith* v. *Sydney*, *L. R.* 5 *Q. B.* 203); and therefore, where a *ca. sa.* was sued out on a judgment against an administratrix, without suggesting a *devastavit*, it was held, that false imprisonment would lie against the plaintiff and his attorney. *Barker* v. *Braham*, *ubi supra*. But it is not necessary that a *ca. sa.* should be returned in order to justify under it. *Rowland* v. *Veale*, 1 *Cowp.* 18.

Process out of an inferior court to justify imprisonment must show that the court had jurisdiction of the cause of action (10 *Co. Rep.* 76 *a*, 68 *b*; *cf.* 3 *Lev.* 141, 243; *T. Jones*, 165), and that the process was executed within the jurisdiction. 3 *Lev.* 243. *See ante*, p. 806, *et seq.*

But if a writ or warrant be void upon the face of it, as if the officer's name be inserted in the warrant after it is sealed (2 *Wils.* 47), or if the writ be executed after the day on which it expires (2 *Esp.* 585), or on a Sunday (29 *C.* 2, *c.* 7, *s.* 6), it will be no justification to the person arresting under it. But neither the officer nor the party is subject to an indictment for false imprisonment for arresting a person privileged from arrest, whether the privilege be permanent (*Tarlton* v. *Fisher*, 2 *Doug.* 671), or temporary. *Cameron* v. *Lightfoot*, 2 *W. Bl.* 1190, 1195, *n.*

2. *Arrest under criminal process:* (A) *By warrant.*]—A warrant from a magistrate having general cognizance of the matter of it will justify the officer in executing it, whether there be any grounds in fact for granting it or not (*Shergold* v. *Holloway*, 2 *Str.* 1002); but on the contrary, if the magistrate had not cognizance of the matter of the warrant; if, for instance, he granted a warrant to take up J. N., to answer in a plea of debt, the constable would not be justified in arresting him. *Id.*; *and see Com. Dig. Imprisonment* (H.) 8, 9. A conviction by a magistrate having competent jurisdiction over the subject-matter of it, upon which the party has been arrested, is, until reversed or quashed, conclusive evidence in favour even of the magistrate, in a prosecution against him for false imprisonment. 7 *T. R.* 633, *n.* *See* 11 *&* 12 *Vict. cc.* 42, 43, 44. As to gaolers, *see Greaves* v. *Keene*, 4 *Ex. D.* 73: *Henderson* v. *Preston*, 21 *Q. B. D.* 362. As to judges of the superior courts, *see Taaffe* v. *Downes*, 3 *St. Tr., N. S.* 1317. The warrant must be executed within the proper jurisdiction. In the ordinary cases of indictable offences, this is in the county or borough for which the justice granting it acted, or in case of fresh pursuit, within seven miles therefrom. 11 *&* 12 *Vict. c.* 42, *s.* 10; 45 *&* 46 *Vict. c.* 50, *s.* 223; 52 *&* 53 *Vict. c.* 63, *s.* 24. As to execution of warrants by metropolitan police, *see* 2 *&* 3 *Vict. c.* 71, *s.* 17. As to execution of English warrants over the Scottish border, *see* 20 *&* 21 *Vict. c.* 72, *s.* 11. Arrest on Sunday is legal. 29 *C.* 2, *c.* 7, *s.* 6. The death of the issuing magistrate does not affect the warrant. 42 *&* 43 *Vict. c.* 49, *s.* 37. By 11 *&* 12 *Vict. c.* 42, *s.* 11 (*ante*, p. 106), warrants issued in one county, etc., may be executed in another county, etc., if backed by a justice of the latter jurisdiction. In a case of misdemeanor the officer cannot lawfully arrest unless he has the warrant with him. *Codd* v. *Cabe*, 1 *Ex. D.* 352; 45 *L. J.* (*M. C.*) 101. As to felony, *see Creagh* v. *Gamble*, 24 *L. R. Ir.* 458.

(B) *Without warrant.* 1. *Common law powers.*]—A justice of peace may apprehend, or cause to be apprehended by a verbal order merely, any person committing a felony or breach of the peace in his presence. 2 *Hale*, 86. And the sheriff or coroner also may apprehend any felon within the county, without warrant. 4 *Bl. Com.* 289; *and see* 50 *&* 51 *Vict. c.* 55, *ss.* 8, 29.

By constables.]—A constable may arrest any one for a breach of the peace

in his presence, and keep him in his house or the stocks, until he can bring him before a magistrate. 1 *Hale*, 587. *See Cook* v. *Nethercote*, 6 *C. & P.* 741; 40 *R. R.* 855. So, a constable may justify arresting a man within his constablewick upon a reasonable charge of felony, although it afterwards appear that the man is innocent, or even that no felony was, in fact, committed. *Samuel* v. *Paine*, 1 *Doug.* 359: *Cowles* v. *Dunbar*, 2 *C. & P.* 565. *See R.* v. *Ford*, *R. & R.* 329: *R.* v. *Thompson*, 1 *Mood. C. C.* 80. (*See ante*, p. 807.) So, where a felony has been actually committed, a constable may arrest a man upon a reasonable suspicion of his having committed it; 2 *Co. Inst.* 52; 2 *Hale*, 90, 91, 92: *Ledwith* v. *Catchpole*, *Cald.* 291. The question of reasonable suspicion is matter of law, and should not be left to the jury. *Hill* v. *Yates*, 2 *Moore* (*C. P.*) 80; *and see Mure* v. *Kaye*, 4 *Taunt.* 34.

A constable may arrest and detain in custody for examination any person whom he finds in the streets at night, and whom there is reasonable ground to suspect of felony, although there be no proof of a felony actually committed. *Lawrence* v. *Hedger*, 3 *Taunt.* 14; 12 *R. R.* 571: *and see* 2 *Hale*, 98; 2 *Co. Inst.* 52.

By private persons.]—A private person, and *à fortiori* a peace officer, if a felony be committed, or a dangerous wound given in his presence, is not only justified in arresting, but is bound by law to arrest, the felon. 2 *Hawk. c.* 12, *s.* 1. So, he is justified in arresting or giving in charge persons engaged in an affray while it is continuing, or if there is reasonable ground that they mean to renew it; *Price* v. *Seeley*, 10 *Cl. & F.* 28; 8 *Eng. Rep.* 651; but he cannot arrest any person concerned in it after the affray is over, for in that case a warrant is necessary. 2 *Co. Inst.* 52: *Timothy* v. *Simpson*, 1 *Cr. M. & R.* 757; 4 *L. J.* (*Ex.*) 81 (approved in the case last cited). Under the *Riot Act* he is bound to arrest persons not dispersing after proclamation. 1 *G.* 1, *stat.* 2, *c.* 5, *s.* 3: *R.* v. *Pinney*, 3 *St. Tr., N. S.* 11. So, he may arrest any man about to commit a felony or treason, or any act which would manifestly endanger another's life, and detain him until the intent be presumed to have ceased. 2 *Hawk. c.* 12, *s.* 19; *Rolle Abr.* 559 (E.): *Handcock* v. *Baker*, 2 *B. & P.* 260; 5 *R. R.* 587. At common law, apart from any statute, a private person is entitled to arrest and give into custody another person for having committed a felony, *provided that there has been a felony actually committed, and such private person has reasonable ground to believe that the person whom he has given into custody has committed that felony.* The reason for his having such power is that, where a felony has been committed, in many cases the accused person would escape unless a private person, who has reasonable grounds for suspecting him, were authorized to seize and take him into custody. But that power ought not to be exercised except when there is reason to believe that the man would not be forthcoming. *Allen* v. *London and South Western Rail. Co.*, *L. R.* 6 *Q. B.* 66; 40 *L. J.* (*Q. B.*) 55, *Blackburn*, J. *See Beckwith* v. *Philby*, 6 *B. & C.* 635: *R.* v. *Hunt*, 1 *Mood. C. C.* 93: *Stonehouse* v. *Elliott*, 6 *T. R.* 315; 3 *R. R.* 183.

2. *Statutory powers.*]—Persons found committing any offence against the *Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97), may be apprehended without warrant by any peace officer, or by the owner of the property, his servant, or person authorized by him (*s.* 61, *ante*, p. 649). Offenders against *s.* 1 of the *Night Poaching Act*, 1828, may be arrested by the owner of the land, warren or chase, or manor, and their servants. 9 *G.* 4, *c.* 69, *s.* 2 (*ante*, p. 865). *See R.* v. *Fraser*, 1 *Mood. C. C.* 419. Any person may arrest without warrant a person found committing any offence against

the *Larceny Act*, 1861 (24 & 25 *Vict. c.* 96) (except angling in the daytime) (*see s.* 103, *ante*, p. 429): or any indictable offence against the *Coinage Offences Act*, 1861 (24 & 25 *Vict. c.* 99), *s.* 31 (*post*, p. 961). And by the *Customs Act*, 1876 (39 & 40 *Vict. c.* 36), *s.* 190, persons making signals to smuggling vessels may be apprehended by any person. By the *Vagrancy Act*, 1824 (5 *G.* 4, *c.* 83), *s.* 6, persons offending against that Act may be apprehended by any person without warrant.

By 14 & 15 *Vict. c.* 19, *s.* 11, any person whatsoever may apprehend any person found committing any indictable offence *in the night* (*i.e.*, between 9 p.m. and 6 a.m.), and convey or deliver him to a peace officer. (*See ante*, p. 622.) And under 24 & 25 *Vict. c.* 96. *s.* 104 (*ante*, p. 430); *c.* 97, *s.* 57 (*ante*, p. 649); *c.* 100, *s.* 66 (*ante*, p. 777), any constable or peace officer may take into custody, without warrant, any person whom he shall find loitering or lying in any highway, yard, or other place, during the night, or whom he shall have good cause to suspect of having committed or being about to commit any felony against those Acts respectively, and shall take him as soon as reasonably may be before a justice of the peace, to be dealt with according to law. Like provisions are contained in other general and local Acts, with respect to particular offences. *See Steph. Dig. Cr. Proc.* pp. 59–62; *Official Index to Statutes* (ed. 1904), *tit.* "*Arrest.*"

3. *Arrest for a contempt.*]—If a contempt be committed in the face of a court of record (as, by rude and contumelious behaviour; by obstinacy, perverseness, prevarication, or refusal to answer any lawful question; by breach of the peace, or any wilful disturbance whatever), the judge may by parol order the offender to be instantly apprehended and imprisoned, at his (the judge's) discretion, without any further proof or examination. 2 *Hale*, 86; 2 *Hawk. c.* 22; 4 *Bl. Com.* 282, 283: *Spilsbury* v. *Micklethwaite*, 1 *Taunt.* 146. *See Cropper* v. *Horton*, 8 *D. & R.* 166: *R.* v. *Charlesworth*, 2 *F. & F.* 326: *Ex parte Fernandez*, 10 *C. B.* (*N. S.*) 3; 39 *L. J.* (*C. P.*) 321.

4. *Arrest after an escape.*]—In civil cases, where a person who has been taken in custody in execution escapes, if it be a negligent escape, the gaoler or officer may retake him; if a voluntary escape, a retaking would be a false imprisonment. *Jones* v. *Pope*, 1 *Saund.* 34, *and notes*: *Allanson* v. *Butler*, 1 *Sid.* 330: *Buxton* v. *Home*, 1 *Show.* (*K. B.*) 174: *Atkinson* v. *Jameson*, 5 *T. R.* 25. Where a person in custody upon mesne process escapes, if the escape be negligent, the gaoler or officer may retake him; if voluntary, he cannot.

In criminal cases, where a prisoner escapes, if the escape be negligent merely, the gaoler or officer may retake him, at any time, without warrant (*Dalt. c.* 159; if voluntary, he cannot afterwards be retaken by virtue of the same warrant under which he was at first arrested (2 *Hawk. c.* 19, *s.* 12); but he may be retaken on a fresh warrant, or without warrant in cases where he might have been arrested without warrant originally. Prison officers have now all the powers, duties, etc., of constables. 61 & 62 *Vict. c.* 41, *s.* 10.

5. *Arrest under other authority.*]—Where a femme covert appeared before a justice of the peace as a material witness in a case of felony, it was held that he was justified in committing her until the sessions, upon her refusing to appear at the sessions to give evidence or to find sureties for her appearance. *Bennet* v. *Watson*, 3 *M. & Sel.* 1. Under *s.* 20 of the *Indictable Offences Act*, 1848 (11 & 12 *Vict. c.* 42), the examining justice can commit a witness to prison until after the trial

of the accused, or until the witness enter into a proper recognizance, if after making a deposition he refuses to enter into a recognizance to attend the trial. Under former statutes it was held that a magistrate might commit an accused person for re-examination; but if the committal were for an unreasonable time, the warrant of commitment was virtually void, and the commitment is an imprisonment. *Davis* v. *Capper*, 5 *Man. & Ryl.* 53; 10 *B. & C.* 28. Remand of the accused in custody on an inquiry as to an indictable offence may not be for over eight days (11 & 12 *Vict. c.* 42, *s.* 21); unless for the purpose of dealing summarily with the case. 42 & 43 *Vict. c.* 49, *s.* 24.

Courts having bankruptcy jurisdiction have power to issue warrants for the arrest of a bankrupt, and where a prosecution for misdemeanor is ordered, may commit the offender for trial. 46 & 47 *Vict. c.* 52, *s.* 165. The courts having jurisdiction in bankruptcy are now the high court of justice and the county courts (46 & 47 *Vict. c.* 52, *s.* 92, *sub-s.* 1), and a county court, for the purposes of its bankruptcy jurisdiction, in addition to the ordinary powers of the court, has all the powers and jurisdiction of the high court. *Id. s.* 100.

Officers in the army and navy have, in many instances, authority to imprison soldiers and seamen under their command (*see Manual of Military Law*); and as to the effect of being under military law, *see Marks* v. *Frogley* [1898] 1 *Q. B.* 396, 888. But false imprisonment has been held to lie against a superior officer, where the imprisonment at first was legal, but was afterwards aggravated with many circumstances of cruelty, and continued beyond all necessary bounds. *Wall* v. *Macnamara*, 1 *T. R.* 536, *cit.*; 1 *R. R.* 285, *cit.* So, where a seaman was confined by his captain for three days, for a supposed breach of duty, and was then liberated by him, without being brought to a court-martial, it was held that false imprisonment would lie. *Swinton* v. *Molloy*, 1 *T. R.* 537, *cit.*; 1 *R. R.* 286, *cit.*

An arrest and detention under an impress warrant may be lawful, but the party executing it does so at his peril; for if he take a man not liable to be impressed, as, for instance, a person who has never served at sea, he is guilty of false imprisonment. *Flewster* v. *Royle*, 1 *Camp.* 187.

Where the master of an English merchant ship contracted with the Chilian government to take from Valparaiso to England certain persons whom that government had ordered to be banished to England, this was held to be a false imprisonment as soon as the ship was out of the Chilian territory. *R.* v. *Lesley, Bell*, 220; 29 *L. J.* (*M. C.*) 97; 8 *Cox*, 269.

Sect. 6.

ABDUCTION.

Statutes.

13 *Edw.* 1, *c.* 34—(a) *Abduction of married women.*]—And of women carried away with the goods of their husbands the King shall have the suit for the goods so taken away. . . . [*See ante*, p. 459; 1 *Hale*, 637].

(b) *Abduction of nuns.*]—He that carrieth a nun from her house, although she consent shall be punished by three years' imprisonment, and shall make convenient satisfaction to the house from which she was taken, and nevertheless shall make fine at the King's will.

c. 35—*Abduction of wards.*]—Concerning children, males or females, whose marriage belongeth to another, taken or carried away, if the ravisher have no right in the marriage, though after he restore the child unmarried, or else pay for the marriage, he shall nevertheless be punished for his offence by two years' imprisonment, and if he do not restore or do marry the child after the years of consent, and be not able to satisfy for the marriage, he shall abjure the realm or have perpetual imprisonment. . . .

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 53—*Abduction of a woman on account of her fortune.*]—Where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress *or co-heiress*, or presumptive next of kin, *or one of the presumptive next of kin*, to any one having such interest, whosoever shall, from motives of lucre, take away, *or detain* such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, and whosoever shall fraudulently allure, take away, or detain such woman, being under the age of *twenty-one* years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, *with intent* to marry or carnally know her, *or to cause her to be married or carnally known by any other person*, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years . . .; and whosoever shall be convicted of any offence against this section shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, *or in which she shall have any such interest, or which shall come to her as such heiress, co-heiress, or next of kin as aforesaid*; and if any such marriage as aforesaid shall have taken place, such property shall, upon such conviction, be settled in such manner as the Court of Chancery in England or Ireland shall upon any information at the suit of the attorney-general appoint. [*This section re-enacts* 9 *G.* 4, *c.* 31, *s.* 19, *with the additions italicized.*]

Sect. 54—*Abduction by force with intent to marry, etc.*]—Whosoever shall, by force, take away or detain against her will any woman of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . [*This section re-enacts* 10 *G.* 4, *c.* 34, *s.* 22 (1).]

48 & 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 20, *and sched.*—*Person charged and husband or wife of person charged to be competent but not compellable witnesses.*]—*Post*, p. 906.

61 & 62 *Vict. c.* 36 (*Criminal Evidence Act*, 1898), *ss.* 1, 4, *and sched.*—*Evidence of accused and husband or wife of accused.*]—*Ante*, pp. 392–398.

Indictment under first part of 24 & 25 *Vict. c.* 100, *s.* 53.

Central Criminal Court, to wit:—The jurors for our Lord the King upon their oath present, that J. S. [in the parish of ——, and within the

jurisdiction of the said court], on the first day of June, in the year of our Lord ——, feloniously, and from motives of lucre did take away and detain ("*take away or detain*") one A. N., against her will, she, the said A. N., then having a certain present and absolute interest ("*any interest whether legal or equitable, present or future, absolute, conditional or contingent*") in certain real estate ("*real or personal estate*"), to wit [*here describe the estate*], with intent her the said A. N. to marry ("*to marry or carnally know her, or to cause her to be married or carnally known by any other person*"); against the form [*as ante*, p. 840]. *Add a count stating generally the nature of some part of the property, and, if the intent be doubtful, add counts varying the intent. Formerly, if a woman was taken away forcibly in one county, and was married or defiled with her own consent, without any continuing force, in another county, the offence was not complete in either county, and the offender could not be indicted* (*R.* v. *Gordon*, 1 *Russ. Cr.* (4th ed.) 707; 3 *Russ. Cr.* (6th ed.) 255; *but now as actual marriage or defilement is not necessary, this difficulty cannot occur: and see* 7 *G.* 4, *c.* 64, *s.* 12 (*ante*, p. 43).

Felony: penal servitude for not more than fourteen nor less than three years, or imprisonment with or without hard labour, not exceeding two years. 24 *&* 25 *Vict. c.* 100, *s.* 53; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2, (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 *&* 25 *Vict. c.* 100, *s.* 71, (*ante*, p. 778).

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant took away and detained A. N. against her will. If she be taken away in the first instance with her own consent, but afterwards refuse to continue with the offender, and be forcibly detained by him, the offence is within the statute. *See* 1 *Hawk, c.* 41, (*forcible marriage*), *s.* 7. Prove also, that A. N. had the interest stated in the indictment, from which the motives of lucre may be presumed. Prove the intent stated in the indictment by the declarations or acts of the defendant, or by circumstances from which the intent may be inferred. *See R.* v. *Barratt*, 9 *C. & P.* 387. Under the old law the woman must have been married or defiled: *Fulwood's case, Cro. Car.* 488: *R.* v. *Swendsen*, 14 *St. Tr.* 559; 1 *Hale*, 660, 661; *cf.* 4 *Bl. Com.* 209: *Brown's case, Ventr.* 243; 3 *Keb.* 193; *and see ante*, p. 398: but this is no longer necessary, the intent to marry or carnally know being sufficient. *R.* v. *Perry* (3 *Russ. Cr.* (6th ed.) 666), cited in *R.* v. *Sergeant, Ry. & M.* 352, 354, *Abbott*, C.J.; 1 *Hawk. c.* 41, *s.* 13, *forcible marriage*; 1 *East, P. C.* 454 (*ante*, p. 398). By virtue of *s.* 4 of the *Criminal Evidence Act*, 1898 (61 *&* 62 *Vict. c.* 36), *ante*, p. 896, the husband or wife can be called for the prosecution or for the defence, without the consent of the accused spouse, but appears not to be compellable. *See* 48 *&* 49 *Vict. c.* 69, *s.* 20 (*post*, p. 906).

The offender is incapable of taking any interest, legal or equitable, in the real estate of the woman, or in which she has any such interest, or which shall come to her as any such heiress, etc. And if a marriage shall have taken place, the property shall, on conviction of the offender, be settled in such manner as the High Court (Chancery Division), at the suit of the attorney-general, shall appoint. 24 *&* 25 *Vict. c.* 100, *s.* 53. *R.* v. *Burrell, L. & C.* 354; 33 *L. J.* (*M. C.*) 54; 9 *Cox*, 368, is a decision on that part of *s.* 53 which relates to the fraudulent taking away of women under the age of twenty-one. The facts proved in that case, which were complicated, were held not sufficient to sustain a conviction.

OF A GIRL UNDER SIXTEEN YEARS OF AGE.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*), *s.* 55.]—Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. [*This section re-enacts* 9 *G.* 4, *c.* 31, *s.* 20.]

48 & 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 20—*Evidence of defendant and husband and wife of defendant.*]—*See post*, p. 906.

61 & 62 *Vict. c.* 36 (*Criminal Evidence Act*, 1898), *ss.* 1, 4, *and sched.*—*Evidence of defendant and husband or wife of defendant.*]—*See ante*, pp. 392–398.

4 *Edw.* 7, *c.* 15 (*Prevention of Cruelty to Children Act*, 1904), *ss.* 12–18 *and sched.* 1—*Procedure and evidence.*]—*See ante*, pp. 882–885, 887.

Indictment. (24 & 25 *Vict. c.* 100, *s.* 55.)

Commencement as in the last precedent]—unlawfully did take and cause to be taken one A. N. out of the possession and against the will of R. N., her father ("*out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her*"), she the said A. N. then being an unmarried girl under the age of sixteen years, to wit, of the age of fifteen years; against the form [*as ante*, p. 840]. *The allegation "being* an unmarried girl," *is sufficient. R.* v. *Moore*, 2 *Lev.* 179: *R.* v. *Boyall*, 2 *Burr.* 832 (*ante*, p. 84). *If the offence is continuous it is not necessary to specify the date of the acts alleged to constitute the offence.* 4 *Edw.* 7, *c.* 15, *s.* 18 (4), *and sched.* 1 (*ante*, pp. 885, 887).

Misdemeanor: imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 100, *s.* 55. *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour, Id. s.* 71 (*ante*, p. 778).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant took A. N. out of the charge of her father or mother, or of some person having the lawful care or charge of her. *Cf. s.* 7 of the *Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), and the cases thereon, *post*, pp. 902, 903.

Take.]—The taking need not be by force, actual or constructive, and it is immaterial whether the girl consents or not. *R.* v. *Mankletow, Dears.*

159; 22 *L. J.* (*M. C.*) 115; 6 *Cox*, 143: *see R.* v. *Kipps*, 4 *Cox*, 167: *R.* v. *Booth*, 12 *Cox*, 231. Where the defendant went in the night to her father's house, and placed a ladder against her window, and held it for her to descend, which she did, and eloped with him, this was held to be a "taking of her out of the possession of her father" within the statute; although she herself proposed the plan to the defendant. *R.* v. *Robins*, 1 *C. & K.* 456. So, where the girl was persuaded by the defendant to leave her father's house and go away with him, without the father's consent, and accordingly left her home alone by a preconcerted arrangement between them, and went to a place appointed, where she was met by the prisoner, and they then went away together, without the intention of returning: this was held to be a taking of the girl out of her father's possession within the statute, since up to the moment of her meeting with the defendant, she had not absolutely renounced her father's protection. *R.* v. *Mankletow* (*supra*). So, where the defendant, by concert with the girl, met her and stayed with her away from her father's house for several nights, sleeping with her; and the jury found that the father did not consent, and that the defendant knew he did not; and that he took the girl away with him in order to gratify his passions, and then let her return home and not with the intention of keeping her away from her home permanently; the conviction was held right. *R.* v. *Timmins*, *Bell*, 276; 30 *L. J.* (*M. C.*) 45; 8 *Cox*, 401. Where a man induces a girl, by promises of what he will do for her, to leave her father's house and live with him, he may be convicted under this statute, although he is not actually present or assisting her at the time she leaves her father's roof. *R.* v. *Robb.* 4 *F. & F.* 59. If the girl leaves her father, without any persuasion, inducement or blandishment held out to her by the defendant, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her father's custody, yet his not doing so is no infringement of this statute, for the statute does not say he shall restore her, but only that he shall not take her away. *R.* v. *Olifier*, 10 *Cox*, 402, *Bramwell*, B. If the suggestion to go away with the prisoner comes from the girl only, and he takes merely the passive part of yielding to her suggestion, he is entitled to an acquittal. *R.* v. *Jarvis*, 20 *Cox*, 249, *Jelf*, J. It is submitted that the ruling to the contrary in *R.* v. *Biswell*, 2 *Cox*, 257, is not law. *See* discussion of the authorities, *R.* v. *Mackney*, 29 *Vict. L. R.* 22. And where a young woman persuaded a girl under sixteen to go away with her from her father's house to London, telling her that her (the defendant's) mother wanted a little girl as a servant, and would give her 5*l.* wages, and the girl left her father's house voluntarily for that purpose, this was held not to be a taking within 9 *G.* 4, *c.* 31, *s.* 20, of which 24 *&* 25 *Vict c.* 100, *s.* 55 is a re-enactment. *R.* v. *Meadows*, 1 *C. & K.* 399: *see R.* v. *Handley*, 1 *F. & F.* 648: *sed quære.* If, however, the girl while living with her father, leaves his house for a mere temporary purpose, intending to return to it, she is still in his possession within the meaning of the statute; and if when so out of the house the defendant induces her to run away with him, he is guilty of the misdemeanor created by this statute. *R.* v. *Mycock*, 12 *Cox*, 28, *Willes*, J.; *and see R.* v. *Baillie*, 8 *Cox*, 238. Where a servant girl, under sixteen years of age, had permission from her master to visit her parents from Sunday to Monday night, and went to see them on Sunday for a few hours only, and then told them (by previous arrangement with the prisoner) that she was going back to her service, instead of which she remained with the prisoner all night, and did not return to her service until some days afterwards, it was held (1) that the girl was not in the possession of her father at the time of the alleged offence, but under

the lawful charge of her master, and (2) that the above facts would not warrant a conviction for abduction from the master. *R.* v. *Miller*, 13 *Cox*, 179, *Lush*, J.

If the defendant, at the time he took the girl away, did not know, and had no reason to know, that she was under the lawful care or charge of her father, mother, or some other person, he is not guilty of this offence. *R.* v. *Hibbert*, *L. R.* 1 *C. C. R.* 184; 38 *L. J.* (*M. C.*) 61; 11 *Cox*, 246. The defendant met a girl in the street, and induced her to go with him to a neighbouring town, where he seduced her. They returned together, and he left her where he had met her. The girl then went to her home, where she lived with her father. The defendant made no inquiry, and did not know who the girl was, or whether she had a father living or not, but he had no reason to, and did not, believe that she was a girl of the town. Upon these facts it was held that the defendant could not be found guilty of an offence against *s.* 55 of 24 & 25 *Vict. c.* 100. *Id. See also R.* v. *Green*, 3 *F. & F.* 274.

It was held to be an offence against 4 & 5 *Ph. & M. c.* 8, *s.* 3 (of which 24 & 25 *Vict. c.* 100, *s.* 55, is in substance a re-enactment), to take away a natural daughter under sixteen from the custody of her putative father. 1 *Hawk. c.* 41, *s.* 14 (*seduction*): *R.* v. *Cornforth*, 2 *Str.* 1162: *R.* v. *Sweeting*, 1 *East*, *P. C.* 457. Upon the death of the lawful father, the mother retains her authority, though she marry again, unless the father has disposed of the custody of his child to others; the assent of the second husband is not material. *Ratcliff's case*, 3 *Co. Rep.* 38.

Against the will, etc.]—Prove also that she was taken away against the will of the person who had the care or charge of her. If the defendant induce the parents, by false and fraudulent representations, to allow him to take the child away, this is an abduction within the statute. *R.* v. *Hopkins*, *C. & Mar.* 254. It seems to be doubtful whether, if the parent once consent, but afterwards dissent, a subsequent taking away can be said to be against the will of the parent. *Calthrop* v. *Axtel*, 1 *East*, *P. C.* 457; 3 *Mod.* 168. It was held not to be clear under 4 & 5 *Ph. & M. c.* 8 (*rep.*), whether it would be an offence to take away a girl against the consent of her parent, but by the consent of one who has the temporary care of her. 1 *East*, *P. C.* 457. Where the girl's mother had encouraged her in a lax course of life, by permitting her to go out alone at night and dance at public-houses, from one of which she went away with the defendant, *Cockburn*, C.J., ruled that she could not be said to be taken away against the mother's will within the meaning of 9 *G.* 4, *c.* 31, *s.* 20 (of which the present section is a re-enactment). *R.* v. *Primelt*, 1 *F. & F.* 50.

Under sixteen, etc.—Prove that she was under the age of sixteen years, and unmarried. It is no defence that the defendant did not know her to be under sixteen, or might suppose from her appearance that she was older; *R.* v. *Robins*, 1 *C. & K.* 456: *R.* v. *Olifier*, 10 *Cox*, 402: *R.* v. *Mycock*, 12 *Cox*, 28: *R.* v. *Booth*, 12 *Cox*, 231; or even that the defendant *bonâ fide* believed and had reasonable ground for believing that she was over sixteen. *R.* v. *Prince*, *L. R.* 2 *C. C. R.* 154; 44 *L. J.* (*M. C.*) 122; 13 *Cox*, 138. If she was under the age of fourteen years, and taken away by force or fraud, the defendant must be indicted as in the next precedent but one.

The husband or wife of the defendant may be called for the prosecution or defence without the consent of the defendant; 61 & 62 *Vict. c.* 36, *s.* 4 (*ante*, p. 396); but appears not to be a compellable witness. 48 & 49

Vict. c. 69, *s.* 20, *post*, p. 906; 4 *Edw.* 7 *c.* 15, *s.* 12, *ante*, p. 882; *and see ante*, pp. 392–398.

The act is positively prohibited, and therefore the absence of a corrupt motive is no answer to the charge. *See R.* v. *Booth*, 12 *Cox*, 231. So, it was held to be no legal excuse that the defendant made use of no other means than the common blandishments of a lover, to induce her to elope with and marry him. *R.* v. *Twisleton*, 1 *Lev.* 257; 1 *Sid.* 387; 2 *Keb.* 432; 1 *Hawk. c.* 41, *s.* 10, *tit.* "*Seduction.*"

OF GIRL UNDER EIGHTEEN YEARS OF AGE, WITH INTENT THAT SHE SHOULD BE CARNALLY KNOWN.

Statute.

48 *&* 49 *Vict c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 7—*Abduction of a girl under eighteen with intent that she should be carnally known.*]—Any person who—with intent that any unmarried girl under the age of eighteen years should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally—takes or causes to be taken such girl out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour. Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court or jury that the person so charged had reasonable cause to believe that the girl was of or above the age of eighteen years.

Sect. 17—*Misdemeanors under this Act to be within Vexatious Indictments Act—Indictment under this Act not triable at quarter sessions.*]—Every misdemeanor under this Act shall, in England and Ireland, be deemed to be an offence within, and subject to, the provisions of the *Vexatious Indictments Act*, 1859 (22 *&* 23 *Vict. c.* 17), and any Act amending the same (*see ante*, p. 7), and no indictment under the provisions of this Act shall in England be tried by any court of quarter sessions. (*See ante*, p. 126.)

Sect. 18—*Costs of Prosecutions.*]—The court before which any misdemeanor indictable under this Act, or any case of indecent assault, shall be prosecuted or tried may allow the costs of the prosecution, in the same manner as in cases of felony (*see ante*, p. 246), and may in like manner, on conviction, order payment of such costs by the person convicted; and every order for the allowance or payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid upon the same terms and in the same manner in all respects as in cases of felony. (*See ante*, p. 261.)

Sect. 20—*Evidence of accused and husband or wife of accused.*]—*See post*, p. 906.

61 *&* 62 *Vict. c.* 36 (*Criminal Evidence Act*, 1898), *ss.* 1, 4 *sched.*—*Evidence of accused and husband and wife of accused.*]—*See ante*, pp. 392–398.

Indictment under 48 *&* 49 *Vict. c.* 69, *s.* 7. (*Ante*, p. 902.)

An indictment for this offence can be framed from the precedent on p. 899, *by altering the age of the girl and adding* "with intent that she the said A. B. should be unlawfully and carnally known * by a certain man, to wit, by E. F." * *If there is evidence which it may be inferred that the carnal knowledge was intended to be* "generally" (*sic in statute*), *substitute* "generally" *for the words between the asterisks.*

Misdemeanor: punishable by imprisonment for not more than two years with or without hard labour. 48 *&* 49 *Vict. c.* 69, *s.* 7.

Evidence.

For the evidence necessary to support this indictment, *see ante*, p. 899, *mutatis mutandis.*

In order to support an indictment under this section it is necessary to prove that the girl was *taken* out of the possession of her father or mother or other person having lawful care or charge of her, against the will of such person, and for this purpose the parent or guardian must be called (*R.* v. *Nash, Times, July* 2, 1903, *Wright*, J.), or that she left her father, etc., in consequence of some persuasion, inducement or blandishment held out to her by the defendant. *R.* v. *Henkers*, 16 *Cox*, 257, *Common Serjeant, after consulting Wills*, J., *following R.* v. *Olifier*, 10 *Cox*, 402 (*ante*, p. 900). Where the girl has left her home without any inducement from the defendant, he is not guilty of abduction, even though it be proved that before she so left he had taken her about to places of entertainment, and had had connection with her. *R.* v. *Kauffman*, 68 *J. P. Rep.* 189, *Bosanquet*, Common Serjeant; *and cf. R.* v. *Mackney*, 29 *Victoria L. R.* 22, where the English cases are considered. Whether the girl was in possession of her father is a question for the jury. *R.* v. *Mace*, 50 *J. P.* 776. Upon an indictment under this section for taking a girl out of the possession of her father, the proof was that at the time of the commission of the alleged offence she was employed by another person as barmaid at a distance from her father's home. It was held that she was under the lawful charge of her employer and not in the possession of her father, and that therefore the defendant could not be convicted of the offence with which he was charged. *R.* v. *Henkers, ubi supra.*

It is a defence if the prisoner, at the time of taking the girl from lawful custody, had reasonable cause to believe that she was eighteen, though he did not inquire till after the taking. *R.* v. *Packer*, 16 *Cox*, 57, *Pollock*, B.

STEALING CHILDREN UNDER THE AGE OF FOURTEEN YEARS.

Statute.

24 *&* 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 56.]—Whosoever shall *unlawfully*, either by force or fraud, lead or take away, or decoy or entice away, or detain, any child under the age of *fourteen* years, with intent to deprive any parent, *guardian*, or other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; and whosoever shall, with any such intent,

receive or harbour any such child, knowing the same to have been by force or fraud led, taken, decoyed, enticed away, or detained, as in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, . . . or to be imprisoned, . . . and, if a male under sixteen years of age, with or without whipping: Provided that no person who shall have claimed any right to the possession of such child, or shall be the mother or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof, on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof. [*This section re-enacts* 9 *G.* 4, *c.* 31, *s.* 21, *with increase in the age from ten to fourteen and inserting "guardian."*]

4 *Edw.* 7, *c.* 15 (*Prevention of Cruelty to Children Act*, 1904), *ss.* 12–18, *sched.* 1.—*Procedure and evidence.*]—*See ante*, pp. 882, 885, 887.

Indictment under the first part 24 *&* 25 *Vict. c.* 100, *s.* 56. (*Ante*, p. 903.)

Commencement as ante, p. 839]—feloniously and unlawfully did by force ("*force or fraud*") lead and take away ("*lead or take away, or decoy or entice away, or detain*") one A. N., the said A. N. then being a child under the age of fourteen years, to wit, of the age of seven years, with intent thereby then to deprive one J. N., the father ("*any parent, guardian, or other person having the lawful care or charge of such child*") of such child, of the possession of the said child; against the form [*as ante*, p. 840]. (*2nd Count.*)—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, feloniously and unlawfully did, by force, lead and take away the said A. N., the said A. N. then being a child under the age of fourteen years, to wit, of the age of seven years, with intent thereby then feloniously to steal, take, and carry away divers articles ("*any article upon or about the person of such child, to whomsoever such article may belong*"); that is to say, one necklace [*etc., stating the articles*], then being upon and about the person of the said child; against the form [*as ante*, p. 840]. *Add counts stating that the defendant did* "by fraud entice away," *or* "did by fraud detain," *or* "did by force detain," *etc., if necessary. If the offence is continuous, e.g. in the case of "detaining," the dates of the acts constituting it need not be specified.* 4 *Edw.* 7, *c.* 15, *s.* 18 (4), *and sched.* 1 (*ante*, pp. 885, 887). *In such a case the averment should be* "on the —— day of ——, and on divers other days thereafter between that day and the —— day of ——."

Felony: penal servitude not exceeding seven years and not less than three years, or imprisonment not exceeding two years, with or without hard labour, and, if a male under sixteen years of age, with or without whipping. 24 *&* 25 *Vict. c.* 100, *s.* 56; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the defendant to enter into recognizances and find sureties for keeping the peace*, 24 *&* 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

Evidence.

Prove that the defendant took and enticed the child away: that the child was under the age of fourteen years; as to presumption of age, *see* 4 *Edw.* 7, *c.* 15, *s.* 17, *sched.* 1 (*ante*, p. 884). As to unsworn evidence by child of tender years and mode of taking evidence of children, *see* 4 *Edw.* 7, *c.* 15,

ss. 15, 16 (*ante*, pp. 883, 884); and prove the intent from circumstances from which the jury may infer it. Proof that J. N. was the father of the child will prove the intent stated in the the first count, because the natural consequence of taking the child must be to deprive the father of its possession. The defendant may prove that he claimed to have a right to the possession of the child, for such persons are specially exempted from the operation of this section of the Act. 24 & 25 *Vict. c.* 100, *s.* 56. The prisoner being indicted under this section for that she did feloniously and unlawfully, by fraud, detain a child, under the age of fourteen, with intent to deprive the mother of the possession of her, it was held that she was rightly convicted upon evidence that the child had been in the service of the prisoner, and was missing and could not be discovered; and that she gave different accounts of what had become of the child, but implying that she had given her up to some third person, although there was no evidence that the child was still in her actual custody, nor indeed, any evidence where she was. *R.* v. *Johnson*, 15 *Cox*, 481 (*C. C. R.*). An indictment under this section is supported by evidence of force or fraud exercised upon the guardian of the child, or upon the child so taken or detained, or any other person. *R.* v. *Bellis*, 62 *L. J.* (*M. C.*). 155 (*C. C. R.*), overruling *R.* v. *Barrett*, 15 *Cox*, 658. As to evidence by the defendant, *see s.* 1 of the *Criminal Evidence Act*, 1898 (*ante*, pp. 392, 393). As to evidence by the husband or wife of the defendant, *see s.* 4 of that Act (*ante*, p. 396) and 4 *Edw.* 7, *c.* 15, *s.* 12 (*ante*, p. 882).

Sect. 7.—Rape, etc.

Ravishing Women.

Common Law.

Rape is the unlawful carnal knowledge of a woman by force and against her will. 1 *East, P. C.* 434. It was anciently a felony at common law, and after being made a misdemeanor by 3 *Edw.* 1, *c.* 13, it was again made felony by 13 *Edw.* 1, *st.* 1, *c.* 34, and punishable with death without benefit of clergy. 18 *Eliz. c.* 7; *and see* 1 *Hale*, 627, *et seq.*

Statutes.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 48.]—Whosoever shall be convicted of the crime of rape shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 9 *G.* 4, *c.* 31, *s.* 16.]

Sect. 63—*Carnal knowledge defined.*]—Whenever, upon the trial for any offence punishable under this Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only. [*Irrespective of this statute, the law remains the same as it has since* 9 *G.* 4, *c.* 31, *namely, that where carnal knowledge constitutes a crime, that crime is complete without*

emission, upon proof of penetration. R. v. *Marsden* [1891] 2 *Q. B.* 149; 60 *L. J.* (*M. C.*) 171. *As to earlier law, see* 1 *East, P. C.* 436–440.]

48 & 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 4 (*last paragraph*).]—Whereas doubts have been entertained whether a man who induces a married woman to permit him to have connection with her by personating her husband is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be guilty of rape. [*This gets rid of the decision in R.* v. *Barrow, L. R.* 1 *C. C. R.* 156; 38 *L. J.* (*M. C.*) 20, *which was rejected in Ireland. R.* v. *Dee*, 14 *L. R. Ir.* 468; 15 *Cox*, 579.]

Sect. 5, *sub-s.* 2—*Carnally knowing imbecile women under circumstances not amounting to rape.*]—Any person who . . . (2) unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of any female idiot or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour. . . .

53 & 54 *Vict. c.* 5 (*Lunacy Act*, 1890), *s.* 324—*Abuse of female lunatics.*]—If any manager, officer, nurse, attendant, or other person employed in any institution for lunatics (including an asylum for criminal lunatics), or workhouse, or any person having the care or charge of any single patient, carnally knows or attempts to have carnal knowledge of any female under care or treatment as a lunatic in the institution or workhouse, or as a single patient, he shall be guilty of a misdemeanor, and on conviction or indictment shall be liable to be imprisoned, with or without hard labour, for any term not exceeding two years, and no consent or alleged consent of such female thereto shall be any defence to any indictment or prosecution for such offence.

Sect. 325, *sub-s.* (2)—*Prosecution only by consent of Attorney-General or order of Commissioners of Lunacy, or visitors.*

48 & 49 *Vict. c.* 69, *s.* 9—*Power, on indictment for rape or for felony under s.* 4 *of Criminal Law Amendment Act*, 1885, *to convict of certain misdemeanors.*]—If upon the trial of any indictment for rape, or any offence made felony by section four of this Act [*post*, p. 912], the jury shall be satisfied that the defendant is guilty of an offence under sections three [*post*, p. 920], four [*post*, p. 912], or five [*supra*, and *post*, p. 913], of this Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same [*see ante*, p. 219], then and in every such case the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid, or for the misdemeanor of indecent assault.

Sect. 20—*Persons charged and husband or wife of person charged to be competent but not compellable witnesses.*]—Every person charged with an offence under this Act or under section forty-eight and sections fifty-two to fifty-five, both inclusive, of the *Offences against the Person Act*, 1861

(24 & 25 *Vict. c.* 100), and the husband or wife of the person so charged shall be competent but not compellable witnesses on every hearing at every stage of such charge, except an inquiry before a grand jury. [*It is submitted that* 61 & 62 *Vict. c.* 36, *s.* 4 (*ante*, p. 396), *has not the effect of making either the husband or the wife of the accused compellable witnesses.*]

61 & 62 *Vict. c.* 36 (*Criminal Evidence Act*, 1898), *ss.* 1, 4, *sched.*]—*See ante*, pp. 392–398.

Indictment for Rape. (24 & 25 *Vict. c.* 100, *s.* 48, *ante*, p. 905.)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, at the parish of A., in the county of L., and within the jurisdiction of the said court, in and upon one A. N. violently and feloniously did make an assault, and her the said A. N. then violently and against her will feloniously did ravish and carnally know; against the form [*as ante*, p. 840]. *The offence is a felony at common law, but the punishment is statutory. An indictment is good which charges that A. committed a rape, and that B. was present aiding and abetting him in the commission of the felony; for the party aiding may be charged either as, as he was in law, a principal in the first degree, or, as he was in fact, a principal in the second degree. R. v. Crisham, C. & Mar.* 187. *A general conviction of a defendant charged both as principal in the first degree, and as an aider and abettor of other men in rape, is valid on the count charging him as principal. And on such an indictment, evidence may be given of several rapes on the same woman, at the same time, by the defendant and other men, each assisting the other in turn, without putting the prosecutor to elect on which count to proceed. R. v. Folkes*, 1 *Mood. C. C.* 354: *R. v. Gray*, 7 *C. & P.* 164. *The words "make an assault" are not essential, as an assault is included in the word rape. R. v. Allen*, 2 *Mood. C. C.* 179.

The omission of the "carnaliter cognovit" makes the indictment bad on demurrer, but it seems, not after verdict. R. v. Warren, 3 *Russ. Cr.* (6th ed.) 230. 7 *G.* 4, *c.* 64, *s.* 21 (*ante*, p. 165).

As to the conviction of the defendant upon this indictment of other offences than that charged against him in the indictment, see 48 & 49 *Vict. c.* 69, *s.* 9 (*ante*, p. 906).

Felony: penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 100, *s.* 48; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

That J. S.]—If it be proved that the defendant is under the age of fourteen years, he must be acquitted, whatever may be the nature of the evidence against him; for a boy under the age of fourteen years is presumed by law incapable of being a principal in the first degree in rape; 1 *Hale*, 630; and this presumption was not affected by 9 *G.* 4, *c.* 31, *s.* 18 (*rep.*), of which 24 & 25 *Vict. c.* 100, *s.* 63, is a re-enactment. *R. v. Groombridge*, 7 *C. & P.* 582. Nor is evidence admissible against him, to show that in fact he has attained the full state of puberty, and was capable of

committing the crime. *R.* v. *Philips*, 8 *C. & P.* 736: *R.* v. *Jordan*, 9 *C. & P.* 118. But in *R.* v. *Brimilow*, 2 *Mood. C. C.* 122; 9 *C. & P.* 366, a boy under fourteen indicted for rape was held properly convicted of assault under 1 *Vict. c.* 85, *s.* 11 (*rep.*). *Quære*, however, whether he might not be convicted on this indictment of an indecent assault, under 48 *&* 49 *Vict. c.* 69, *s.* 9 (*ante*, p. 906). A woman may be convicted as principal in the second degree in rape. *R.* v. *Ram*, 17 *Cox*, 609, 610, *n.*, *Bowen*, L.J. A husband cannot be guilty of a rape upon his wife. 1 *Hale*, 629: *but see R.* v. *Clarence*, 22 *Q. B. D.* 23, *Hawkins*, J. But both a husband and a boy under fourteen may be principals in the second degree, and be punished for being present aiding and abetting. 1 *Hale*, 630. *See R.* v. *Eldershaw*, 3 *C. & P.* 396: *R.* v. *Waite* [1892] 2 *Q. B.* 600: *R.* v. *Williams* [1893] 1 *Q. B.* 320. Under 48 *&* 49 *Vict. c.* 69, *s.* 20 (*ante*, p. 906), the defendant and his wife, and, in the case of a female accessory, her husband, were competent but not compellable witnesses on the trial of the indictment, but not before the grand jury. This enactment appears to be superseded as to the defendant by 61 *&* 62 *Vict. c.* 36, *s.* 1 (*ante*, p. 892), and the husband or wife of the defendant appears now to be a competent witness for prosecution or defence without the consent of the defendant, but not to be a compellable witness. 61 *&* 62 *Vict. c.* 36, *s.* 4 (*ante*, p. 896).

The said A. N. violently and against her will.]—It must be proved that the rape was committed on A. N. by force and without her consent. If, however, she yielded through fear of death or duress, it is rape. 1 *Hawk. c.* 41, *s.* 6: *R.* v. *Jones*, 4 *L. T.* (*O. S.*) 154: *cf. R.* v. *Hallett*, 9 *C. & P.* 748: *R.* v. *Rudland*, 4 *F. & F.* 495. *See ante*, p. 30. If the connection took place when she was in a state of insensibility from liquor, having been made drunk by the prisoner (though the liquor was given only for the purpose of exciting her), it is a rape. *R.* v. *Camplin*, 1 *Den.* 89; 1 *C. & K.* 746; 1 *Cox*, 220. So, also, if a man gets into bed with a woman while she is asleep, and he knows she is asleep, and he has connection with her while in that state, he is guilty of rape. *R.* v. *Mayers*, 12 *Cox*, 311: *R.* v. *Young*, 14 *Cox*, 114, *Lush*, J. It is no excuse that the woman consented at first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact. 1 *Hawk. c.* 41, *s.* 7. Even that the woman was a common strumpet, or the concubine of the ravisher, is no excuse; *Id.*; 1 *Hale*, 628, 629; although such circumstances should certainly operate strongly with the jury as to the probability of the fact that connection was had with the woman against her consent. An indictment for rape will lie against one who *ravishes* a girl of or above the age of thirteen years and under the age of sixteen years, although 48 *&* 49 *Vict. c.* 69, *s.* 5, *sub-s.* 1 (*post*, p. 913), makes the mere unlawful carnal knowledge of such a girl a misdemeanor. Under 38 *&* 39 *Vict. c.* 94, *s.* 4 (*rep.*), which enacted that whosoever should unlawfully and carnally know and abuse any girl being above the age of twelve and under the age of thirteen years, whether with or *without her consent*, should be guilty of a misdemeanor, it was held that an indictment for rape would still lie against one who ravished a girl between the age of twelve and thirteen. *R.* v. *Ratcliffe*, 10 *Q. B. D.* 74; 52 *L. J.* (*M. C.*) 40. The words "without her consent," which alone gave rise to the doubt in that case, are not contained in 48 *&* 49 *Vict. c.* 69, *s.* 5.

Connection with women of weak intellect.]—If the connection was with a woman of weak intellect, incapable of distinguishing right from wrong, and the jury found that she was incapable of giving consent, or of exercising any judgment upon the matter, and that (though she made no

resistance) the defendant had carnal knowledge of her by force, and *without her consent*, that is a rape. *R.* v. *Fletcher* [1859] *Bell*, 63; 28 *L. J.* (*M. C.*) 85; 8 *Cox*, 131; *see R.* v. *Ryan*, 2 *Cox*, 115. It was, however, afterwards held that the mere fact of connection with an idiot girl who was capable of recognizing and describing the prisoner, and who was a fully developed woman, who, notwithstanding her imbecile condition, might have strong animal instincts, is not sufficient evidence of rape to be left to a jury. *R.* v. *Fletcher* [1866] *L. R.* 1 *C. C. R.* 39; 35 *L. J.* (*M. C.*) 172; 10 *Cox*, 248. These two cases agree on the principle, and only differ as to the amount of evidence of consent adduced. The prisoner was convicted of attempting to rape a girl of fourteen years of age, who had been blind from six weeks old, and wrong in her mind, hardly capable of understanding anything that was said to her, but could go up and down stairs by herself. She passively obeyed all directions given to her, but was obliged to be dressed and undressed. She was unable to do any work. There were no marks of violence on her person, but the surgeon thought that there had been recent connection, and that she had been in the habit of having connection. She was unable to give evidence in court. The prisoner had known the girl and her family for upwards of two years. It was held that there was sufficient evidence of the girl's incapacity to consent to support the finding of the jury that the prisoner attempted to have connection with her without her consent, and the conviction was affirmed. *R.* v. *Barratt*, *L. R.* 2 *C. C. R.* 81; 43 *L. J.* (*M. C.*) 7; 12 *Cox*, 498. Where the prosecutrix, an apparent idiot, proved that the prisoner had had connection with her, but it appeared from her examination that although she knew he was doing wrong, she made no resistance, and the prisoner on being apprehended and charged with committing rape upon the prosecutrix "against her will," said "Yes, I did; and I am very sorry for it," it was held that there was evidence to go to the jury of a rape. *R.* v. *Pressy*, 10 *Cox*, 635, *C. C. R.* And now, by 48 & 49 *Vict s.* 5, *sub-s.* 2 *ante*, p. 906), connection, or an attempt to have connection, with "any female idiot or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that this woman or girl was an idiot or imbecile," is a misdemeanor punishable with two years' imprisonment.

Connection by personating husband.]—It is rape for a man to have carnal knowledge of a woman by a fraud which induces her to suppose he is her husband. 48 & 49 *Vict. c.* 69, *s.* 4 (*ante*, p. 906). This enactment gets rid of decisions to the contrary in *R.* v. *Barrow*, *L. R.* 1 *C. C. R.* 156; 38 *L. J.* (*M. C.*) 20; 11 *Cox*, 191: *R.* v. *Clarke*, *Dears.* 397; 24 *L. J.* (*M. C.*) 25; 6 *Cox*, 412, *and see* 413, *n.*: *R.* v. *Sweenie*, 8 *Cox*, 223 (*Sc.*). *R.* v. *Barrow* had been disapproved by some English judges in *R.* v. *Flattery*, 2 *Q. B. D.* 410; 46 *L. J.* (*M. C.*) 630; and by the Irish judges in *R.* v. *Dee*, 15 *Cox*, 579; 14 *L. R.* (*Ir.*) 468. Though not rape before 48 & 49 *Vict. c.* 69, *s.* 4, the offence seems to have been an assault; *R.* v. *Williams*, 8 *C. & P.* 286: *R.* v. *Saunders*, 8 *C. & P.* 265; and if the woman was asleep the offence was always held rape (*ante*, p. 908).

Connection by false pretences.]—Where a medical man had connection with a girl of fourteen years of age, under the pretence that he was thereby treating her medically for the complaint for which he was attending her, and she made no resistance, owing solely to the *bonâ fide* belief that such was the case, this was held to be certainly an assault, and, it was suggested, a rape. *R.* v. *Case*, 1 *Den.* 580; 19 *L. J.* (*M. C.*) 174; 4 *Cox*, 220. Where the prosecutrix, a girl of nineteen, consulted

the prisoner, a quack doctor, with respect to illness from which she suffered, and he advised a surgical operation, and under pretence of performing it, had connection with her, she submitting to what was done, not with any intention that he should have connection with her, but under the belief that he was merely performing a surgical operation, that belief being wilfully and fraudulently induced by the prisoner, it was held that the prisoner was guilty of rape. *R.* v. *Flattery*, 2 *Q. B. D.* 410; 46 *L. J.* (*M. C.*) 130; 13 *Cox*, 388. By 48 & 49 *Vict. c.* 69, *s.* 3 (2), any person who by false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection . . . shall be guilty of a misdemeanor; and it has been held (*R.* v. *O'Shay*, 19 *Cox*, 76, *Ridley*, J.; *cf. Steph. Dig. Cr. L.* (6th ed.) p. 207) that the effect of this section is to render *R.* v. *Flattery*, *ubi supra*, no longer law. But in the later case the attention of the judge does not seem to have been called to 48 & 49 *Vict. c.* 59, *s.* 16, which enacts that "this Act shall not exempt any person from any proceeding for an offence which is punishable at common law or under any Act of Parliament other than this Act, so that a person be not punished twice for the same offence" (*and see ante*, p. 170).

The party ravished is a competent witness to prove this and every other part of the case. Corroboration of her testimony is not in law essential; *see* 3 *Russ. Cr.* (6th ed.) 232; but is in practice required. (*a*) For instance, if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances which give greater probability to her evidence. But, on the other hand, if she be of evil fame, and stand unsupported by the testimony of others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to have been committed were such that it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned. 4 *Bl. Com.* 213. And the defendant may give evidence of the woman's notoriously bad character for want of chastity or common decency, or that she is a common prostitute, *per Stephen*, J., in *R.* v. *Riley*, *infra*; or that she had before been connected with the prisoner himself; *R.* v. *Riley*, 18 *Q. B. D.* 481; 56 *L. J.* (*M. C.*) 52; but he cannot give evidence of any other particular facts to impeach her chastity. *R.* v. *Hodgson*, *R. & R.* 211: *R.* v. *Clarke*, 2 *Stark.* (*N. P.*) 241: *R.* v. *Barker*, 3 *C. & P.* 589: *R.* v. *Martin*, 6 *C. & P.* 562. The prosecutrix may on cross-examination be asked whether she has had connection with men, named to her, other than the prisoner, but she may decline to answer the question. *R.* v. *Cockcroft*, 11 *Cox*, 410, *Willes*, J. Whether she can so decline, however, seems doubtful. *See Cundell* v. *Pratt*, *and other cases cited ante*, p. 404. If, on cross-examination, she deny having had intercourse with men, named to her, other than the prisoner, those men cannot be called to contradict her, and the cross-examining party is bound by her answer. *R.* v. *Holmes*, *L. R.* 1 *C. C. R.* 334; 41 *L. J.* (*M. C.*) 12: *R.* v. *Cockcroft*, 11 *Cox*, 410: *R.* v. *Hodgson*, *R. & R.* 211. A ruling to the contrary in *R.* v. *Robins*, 2 *M. & Rob.* 512, was noticed and overruled in *R.* v. *Holmes*, *ubi supra*. If the prosecutrix is cross-examined with a view to show that she consented or was of unchaste life, it would seem that under 61 & 62 *Vict. c.* 36, *s.* 1 (*f*) (*ante*, p. 895), the prisoner, if called, may be cross-examined as to previous

(*a*) *Semble*, where there is no such corroboration as will justify conviction of rape, or the attempt, the jury may convict of indecent assault, as to which corroboration is not essential. *R.* v. *McGee* [1895] 6 *Queensland L. J.*, *Right Hon. Sir S. Griffith*, C.J.,

convictions. *See R.* v. *Fisher*, 34 *L. J. Newsp.* 100; *Jelf on Criminal Evidence*, p. 70, *and ante*, p. 395.

In the case of rape or kindred offences against women or girls, the fact that a complaint was made by the prosecutrix shortly after the alleged offence, and the particulars of such complaint, may be given in evidence so far as they relate to the prisoner, not as evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with her evidence, given at the trial. *R.* v. *Lillyman* [1896] 2 *Q. B.* 167 (*C. C. R.*), where the prior rulings were considered; and it was held that the prevalent practice had been wrong in limiting the questions to whether the prosecutrix made a complaint or mentioned a name. As to the present state of the law on this subject, *see ante*, p. 319, and *R.* v. *Osborne*, 21 *T. L. R.* 288 (20 *Feb.*, 1905, *C. C. R.*).

Did ravish and carnally know.]—To constitute the offence of rape, there must be a penetration. *R.* v. *Hill*, 1 *East, P. C.* 439. But any, the slightest, penetration will be sufficient. Where a penetration was proved, but not of such a depth as to injure the hymen, still it was held to be sufficient to constitute the crime of rape. *R.* v. *Russen*, 1 *East, P. C.* 438, 439: *see R.* v. *M'Rue*, 8 *C. & P.* 641: *R.* v. *Allen*, 9 *C. & P.* 31. Proof of the rupture of the hymen is unnecessary. *R.* v. *Hughes*, 2 *Mood. C. C.* 190; 9 *C. & P.* 752: *and see R.* v. *Lines*, 1 *C. & K.* 393, overruling *R.* v. *Gammon*, 5 *C. & P.* 321.

Until the passing of 9 *G.* 4, *c.* 31, *s.* 18 (re-enacted in 24 *&* 25 *Vict. c.* 100, *s.* 63, *ante*, p. 905), it was also necessary to prove emission, which might be proved either positively, by the evidence of the woman that she felt it; or it might be presumed from circumstances, as, for instance, that the defendant, after having connection with the prosecutrix, arose from her voluntarily, without being interrupted in the act. *R.* v. *Harmwood*, 1 *East, P. C.* 440: *R.* v. *Sheridan*, *Id.* 438: *R.* v. *Burrows*, *R. & R.* 519. It is under the statutes cited now unnecessary to prove the actual emission of seed, in order to constitute a carnal knowledge; carnal knowledge is deemed complete upon proof of penetration only. *See R.* v. *Marsden* [1891] 2 *Q. B.* 149; 60 *L. J.* (*M. C.*) 171; 17 *Cox*, 297. And it has been held that even though the jury negative the emission, or the circumstances be proved to have been such that no emission did or could take place, the offence is complete if the penetration be proved. *R.* v. *Jennings*, 4 *C. & P.* 249; 1 *Lewin*, 93: *R.* v. *Cox*, 1 *Mood. C. C.* 337; 5 *C. & P.* 297: *R.* v. *Allen*, 9 *C. & P.* 31.

If actual penetration be not proved, the defendant may, nevertheless, on this indictment, be convicted of an attempt to commit a rape. 14 *&* 15 *Vict. c.* 100, *s.* 9 (*ante*, p. 219). As to the evidence necessary to prove the attempt, *see R.* v. *Lloyd*, 7 *C. & P.* 318: *R.* v. *Wright*, 4 *F. & F.* 967. And where an indictment charged H. with rape, and W. as an aider and abettor, and the jury found H. guilty of attempting to commit a rape and W. of aiding H. in the attempt, and it was contended that this finding amounted to an acquittal of W., as the case was not within 14 *&* 15 *Vict. c.* 100, *s.* 9, the objection was overruled and the conviction of W. for misdemeanor was affirmed. *R.* v. *Haywood L. R.* 1 *C. C. R.* 221: *R.* v. *Wyatt*, 39 *L. J.* (*M. C.*) 88, *S. C.* A boy under fourteen cannot be convicted of an assault with intent to commit a rape. *R.* v. *Eldershaw*, 3 *C. & P.* 396: *R.* v. *Waite* [1892] 2 *Q. B.* 600: *R.* v. *Williams* [1893] 1 *Q. B.* 320; 62 *L. J.* (*M. C.*) 29. An acquittal upon an indictment for rape, or for assault with intent to commit rape, is no bar to a subsequent indictment on the same facts for a common assault. *R.* v. *Dungey*, 4 *F. & F.* 99. And if upon the trial of an indictment for rape, the jury

are satisfied that the defendant is guilty of an offence under *ss.* 3 (*post*, p. 920), 4 (*infra*), or 5 (*ante*, p. 906, *and post*, p. 913) of the *Criminal Law Amendment Act*, 1885, or of an indecent assault, but are not satisfied that the defendant is guilty of rape, or of an attempt to commit the same, the jury may acquit the defendant of the rape, and find him guilty of such offence as aforesaid, or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid, or for an indecent assault. 48 *&* 49 *Vict. c.* 69, *s.* 9 (*ante*, p. 906). As to whether on acquittal for rape the defendant can be prosecuted for assault with intent to commit rape, *see R.* v. *Gisson*, 2 *C. & K.* 781.

CARNAL KNOWLEDGE OF GIRLS UNDER THIRTEEN, AND GIRLS OF OR OVER THIRTEEN AND UNDER SIXTEEN YEARS OF AGE.

Statute.

48 *&* 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 4—*Defilement of girl under thirteen years of age.*]—Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .

Any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour. [*This clause gets rid of the decision in R.* v. *Cockburn*, 3 *Cox*, 543 (*see post*, p. 915).]

Whipping.]—Provided that in the case of an offender whose age does not exceed sixteen years, the court may, instead of sentencing him to any term of imprisonment, order him to be whipped, as prescribed by the *Whipping Act*, 1862 (25 *&* 26 *Vict. c.* 18), and the said Act shall apply, so far as circumstances admit, as if the offender had been convicted in manner in that Act mentioned; and if, having regard to his age and all the circumstances of the case, it should appear expedient, the court may, in addition to the sentence of whipping, order him to be sent to a certified reformatory school, and to be there detained for a period of not less than two years and not more than five years.

The court may also order the offender to be detained in custody for a period of not more than seven days before he is sent to such reformatory school. [*See ante*, p. 242.]

Unsworn evidence.]—Where, upon the hearing of a charge under this section, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath, if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. [*See ante*, p. 388.]

Corroboration.]—Provided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution shall be corroborated by some other material evidence in support thereof implicating the accused: Provided also, that any witness whose evidence has been admitted under this section shall be liable to indictment and punishment for perjury in all respects as if he or she had been sworn. [*For rest of section, see ante,* p. 906; *and cf.* 4 *Edw.* 7, *c.* 15, *s.* 15, *ante,* p. 883. *Refusal by the prisoner to be medically examined is not corroboration within this section. R.* v. *Gray,* 68 *J. P. Rep.* 327.]

Sect. 5, *sub-s.* 1—*Defilement of girl between thirteen and sixteen years of age—Defence—Limitation of prosecution.*]—Any person who unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years: shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour. [*Sub-s.* 2 *is printed ante,* p. 906].

Provided that it shall be a sufficient defence to any charge under sub-section one of this section if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.

Provided also, that no prosecution shall be commenced for an offence under sub-section one of this section more than three (*now* "six," *vide infra*) months (*altered from* "three months" *by* 4 *Edw.* 7, *c.* 15, *s.* 27, *infra*) after the commission of the offence. [*As to limitation and what is commencement of prosecution under sub-s.* 1, *see R.* v. *West* [1898] 1 *Q. B.* 174; 18 *Cox,* 675 (*ante,* p. 96): *R.* v. *Beighton,* 18 *Cox,* 535. *For indictment, see post,* p. 917.]

4 *Edw.* 7, *c.* 15 (*Prevention of Cruelty to Children Act,* 1904), *s.* 27—*Amendment of second proviso to* 48 *&* 49 *Vict. c.* 69, *s.* 5, *supra.*]—The limit of time mentioned in the second proviso of *s.* 5 of the *Criminal Law Amendment Act,* 1885, shall be six months after the commission of the offence. [*The question whether the extended time for prosecution given by this section applies to offences committed within three months before October* 1, 1904 (*when the section came into force*), *has been reserved for the consideration of the C. C. R. in R.* v. *Chandra Dharma,* 69 *J. P. Rep.* 39, *and in R.* v. *Court, Kent Assizes, February,* 1905, *by Channell,* J.]

48 *&* 49 *Vict. c.* 69, *s.* 6—*Owner, occupier, etc., of premises permitting defilement of girls under thirteen, and between thirteen and sixteen years of age on his premises—Defence.*]—Any person who, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control thereof, induces or knowingly suffers any girl of such age as is in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally, (1) shall, if such girl is under the age of thirteen years, be guilty of felony, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*For minimum term of penal servitude and alternative punishment, see* 54 *&* 55 *Vict. c.* 69, *s.* 1, *ante,* p. 235]; and (2) if such girl is of or above the age of thirteen and under the age of sixteen years, shall be guilty of a misdemeanor, and being convicted

thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Provided that it shall be a sufficient defence to any charge under this section if it shall be made to appear to the court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.

[*The prisoner was convicted under the above section* (6), *of knowingly suffering a girl under sixteen to be on premises for the purpose mentioned in that section. The girl was the prisoner's daughter, and the premises were her home where she resided with the prisoner. It was held that the conviction was good. R.* v. *Webster*, 16 *Q. B. D.* 134; 55 *L. J.* (*M. C.*) 63; 15 *Cox*, 775. *But see R.* v. *Merthyr Tydfil Justices*, 10 *Rep.* 189; 10 *T. L. R.* 375: *where a mother was held not within s.* 6, *who, for the purpose of obtaining conclusive evidence against a man who had seduced her daughter, permitted him to come to her house to repeat his unlawful intercourse.*]

Sect. 9—*Power to convict of misdemeanors under ss.* 3, 4, *or* 5 *of this Act, or of an indecent assault, on indictment for rape or for felony under s.* 4 *of this Act.*]—*Ante*, p. 906.

Sect. 12—*Power of court on trial of offence under this Act, in certain cases, to make provision for custody of girl under age of sixteen.*]—Where on the trial of any offence under this Act it is proved to the satisfaction of the court that the seduction or prostitution of a girl under the age of sixteen has been caused, encouraged, or favoured by her father, mother, guardian, master, or mistress, it shall be in the power of the court to divest such father, guardian, master, or mistress of all authority over her, and to appoint any person or persons willing to take charge of such girl to be her guardian until she has attained the age of twenty-one, or any age below this as the court may direct, and the High Court shall have the power from time to time to rescind or vary such order by the appointment of any other person or persons as such guardian, or in any other respect. [*Cf.* 4 *Edw.* 7, *c.* 15, *s.* 6, *ante*, p. 879.]

Sect. 17—*Misdemeanors under this Act to be within Vexatious Indictments Act—Indictment under this Act not triable at quarter sessions.*]—*Ante*, p. 902.

Sect. 18—*Costs of prosecution.*]—*Ante*, p. 902.

Sect. 20—*Person charged and husband or wife of person charged to be competent but not compellable witnesses.*]—*Ante*, p. 906.

61 & 62 *Vict. c.* 36, *ss.* 1, 4—*Criminal Evidence Act*, 1898.]—*Ante*, pp. 892, 898.

Indictment for carnally knowing a Girl under Thirteen Years.
(48 & 49 *Vict. c.* 69, *s.* 4, *ante*, p. 912.)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present that J. S., on the first day of June, in the year of our Lord ——, in the parish of —— and within the jurisdiction of the said court, one A. N., a girl under the age of thirteen years, to wit, of the age of eleven years, feloniously did unlawfully and carnally know; against the form [*as ante*, p. 940]. *The insertion of the words "in and upon —— did make an assault, and he the said A. N. then feloniously," etc.* (*Arch.*

Cr. Pl. (21st ed.) p. 825), *would not enable the jury to find the defendant guilty of a* common *assault. R.* v. *Catherall*, 13 *Cox*, 109. *They are therefore omitted from later editions.*

By s. 9 *of* 48 *&* 49 *Vict. c.* 69 (*ante*, p. 906), *the defendant may on this indictment be convicted of an* indecent *assault or of a misdemeanor under ss.* 3, 4, *or* 5 *of the Act.*

Felony: penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, not exceeding two years. 48 *&* 49 *Vict. c.* 69, *s.* 4; 54 *&* 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235). *As to the sentence in the case of an offender whose age does not exceed sixteen years, see* 48 *&* 49 *Vict. c.* 69, *s.* 4 (*ante*, p. 912).

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126); 48 *&* 49 *Vict. c.* 69, *s.* 17 (*ante*, p. 902).

Evidence.

The evidence is the same as in rape, with this exception, that it is immaterial whether the act was done with or without the consent of the female. If it was in fact without her consent, an indictment for rape will lie, notwithstanding the age of the child. *R.* v. *Dicken*, 14 *Cox*, 8, *Mellor*, J. So, where the prisoner was indicted for an *attempt* to commit the felony, and the evidence was that he had attempted to have carnal knowledge of the girl, but that she had consented to the attempt, it was held that the fact of her consent was immaterial, and that the prisoner was properly convicted. *R.* v. *Beale*, *L. R.* 1 *C. C. R.* 10; 35 *L. J.* (*M. C.*) 60; 10 *Cox*, 157. In order to prove carnal knowledge under *s.* 4, it is not necessary to prove emission. *R.* v. *Marsden* [1891] 2 *Q. B.* 149; 60 *L. J.* (*M. C.*) 171; 17 *Cox*, 297. As to the admissibility of statements made by the girl immediately after the commission of the alleged offence, *see R.* v. *Lillyman* (*ante*, p. 319): *R.* v. *Osborne*, 21 *T. L. R.* 288 (*C. C. R.*) (*post*, p. 919).

Upon the trial of an indictment charging a felony under *s.* 4, the prisoner cannot be found guilty of a misdemeanor except by statute; a prisoner, therefore, who is indicted for a felony under *s.* 4 of 48 *&* 49 *Vict. c.* 69 cannot be convicted of a *common* assault merely, notwithstanding the provisions of *s.* 9 of that Act (*ante*, p. 906), whereby it is enacted that if on the trial of an indictment under *s.* 4 the jury are satisfied that the defendant is guilty of an offence under *ss.* 3, 4, or 5 of that Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in the indictment or of an attempt to commit the same, the jury may acquit the defendant of the felony, and find him guilty of such offence as aforesaid, or of an indecent assault. *See R.* v. *Catherall*, 13 *Cox*, 109, *Amphlett*, B. (decided before 1885).

Evidence of children of tender years.]—Where upon the hearing of the charge, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court, understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath, if, in the opinion of the court, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth, subject however to this important proviso, that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section, and given on behalf of the prosecution, shall be corroborated by some other material evidence in support thereof, implicating the accused. 48 *&* 49 *Vict. c.* 69, *s.* 4 (*ante*, pp. 912, 913). It is not

clear whether the reference to offences involving bodily injury to a child under sixteen in 4 *Edw.* 7, *c.* 15, *sched.* 1, apply the procedure and evidence sections of that Act to the offence: *see ante*, p. 888. Where upon the trial of an indictment under 48 & 49 *Vict. c.* 69, *s.* 4 (*ante*, p. 912), for unlawfully and carnally knowing a girl under the age of thirteen years, the defendant was acquitted of that charge, but was convicted of an indecent assault under the provision of *s.* 9 of that statute, it was held that he was rightly convicted, although the girl had been examined under *s.* 4 without being sworn, although without her evidence the evidence would have been insufficient to justify a conviction for indecent assault, and although the statute contains no provision rendering unsworn evidence admissible on an indictment for indecent assault. *R.* v. *Wealand*, 20 *Q. B. D.* 827; 57 *L. J.* (*M. C.*) 44; 16 *Cox*, 402. Where an indictment contained two counts, the first of which charged the defendant under 48 & 49 *Vict. c.* 69, *s.* 4, with attempt to have carnal knowledge of a girl under thirteen, and the second charged an indecent assault under 24 & 25 *Vict. c.* 100, *s.* 52, it was held that the unsworn evidence of the girl, although admissible in support of the first count, was inadmissible on the second count. *R.* v. *Paul*, 25 *Q. B. D.* 202; 59 *L. J.* (*M. C.*) 138; 17 *Cox*, 111. This case is overruled by 4 *Edw.* 7, *c.* 15, *s.* 15, *and sched.* 1 (*ante*, pp. 883, 887), as to offences under *s.* 52, against a girl under sixteen. Evidence not upon oath given before the committing magistrate under the provisions of 48 & 49 *Vict. c.* 69, *s.* 4, and reduced into writing, signed and returned by him with the depositions of the other witnesses in the case, cannot be read against the prisoner on his trial, although the witness may be so ill as not to be able to travel, as the provisions of 11 & 12 *Vict. c.* 42, *s.* 17, only apply to depositions taken upon oath or affirmation. *R.* v. *Prunley*, 16 *Cox*, 344, *Cave*, J. This decision does not apply to cases within 4 *Edw.* 7, *c.* 15, *ss.* 15, 16 (*ante*, pp. 883, 884).

Proof of age.]—The girl must be proved to have been under thirteen years of age when the offence was committed. The safer way of doing this is to produce a duly certified copy of the certificate of birth, coupled with evidence of identity; but the age may be proved by any other legal means. *See R.* v. *Cox* [1898] 1 *Q. B.* 179; 18 *Cox*, 672; and the other cases collected (*ante*, p. 353). Where the offence was committed on the 5th of February, 1842, and the child's father proved that on his return home, after an absence of a few days, on the 9th day of February, 1832, he found the child had been born, and was told by the grandmother that she had been born the day before, and the register of baptism showed that the child had been baptized on the 9th of February, 1832; this evidence was held not sufficient to prove the age of the child, it being under the then state of the law necessary to prove that the child was under the age of *ten* years at the time of the alleged offence. *R.* v. *Wedge*, 5 *C. & P.* 298. *See R.* v. *Nicholls*, 10 *Cox*, 476, *and R.* v. *Weaver*, *L. R.* 2 *C. C. R.* 85; 43 *L. J.* (*M. C.*) 13 (*post*, p. 916). As to evidence by the defendant and his wife, *see ante*, pp. 392–398.

The presumption of law that a male under the age of fourteen cannot be guilty of the felony of carnal knowledge of a female (*ante*, pp. 22, 344), is not rebutted by 48 & 49 *Vict. c.* 69, *s.* 4. *R.* v. *Waite* [1892] 2 *Q. B.* 600; 61 *L. J.* (*M. C.*) 187; 17 *Cox*, 554. But although a boy under fourteen, who is tried on an indictment under *s.* 4 of the *Criminal Law Amendment Act*, 1885, charging him with having had carnal knowledge of a girl under thirteen, is entitled to be acquitted of that offence, he may be convicted of an indecent assault under *s.* 9 of that Act. *R.* v. *Williams* [1893] 1 *Q. B.* 320; 62 *L. J.* (*M. C.*) 29.

Indictment for carnally knowing and abusing a Girl of or above Thirteen and under Sixteen Years. (48 & 49 *Vict. c.* 69, *s.* 5, *sub-s.* 1, *ante*, p. 913.)

Commencement as ante, p. 914]—in and upon one A. N., a girl of [*or* above] the age of thirteen years and under the age of sixteen years, to wit, of the age of fourteen years and two months, unlawfully did make an assault, and her the said A. N. did then unlawfully and carnally know; against the form [*as ante*, p. 840]. *On this indictment the prisoner can be convicted of common assault.* *R.* v. *Bostock*, 17 *Cox*, 700, *Charles* J.: *R.* v. *Guthrie*, *L. R.* 1 *C. C. R.* 241 (*post*, p. 918).

Add a count charging an indecent *assault, for the form of which see post*, p. 919.

No indictment can be preferred for this offence unless one or other of the preliminary steps required by 22 & 23 *Vict. c.* 17, *as extended by* 30 & 31 *Vict. c.* 35, *s.* 1 (*ante*, p. 7, *et seq.*), *has been taken.* 48 & 49 *Vict. c.* 69, *s.* 17 (*ante*, p. 902).

A girl of thirteen and under sixteen cannot be indicted for "abetting" or "inciting" to the commission of this offence on herself. *R.* v. *Tyrrell* [1894] 1 *Q. B.* 710; 63 *L. J.* (*M. C.*) 58; 17 *Cox*, 716 (*C. C. R.*).

Misdemeanor: imprisonment, with or without hard labour, not exceeding two years. 48 & 49 *Vict. c.* 69, *s.* 5.

This offence is not triable at quarter sessions. 48 & 49 *Vict. c.* 69, *s.* 17 (*ante*, p. 902).

Evidence.

The evidence is the same as in rape, with this exception, that it will be no defence that the girl consented. If she did not consent, it will be a rape, and the defendant may be indicted accordingly. *R.* v. *Ratcliffe*, 10 *Q. B. D.* 74; 52 *L. J.* (*M. C.*) 40 (*ante*, p. 908). As to the admissibility of statements made by the girl immediately after the commission of the alleged offence, *see R.* v. *Lillyman* (*ante*, p. 819): *R.* v. *Osborne*, 21 *T. L. R.* 288 (*C. C. R.*) (*post*, p. 919). In *R.* v. *Neale*, 1 *Den.* 36; 1 *C. & K.* 591, on an indictment under 7 *G.* 4, *c.* 31, *s.* 17 (*rep.*), for carnally knowing a girl over ten and under fourteen, it was held that proof that the girl did not consent did not take the case out of the statute, nor afford any defence to the indictment, though such facts would have justified indictment and conviction for rape. *See also* 14 & 15 *Vict. c.* 100, *s.* 12 (*ante*, p. 218). In order to prove carnal knowledge under *s.* 5, it is not necessary to prove emission. *R.* v. *Marsden* [1891] 2 *Q. B.* 149; 60 *L. J.* (*M. C.*) 171; 17 *Cox*, 297. The child must be proved to be of or above the age of thirteen years, and under the age of sixteen years. Where the mother of the child stated that she was ten years of age last March, although on cross-examination it appeared that the witness knew neither the year nor the month of the child's birth, and she also gave confused and inconsistent answers as to the ages of her children, it was held that there was evidence to go to the jury of the age of the child. *R.* v. *Nicholls*, 10 *Cox*, 476. The age of the child may be proved by the production of a certified copy of the entry of its birth in the register of births kept under 6 & 7 *W.* 4, *c.* 86; *R.* v. *Weaver*, *L. R.* 2 *C. C. R.* 85; 43 *L. J.* (*M. C.*) 13; coupled with identification of the child with that named in the certificate. *See ante*, p. 353, *and R.* v. *Wedge*, 5 *C. & P.* 298 (*ante*, p. 916). But this mode of proof does not exclude evidence of age by persons who know the child. *R.* v. *Cox* [1898] 1 *Q. B.* 179; 18 *Cox*, 672 (*C. C. R.*). It is a sufficient defence to this charge if it shall be made to appear to the court or jury before

whom the charge shall be brought, that the defendant had reasonable cause to believe that the girl was of or above sixteen years of age. 48 & 49 *Vict. c.* 69, *s.* 5, *sub-s.* 1 (*ante*, p. 913). No prosecution can be commenced for this offence more than six months after its commission. 4 *Edw.* 7, *c.* 15, *s.* 27, (*ante*, p. 913); as to what is a commencement of the prosecution, *see R.* v. *West* [1898] 1 *Q. B.* 174, *and ante*, p. 96. As to evidence by the defendant, *see ante*, p. 392, *et seq.* The defendant's wife is a competent witness for the prosecution or the defence, even without his consent, but is not compellable. 4 *Edw.* 7, *c.* 15, *s.* 12, *and sched.* 1 (*ante*, pp. 882, 887).

On an indictment for either of the offences mentioned in these two sections (4, 5) the defendant may, whether the girl consented or not (*R.* v. *Beale*, *L. R.* 1 *C. C. R.* 10; 35 *L. J.* (*M. C.*) 60; *R.* v. *Ryland*, 11 *Cox*, 101), be convicted of an attempt to commit the felony or misdemeanor charged, if the facts proved warrant such a finding; 14 & 15 *Vict. c.* 100, *s.* 9 (*ante*, p. 219); and may have sentence of imprisonment not exceeding two years, with or without hard labour, such sentence being authorized where the girl is under thirteen by 48 & 49 *Vict. c.* 69, *s.* 4, and where the girl is of or above thirteen and under sixteen, by *s.* 5 of the same statute. It is said that on an indictment for the statutory misdemeanor under *s.* 5, *sub.-s.* 1 (*ante*, p. 913), the defendant cannot, if the girl's age be proved to be under thirteen years, be convicted; for 14 & 15 *Vict. c.* 100, *s.* 12 (*ante*, p. 219), has been held to apply only where an indictment for misdemeanor is proved by facts amounting to a felony. *R.* v. *Shott*, 8 *C. & K.* 206 (*ante*, p. 93). *Sed quære; see* 2 *Taylor Ev.* (9th ed.) 1128.

It would seem that evidence of prior offences outside the six months limit may not be given for the prosecution, but may be obtained by cross-examination. *R.* v. *Beighton*, 18 *Cox*, 535, *Pollock*, B.: *see* 61 & 62 *Vict. c.* 36, *s.* 1 (*f*) (*ante*, p. 895).

If upon the trial of an indictment framed as above under *s.* 5, the offence of carnally knowing be disproved, the defendant may nevertheless be found guilty of a common assault, if the facts proved warrant such a verdict. *R.* v. *Bostock*, 17 *Cox*, 700, *Charles*, J.: *R.* v. *Guthrie*, *L. R.* 1 *C. C. R.* 241; 39 *L. J.* (*M. C.*) 95. If, however, the girl is over thirteen and consented, the defendant cannot be found guilty of a common assault. *See R.* v. *Meredith*, 8 *C. & P.* 589, and other cases (*ante*, p. 834).

INDECENT ASSAULT, ETC.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 52—*Indecent assault on females.*]—Whosoever shall be convicted of any indecent assault upon any female . . . shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

24 & 25 *Vict. c.* 100, *s.* 62—*Indecent assault on males.*]—*Post*, p. 925.

43 & 44 *Vict. c.* 45 (*Criminal Law Amendment Act*, 1880), *s.* 2.]—It shall be no defence to a charge or indictment for an indecent assault

on a young person under the age of thirteen to prove that he or she consented to the act of indecency. [*This enactment got rid of the decisions in R.* v. *Read*, 1 *Den.* 377; 2 *C. & K.* 957: *R.* v. *Johnson*, *L. & C.* 632; 34 *L. J.* (*M. C.*) 192: *R.* v. *Wollaston*, 12 *Cox*, 180. *As to consent by children of tender years, see R.* v. *Lock*, *L. R.* 2 *C. C. R.* 10; 42 *L. J.* (*M. C.*) *s.* 5, *and ante*, p. 834.]

48 *& 49 Vict. c.* 69, *s.* 9—*Power on indictment for rape or felony under s.* 4 *of Criminal Law Amendment Act*, 1885, *to convict of indecent assault.*] —*Ante*, p. 906.

Sect. 20—*Person charged and husband or wife of person charged to be competent but not compellable witnesses.*]—*Ante*, p. 906.

61 *& 62 Vict. c.* 36, *ss.* 1, 4, *sched.*—*Evidence by person charged and husband and wife of person charged.*]—*Ante*, pp. 392–398.

4 *Edw.* 7, *c.* 15, *ss.* 12–18, *and sched.* 1—*Procedure and evidence in case of offences under* 24 *&* 25 *Vict. c.* 100, *s.* 52, *against a girl under sixteen.*]—*Ante*, pp. 882–887.

Indictment. (24 *&* 25 *Vict. c.* 100, *s.* 52, *ante*, p. 918.)

Commencement as ante, p. 914]—one A. N. unlawfully and indecently did assault, and her the said A. N. did then beat, wound, and ill-treat [and other wrongs to the said A. N. did], to the great damage of the said A. N.; against the form [*as ante*, p. 840].

Where the assault is on a girl under thirteen, the fact that she is so should be stated in the indictment, because of 43 *&* 44 *Vict. c.* 45, *s.* 2, *supra; and of the provisions as to presuming age in* 4 *Edw.* 7, *c.* 15, *s.* 17, *and sched* 1. (*ante*, pp. 884, 887).

No indictment can be preferred for any indecent assault unless one or other of the preliminary steps required by 22 *&* 23 *Vict. c.* 17, *s.* 1 (*as extended by* 30 *&* 31 *Vict. c.* 35, *s.* 1), *has been taken. See ante*, p. 7, *et seq.*

Misdemeanor: imprisonment, with or without hard labour, not exceeding two years. 24 *&* 25 *Vict. c.* 100, *s.* 52. *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour, Id. s.* 71 (*ante*, p. 778).

Evidence.

Prove an assault, accompanied with circumstances of indecency on the part of the defendant. If the person assaulted is under thirteen, his or her consent is no defence. 43 *&* 44 *Vict. c.* 45, *s.* 2, *and note* (*ante*, p. 918). In *R.* v. *Osborne*, 21 *T. L. R.* 288 (*C. C. R.*), it was held that *R.* v. *Lillyman* (*ante*, p. 319) applied to a charge of indecent assault on a girl under thirteen, although consent is not a material element in such an offence, and that a statement by the girl in answer to a question made immediately after the alleged offence was admissible, if the question was neither leading, suggestive, nor of an intimidating character. This decision overrules *R.* v. *Kingham*, 66 *J. P.* 393, *and R.* v. *Merry*, 19 *Cox*, 442. If the child assaulted is under sixteen, the court may take unsworn evidence from her or any other child witness, subject to corroboration. 4 *Edw.* 7, *c.* 15, *s.* 15 (*ante*, p. 883). As to effect of non-resistance by a girl over thirteen to indecent acts by her schoolmaster, *see R.* v. *McGavaran*, 6 *Cox*, 64. As to proof of the age of the child, *see ante* p. 353, *and*

57 & 58 *Vict. c.* 41, *s.* 17, *and sched.* 1 (*ante*, pp. 884, 887). It has been held that, if on an indictment for an indecent assault it appears that the woman consented to the assault, but that her consent was procured by fraud, *e.g.* under the pretence of a medical operation, such consent constitutes no defence. *R.* v. *Case*, 1 *Den.* 580; 19 *L. J.* (*M. C.*) 174: *R.* v. *Bennett*, 4 *F. & F.* 1105; *and see ante*, p. 834. Where, on the trial of such an indictment, the prosecutrix denies, on cross-examination, having had intercourse with a third person named to her, such person cannot be called to contradict her upon this answer; *R.* v. *Holmes*, *L. R.* 1 *C. C. R.* 334; 41 *L. J.* (*M. C.*) 12; 12 *Cox*, 137 (*ante*, p. 910); but if on cross-examination she denies having had previous intercourse *with the prisoner*, evidence may be given to contradict her. *R.* v. *Riley*, 18 *Q. B. D.* 481; 56 *L. J.* (*M. C.*) 52; 16 *Cox*, 191. As to evidence by the defendant or the husband or wife of the defendant, *see ante*, pp. 892–898. 48 & 49 *Vict. c.* 69, *s.* 20 (*ante*, p. 906), did not apply to a charge of common assault, but where the defendant being tried on an indictment containing two counts, one for an indecent assault, and another for a common assault, gave evidence on oath in his defence, in which he in effect admitted having committed a common assault, and thereupon was acquitted of the charge of indecent assault, but convicted of the common assault, it was held that his evidence being legally admissible, the conviction was right. *R.* v. *Owen*, 20 *Q. B. D.* 829; 57 *L. J.* (*M. C.*) 46. The defendant may be convicted of an indecent assault on an indictment for rape, or for the offence made felony by *s.* 4 of *Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69, *s.* 9, *ante*, p. 906), although being under fourteen he could not be convicted of the felony charged in the indictment. *R.* v. *Williams* [1893] 1 *Q. B.* 320; 62 *L. J.* (*M. C.*) 29.

PROCURATION OF WOMEN AND GIRLS.

Statute.

48 & 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 2—*Procuration.*]—Any person who—

(1) procures or attempts to procure any girl or woman under twenty-one years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connection, either within or without the [King's] dominions, with any other person or persons; or

(2) procures or attempts to procure any woman or girl to become, either within or without the [King's] dominions, a common prostitute; or

(3) procures or attempts to procure any woman or girl to leave the United Kingdom, with intent that she may become an inmate of a brothel elsewhere; or

(4) procures or attempts to procure any woman or girl to leave her usual place of abode in the United Kingdom (such place not being a brothel), with intent that she may, for the purposes of prostitution, become an inmate of a brothel within or without the [King's] dominions,

shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Corroboration.]—Provided that no person shall be convicted of any offence under this section upon the evidence of one witness, unless such

witness be corroborated in some material particular by evidence implicating the accused.

Sect. 3—Procuring defilement of woman or girl by threats, fraud, or administering stupefying drug—Evidence.]—Any person who—

(1) by threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connection, either within or without the [King's] dominions; or

(2) by false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either within or without the [King's] dominions; or

(3) applies, administers to, or causes to be taken by any woman or girl any drug, matter, or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl,

shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour.

Corroboration.]—Provided that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused.

Sect. 6—Owner, occupier, etc., of premises, permitting defilement of girls under thirteen and between thirteen and sixteen years of age on his premises.] —*Ante*, p. 913.

Sect. 7—Abduction of girl under eighteen years of age with intent that she should be carnally known.]—*Ante*, p. 902.

Sect. 8—Unlawful detention of woman or girl with intent that she should be carnally known or in any brothel.]—Any person who detains any woman or girl against her will—

(1) in or upon any premises with intent that she may be unlawfully and carnally known by any man, whether any particular man, or generally, or

(2) in any brothel,

shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour.

Where a woman or girl is in or upon any premises for the purpose of having any unlawful carnal connection, or is in any brothel, a person shall be deemed to detain such woman or girl in or upon such premises or in such brothel, if, with intent to compel or induce her to remain in or upon such premises or in such brothel, such person withholds from such woman or girl any wearing apparel or other property belonging to her, or, where wearing apparel has been lent or otherwise supplied to such woman or girl by or by the direction of such person, such person threatens such woman or girl with legal proceedings if she takes away with her the wearing apparel so lent or supplied.

No legal proceedings, whether civil or criminal, shall be taken against any such woman or girl for taking away or being found in possession of any such wearing apparel as was necessary to enable her to leave such premises or brothel.

Sect. 9—*Power to convict of misdemeanor under s.* 3 *of this Act on indictment for rape or for felony under s.* 4 *of this Act.*]—*Ante*, p. 906.

Sect. 10—*Power of search under justice's warrant for women or girls supposed to be detained on any premises for immoral purposes, and of arrest of persons unlawfully detaining her.*]—*See Hope* v. *Evered*, 17 *Q. B. D.* 338: *Lea* v. *Charrington*, 23 *Q. B. D.* 45, 272.

Sect. 12—*Power of court on trial of offence under this Act, in certain cases, to make provision for custody of girls under age of sixteen.*]—*Ante*, p. 914.

Sect. 18—*Costs of prosecution.*]—*Ante*, pp. 246, 902.

Sect. 20—*Person charged and husband or wife of person charged to be competent but not compellable witnesses.*]—*Ante*, p. 906.

61 & 62 *Vict. c.* 36 (*Criminal Evidence Act*, 1898), *ss.* 1, 4, *sched.*]—*Ante*, pp. 392–398.

Indictment for an Offence under 48 & 49 *Vict. c.* 69, *s.* 3, *sub-s.* 2 (*ante*, p. 920).

Commencement as ante, p. 914]—by falsely pretending and representing unto a certain woman [*or girl*], named J. N., that [*here set out the false pretences or representations; the words in the statute are "false pretences or false representation"*], did procure the said J. N. to have unlawful carnal connection with a certain man named —— [*or* to the jurors aforesaid unknown], she the said J. N. at the time of such procurement not being a common prostitute, and not being of known immoral character; against the form [*as ante*, p. 840]. *It is immaterial whether the intercourse is procured with the accused or with another. R.* v. *Williams*, 62 *J. P.* 310; 33 *L. J. Newsp.* 253: *and see R.* v. *Jones* [1898] 1 *Q. B.* 119. *It has been ruled that the false pretences must be set out, R.* v. *Field, C. C. C. Sess. Paper*, 1891–1892, p. 757, *Grantham, J., but that if set out they need not be expressly negatived. R.* v. *Clarke*, 59 *J. P.* 248, *Collins, J. For the form of a count for a conspiracy at common law to procure a girl to have illicit connection with a man, see R.* v. *Lord Grey*, 9 *St. Tr.* 127; 1 *East, P. C.* 460: *R.* v. *Mears*, 2 *Den.* 79; 20 *L. J.* (*M. C.*) 59; 4 *Cox*, 423: *R.* v. *Howell*, 4 *F. & F.* 160.

Misdemeanor: imprisonment, with or without hard labour, not exceeding two years. 48 & 49 *Vict. c.* 69, *s.* 3, *sub-s.* 2. *This offence is not triable at quarter sessions* (48 & 49 *Vict. c.* 69, *s.* 17, *ante*, p. 902), *nor can the indictment be preferred unless one or other of the preliminary steps required by* 22 & 23 *Vict. c.* 17, *s.* 1, *as extended by* 30 & 31 *Vict. c.* 35, *s.* 1 (*ante*, p. 7, *et seq.*), *has been taken.* 48 & 49 *Vict. c.* 69, *s.* 17 (*ante*, *p.* 902).

Evidence.

Prove the pretences or representations made by the defendant to J. N., and their falsehood (*see ante*, p. 609, *et seq.*). Seduction by a married man of a woman under promise of marriage by false representation has been held to be within the section. *R.* v. *Williams*, 62 *J. P.* 310; 33 *L. J. Newsp.* 253. Prove, also, that by means of these false pretences or representations the defendant induced J. N. to have carnal connection with the man named in the indictment; and that she was then not a common prostitute, nor a known immoral character. It may be indeed,

that looking at the general presumption which the law makes in favour of innocence (*ante*, p. 342), it would be held that it was not necessary for the prosecution in the first instance to prove that the woman was not a common prostitute nor of known immoral character, but that it would lie upon the defendant to prove that she was a prostitute or of known immoral character. No person can be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused. 48 & 49 *Vict. c.* 69, *s.* 3. As to evidence by the defendant and the wife or husband of the defendant, *see ante*, pp. 392–398, 902.

The defendant may be found guilty of this offence on an indictment charging him with rape, provided the facts do not prove a rape, but do prove the commission of this offence. 48 & 49 *Vict. c.* 69, *s.* 9 (*ante*, p. 906).

Sect 8.

SODOMY AND BESTIALITY.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 61—*Punishment.*]—Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 9 *G.* 4, *c.* 31, *s.* 15, *except as to punishment. The minimum punishment, which used to be ten years' penal servitude, was reduced by* 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, pp. 235, 236). *As to threats to accuse another of this offence, see ante*, p. 521.]

Sect. 63—*Carnal knowledge.*]—*Ante*, p. 905.

Indictment for Sodomy.

Commencement as ante, p. 913]—in and upon one J. N. feloniously did make an assault, and then feloniously, wickedly, and against the order of nature, had a venereal affair with the said J. N., and then feloniously carnally knew him the said J. N., and then feloniously, wickedly, and against the order of nature, with the said J. N. did commit and perpetrate that detestable and abominable crime of buggery (not to be named among Christians); against the form [*as ante*, p. 840]. *See* 1 *East, P. C.* 480.

Felony: penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour. 24 & 25 *Vict. c.* 100, *s.* 61, *as modified by* 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace, see* 24 & 25 *Vict. c.* 100, *s.* 71 (*ante*, p. 778).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

The offence consists in penetration *per anum*. *R.* v. *Jacobs*, *R.* & *R.* 331. It was first made punishable in the common law courts by 25 *H.* 8, *c.* 6 (*rep.*). 1 *Hawk. c.* 4; 1 *Hale*, 669. The evidence is for the most

part the same as in rape (*see ante*, pp. 911, *et seq.*), and as in that case, penetration alone is now sufficient to constitute the offence. *R.* v. *Reekspear*, 1 *Mood. C. C.* 342. As to medical evidence of the commission of the offence, *see Luff, Forensic Medicine, Vol. II.*, p. 273. Prior to 9 *G.* 4, *c.* 31, *s.* 18 (now re-enacted as 24 *&* 25 *Vict. c.* 100, *s.* 63, *ante*, p. 905), emission must also be proved. *R.* v. *Russell*, 1 *M. & Rob.* 122: *R.* v. *Jacobs*, *R. & R.* 331: *R.* v. *Reekspear*, *ubi supra*. It is not necessary to prove the offence to have been committed against the consent of the person upon whom it was perpetrated; and both agent and patient (if consenting) are equally guilty. In *R.* v. *Wiseman*, *Fortesc.* (*K. B.*) 91, where the defendant was indicted for having committed this offence with a woman, a majority of the judges held that this was within the statute, but two or three of them held that it was not: no opinion was publicly given. But it seems to be settled that the offence can be committed with a woman. 3 *Co. Inst.* 59; 3 *Russ. Cr.* (6th ed.) 249. In *R.* v. *Jellyman*, 8 *C. & P.* 604, it was held that a married woman who consents to her husband committing an unnatural offence with her was an accomplice in the felony, and, as such, her evidence required confirmation, although her consent or non-consent was quite immaterial to the offence. If the offence be committed *on* a boy under fourteen years of age, it is felony in the agent only, on the ground that the boy is under the age of discretion. 1 *Hale*, 670; 3 *Co. Inst.* 59; 1 *East, P. C.* 480 (and the same, it should seem, as to a girl under twelve, the age by which at common law a girl is marriageable). If *by* a boy under fourteen, it is felony in the patient, if the patient be an adult. *R.* v. *Allen*, 1 *Den.* 364; 2 *C. & K.* 869; 18 *L. J.* (*M. C.*) 72; 3 *Cox*, 270. It would seem that the presumption applicable to boys under fourteen applies to this offence as well as to rape where the boy is the agent (*see ante*, p. 22). As to cases where a boy under fourteen is the patient, *see* 1 *Hale*, 670. If the evidence fail to make out the entire charge against the defendant, he may nevertheless be convicted of the attempt to commit the felony charged. 14 *&* 15 *Vict. c.* 100, *s.* 9 (*ante*, p. 219). Evidence is not admissible to prove that the defendant has a general disposition to commit the offence. *R.* v. *Cole*, 3 *Russ. Cr.* (6th ed.) 251 (*ante*, p. 306).

Where the defendant forced open a child's mouth, and put in his private parts, and proceeded to the completion of his lust, the judges were of opinion that this did not constitute the offence of sodomy. *R.* v. *Jacobs*, *R. & R.* 331 (*see* 3 *Russ. Cr.* (6th ed.) 250; *and* 48 *&* 49 *Vict. c.* 69, *s.* 11, *post*, p. 925).

Indictment for Bestiality.

Commencement as ante, p. 913]—with a certain cow ("*any animal*") feloniously, wickedly, and against the order of nature, had a venereal affair, and then feloniously, wickedly, and against the order of nature, carnally knew the said cow; and then feloniously, wickedly, and against the order of nature, with the said cow did commit and perpetrate that detestable and abominable crime of buggery (not to be named among Christians); against the form [*as ante*, p. 840]. *The prisoner may be convicted of attempting to commit the statutory felony with a domestic fowl, although its completion may be an impossibility.* *R.* v. *Brown*, 24 *Q. B. D.* 357; 59 *L. J.* (*M. C.*) 47; 16 *Cox*, 715 (*C. C. R.*), *which overrules on this point R.* v. *Mulreaty*, 3 *Russ. Cr.* (6th ed.) 250, *and see ante*, p. 2.

The offence may be committed by a woman. 3 *Co. Inst.* 59; 3 *Russ. Cr.* (6th ed.) 249.

Felony: 24 & 25 *Vict. c.* 100, *s.* 61. *For punishment, see notes to the last precedent. The defendant may upon this indictment be convicted of an attempt to commit the felony charged, if the evidence warrant such finding.* 14 & 15 *Vict. c.* 100, *s.* 9 (*ante*, p. 219). *An indictment for an attempt to commit this offence may readily be framed from this and the next precedent. It is punishable in the same manner as the attempt to commit sodomy.* 24 & 25 *Vict. c.* 100, *s.* 62, *infra. See R.* v. *Mulreaty, ubi supra. There is no statutory time for prosecuting the offence, but delay in prosecution has been made a ground for directing acquittal. R.* v. *Robins*, 1 *Cox*, 114.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the carnal knowledge as in rape or sodomy, *ante*, pp. 911, 923.

ASSAULT WITH INTENT TO COMMIT SODOMY AND ACTS OF GROSS INDECENCY BETWEEN MALE PERSONS.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 62.]—Whosoever *shall attempt to commit the said abominable crime*, or shall be guilty *of any assault with intent to commit the same, or* of any indecent assault upon any male person, shall be guilty of a misdemeanor, *and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding ten years. . . .* [*The italicized parts of this section were new in* 1861.]

48 & 44 *Vict. c.* 45, *s.* 2—*Consent of male person under thirteen to indecent assault no defence.*]—*Ante*, p. 918.

48 & 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 11—*Acts of gross indecency by male person with another male person.*]—Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. [*This enactment covers such cases as R.* v. *Jacobs, R. & R.* 331, *ante*, p. 924, *post*, p. 927. *For indictment, see post*, p. 927.]

Sect. 17—*Misdemeanors under this Act to be within Vexatious Indictments Act—Indictment under this Act not triable at quarter sessions.*]—*Ante*, p. 902.

Sect. 18—*Costs of prosecution.*]—*Ante*, p. 902.

Sect. 20—*Person charged and husband or wife of person charged to be competent but not compellable witnesses.*]—*Ante*, p. 906.

61 & 62 *Vict. c.* 36, *ss.* 1, 4, *sched.*]—*See ante*, pp. 392–398.

4 *Edw.* 7, *c.* 15, *ss.* 12–18, *and sched.* 1—*Procedure and evidence in offences under* 24 & 25 *Vict. c.* 100, *s.* 62, *and* 48 & 49 *Vict. c.* 69, *s.* 11, *against a child under sixteen.*]—*Ante*, pp. 882–885, 887.

Indictment for attempt to commit Sodomy. (24 & 25 *Vict.* c. 100, *s.* 62.)

Commencement as ante, p. 913]—in and upon one J. N. did make an assault, and him the said J. N. did then beat, wound, and ill-treat, with intent that detestable and abominable crime (not to be named among Christians) called buggery, with the same J. N., feloniously, wickedly, diabolically, and against the order of nature, to commit and perpetrate; against the form [*as ante*, p. 840].

Misdemeanor: penal servitude for not more than ten and not less than three years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict.* c. 100, *s.* 62; 54 & 55 *Vict.* c. 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour*, 24 & 25 *Vict.* c. 100, *s.* 71 (*ante*, p. 778).

Evidence.

Prove an attempt to commit sodomy, the offence being incomplete for want of evidence of penetration (*ante*, p. 923). If the complete offence of sodomy be proved, it seems that the defendant will not be entitled to be acquitted; but the judge may, if he think fit, discharge the jury, and direct the defendant to be indicted for the felony. 14 & 15 *Vict.* c. 100, *s.* 12 (*ante*, p. 218). Where the defendant was indicted under this section (24 & 25 *Vict.* c. 100, *s.* 62), for an indecent assault upon a male person, and it appeared that the person alleged to have been assaulted consented to what was done to him by the defendant, it was held that the indictment could not be sustained. *R.* v. *Wollaston*, 12 *Cox*, 180 (*C. C. R.*). Mere submission, however, is not consent, and therefore, where two boys of eight years of age submitted to indecent acts on the part of a man, in ignorance of the nature of the acts done, the man was held to be rightly convicted of an indecent assault, on the ground that the boys, being thus ignorant, could not be held to have consented in the true meaning of that word. *R.* v. *Lock*, *L. R.* 2 *C. C. R.* 10; 42 *L. J.* (*M. C.*) 5. And *consent* is now no defence to an indictment for an indecent assault, where the person assaulted is under the age of thirteen years. 43 & 44 *Vict.* c. 45, *s.* 2 (*ante*, p. 918), and it is therefore now unnecessary in such cases to consider the distinction between mere submission and consent drawn in *R.* v. *Wollaston* and *R.* v. *Lock*, *ubi supra*.

The unsworn evidence of a boy too young to understand the nature of an oath is rendered admissible on a charge for this offence by 4 *Edw.* 7, c. 15, *s.* 15, *and sched.* 1 (*ante*, pp. 883, 887), which overrule *R.* v. *Beer*, 62 *J. P.* 120. Such evidence must be corroborated.

An indictment against two persons, which charged that they, being persons of wicked and unnatural dispositions, did in a certain open and public place unlawfully meet together, with the intent of committing with each other, openly, lewdly, and indecently, in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural, and *sodomitical practices*, and then and there unlawfully, wickedly, openly, lewdly, and indecently did commit with each other, in the sight and view of divers liege subjects, etc., divers such practices as aforesaid, etc., was held bad in arrest of judgment for want of certainty. *R.* v. *Rowed*, 3 *Q. B.* 180; 2 *G. & D.* 518; 11 *L. J.* (*M. C.*) 74. The practices proved in this case and *R.* v. *Wollaston* (*supra*), and *R.* v. *Jacobs*, *R. & R.* 331 (*ante*, p. 924), seem to be within 48 & 49 *Vict.* c. 69, *s.* 11 (*ante*, p. 925).

As to attempts to commit bestiality, which are within 24 & 25 *Vict.* c. 100, *s.* 62, *see ante*, p. 925. As to conspiracy or incitement to commit sodomy, etc., *see R.* v. *Boulton*, 12 *Cox*, 87. As to threats to accuse of these offences, *see ante*, p. 521, *et seq.*

Indictment for Indecent Assault on a Male. (24 & 25 *Vict. c.* 100, *s.* 62, *ante*, p. 925.)

The indictment may be in the same form as that on p. 919, with the substitution of the words a "certain male person."

If the indictment be for an indecent assault, one or other of the preliminary steps required by 22 & 23 *Vict. c.* 17, *s.* 1, *as extended by* 30 & 31 *Vict. c.* 35, *s.* 1, *must be taken* (*see ante*, p. 7).

Punishment: see the last precedent.

Indictment for Misdemeanor under 48 & 49 *Vict. c.* 69, *s.* 11. (*Ante*, p. 925.)

Commencement as ante, p. 913]—being a male person, unlawfully did commit an act of gross indecency with another male person, to wit, C. D.; against the form of, etc. [*as ante*, p. 840]. (*2nd Count*)—*Same as first count, but charging C. D. with committing, etc., with A. B.* (*3rd Count*)— . . . that the said A. B. on the day aforesaid, in the year aforesaid, being a male person, unlawfully did procure the commission by a male person, to wit, the said C. D., of an act of gross indecency with another male person, to wit, with him, the said A. B.; against the form of, etc. (*as ante*, p. 840). *Counts for an indecent assault or an attempt to commit sodomy may be joined.*

No indictment can be preferred for this offence unless the preliminary steps required by 22 & 23 *Vict. c.* 17, *s.* 1, *as extended by* 30 & 31 *Vict. c.* 35, *s.* 1 (*ante*, p. 7, *et seq.*), *have been taken.* 48 & 49 *Vict. c.* 69, *s.* 17 (*ante*, p. 902).

Misdemeanor: imprisonment for any term not exceeding two years, with or without hard labour. 48 & 49 *Vict. c.* 69, *s.* 11 (*ante*, p. 925).

This offence is not triable at quarter sessions. 48 & 49 *Vict. c.* 69, *s.* 17 (*ante*, p. 902).

Evidence.

It is an offence within 48 & 49 *Vict. c.* 69, *s.* 11, for a male person to procure the commission with himself of an act of gross indecency by another male person. *R.* v. *Jones* [1896] 1 *Q. B.* 4 (*C. C. R.*); 18 *Cox*, 207.

The unsworn evidence of a child under sixteen is now admissible on a charge under this section, but must be corroborated. 4 *Edw.* 7, *c.* 15, *s.* 15, *and sched.* 1 (*ante*, pp. 883, 887).

PART II.

OFFENCES OF A PUBLIC NATURE.

CHAPTER I.

OFFENCES AGAINST THE CROWN AND GOVERNMENT.

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SECT. 1.

HIGH TREASON.

Statutes.

25 *Edw.* 3, *st.* 5, *c.* 2 (*Treason Act*, 1351)—*Declaration of Treasons* (*as printed in Revised Statutes, 2nd edition*).]—Item, whereas divers opinions have been before this time in what case treason shall be said, and in what not; the king, at the request of the lords and of the commons, hath made a declaration in the manner as hereafter followeth, that is to say; when a man doth compass or imagine the death of our lord the King, or of our lady his Queen, or of their eldest son and heir; or if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife [of] the King's eldest son and heir; or if a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, and thereof be probably ("*provablement*") attainted of open deed by the people of their condition . . . [*as to counterfeiting the king's seals or coin* (*rep.*), 11 *G.* 4 *&* 1 *W.* 4, *c.* 66; 2 *&* 3 *W.* 4, *c.* 34, *s.* 1]; and if a man slea (*sic*) the chancellor, treasurer, or the king's justices of the one bench, or the other (*see Steph. Dig. Cr. L.* (6th ed.) 45, *n.*) justices in eyre or justices of assise, and all other justices assigned to hear and determine, being in

their places doing their offices: and it is to be understood that in the cases above rehearsed, that ought to be judged treason which extends to our lord the king and his royal majesty: and of such treason the forfeiture of the escheats pertaineth to our sovereign lord as well of the lands and tenements holden of other as of himself. (*As to forfeitures, see now* 33 & 34 *Vict. c.* 23, *s.* 1, *post*, p. 936; *as to petty treason, see* 24 & 25 *Vict. c.* 100, *s.* 8, *ante*, p. 776.) And because that many other like cases of treason may happen in time to come, which a man cannot think nor declare at this present time; it is accorded that if any other case, supposed treason, which is not above specified, doth happen before any justices, the justices shall tarry without any going to judgment of the treason, till the cause be showed and declared before the king and his parliament, whether it ought to be judged treason or other felony. And if per-case any man of the realm ride armed overtly (*see* 2 *Steph. Hist. Cr. L.* 269) or secretly with men of arms against any other, to slay him, or rob him, or take him, or retain him till he hath made fine or ransom for to have his deliverance, it is not in the mind of the king nor his council that in such case it shall be judged treason, but shall be judged felony or trespass according to the laws of the land of old time used, and according as the case requireth. . . . [*Rest rep.* 50 & 51 *Vict. c.* 53, *s.* 3 (*Stat. Law Revision*). *This statute was passed after petition by the Commons to the king representing that certain justices had lately given judgment in their courts for treason and accroachment of royal power, and praying that it might be declared in parliament to what cases this accroachment of royal power extended* (2 *Rot. Parl.* 166, *n.* 15; *Rot. Parl.* 25 *Ed.* 3, p. 2, *n.* 17; *Luders on High Treason*, p. 11; 1 *Hale*, 86, 87; 1 *East, P.C.*, 57; 2 *Chit. Cr. L.* 60). *It is said to be declaratory of the common law* (3 *Co. Inst.* 1; *Sindercombe's case*, 5 *St. Tr.* 848: *R.* v. *Smith O'Brien*, 7 *St. Tr., N. S.* 349, 397; 2 *H. L. C.* 465; 3 *Cox*, 360, *Blackburne*, L.C.J.; 2 *Steph. Hist. Cr. L.* 243).

"*Elsewhere:*" *that is, out of the realm of England. The realm of England comprehends the narrow seas and Wales, but not Ireland* (*Lord McGuire's case*, 4 *St. Tr.* 653), *nor Scotland, nor the Channel Islands* (1 *Hale*, 153, 154). *The operation of this statute was extended to Ireland by Poyning's Act* (10 *H.* 7, *c.* 22, *Ir.*): *see R.* v. *Smith O'Brien, supra; and to Scotland by* 7 *Anne, c.* 21, *s.* 1, *which superseded the Scots law relating to offences which in England amount to high treason. Id., s.* 10.]

11 *H.* 7, *c.* 1, *s.* 1.]—*Service in war under the king* de facto *for the time being not to be deemed treason against the king* de jure. [*See Steph. Dig. Cr. L.* (6th ed.); 2 *Steph. Hist. Cr. L.* 254.]

28 *H.* 8, *c.* 15, *ss.* 1–3.]—*Treasons in admiralty jurisdiction to be tried in England and punished as if committed on land.* (*Ante*, pp. 39–43.)

35 *H.* 8, *c.* 2, *s.* 1—*Venue for treasons committed abroad.*]—Forasmuch as some doubts and questions have been moved, that certain kinds of treasons, misprisions, and concealments of treason done, perpetrated, or committed out of the king's majesty's realm of England cannot ne (*sic*) may by the common laws of this realm be inquired of, heard, and determined within this his said realm of England: for a plain remedy, order, and declaration therein to be had and made, be it enacted by authority of this present parliament that all manner of offences being already made, declared, or hereafter to be made or declared, by any the laws and statutes of this realm, to be treasons, misprisions of treasons, or concealments of treasons, and done, perpetrated, or committed, or hereafter to be done, perpetrate, or committed, by any person or persons out of this realm of

England, shall be from henceforth inquired of, heard, and determined before the king's justices of his bench for pleas to be holden before himself, by good and lawful men of the same shire where the said bench shall sit and be kept, or else before such commissioners and in such shire of the realm as shall be assigned by the king's majesty's commission, and by good and lawful men of the same shire, in like manner and form to all intents and purposes as if any such treasons, misprisions of treasons, or concealments of treasons had been done, perpetrated, and committed within the same shire where they shall be so inquired of, heard, and determined as is aforesaid. (*a*) [*As to the mode of trial of treasons committed without the realm before the passing of this statute, see* 2 *Hawk. c.* 25, *s.* 48: *Platt's case*, 1 *Leach, at* p. 168. *They would seem to have been triable in the county where the offender had lands. Peter Gallon's case, Fitz. Abr. Trial, sec.* 54; *Co.* 3 *Inst.* 11; *Co. Litt.* 261. *This statute (as to the operation of which see Mr. Prynne's argument in* 4 *St. Tr.* 408) *now regulates the trial in England of all foreign treasons.* 3 *Co. Inst. c.* 1, p. 11; *c.* 2, pp. 24, 25; 1 *Inst.* 261, *n.*; *Co. Lit.* 261; 2 *Hawk. c.* 25, *ss.* 48, 49, 53; *Fost.* 238; 1 *Hale*, 169; 1 *East*, 104: *R.* v. *Lynch* [1903] 1 *K. B.* 444; *and see post*, p. 944, *et seq.*]

Sect. 2.]—*Saving of right of peers to be tried by their peers.*

5 *&* 6 *Edw.* 6, *c.* 11, *s.* 4—*Treasons abroad.*]—. . . If any of the king's subjects, denizens, or other, do commit or practise out of the limits of this realm in any outward part any the offences which by this Act are made or heretofore now standing in force (*sic*) have been made treason, that then such treasons, whatsoever they be or wheresoever they shall happen so to be done or committed, shall be enquired and presented by the oaths of twelve good and lawful men, upon good and probable evidence and witness, in such shire and county of this realm and before such persons as it shall please the king, his said heirs and successors, to appoint by commission under his great seal; in like manner and form as treasons committed within this realm have been used to be enquired and presented; and that upon every indictment and presentment founden and made of any such treasons and certified into the King's Bench, like process and other circumstance shall be there made and had against the offenders as if the said treason so presented had been lawfully found to be done and committed within the limits of this realm. . . . [*This enactment provides for enquiry and presentment before commissioners by a body whose functions are to be similar to those of a grand jury, but gives no power to the commissioners to hear and determine. It has not been specifically repealed, but there is no trace in the text books or in reported cases or in those of which the record is preserved in the Record Office, of the trial of any foreign treason by any other procedure than that provided by* 35 *H.* 8, *c.* 2, *s.* 1, *ubi supra.*]

(*a*) In 1775 the law officers (*Thurlow*, A.-G., and *Wedderburn*, S.-C.) had been informed—

(1) That in 18 *Anne* an Act against high treason had been passed in the province of New Hampshire.

(2) That the said Act was disallowed by Order in Council in 1718.

(3) That it was conceived that there was no law of that province at present existing for the trial and punishment of that offence.

They were asked in what manner it was proper to proceed against persons for high treason committed in New Hampshire.

They replied: "We are humbly of opinion that it requires no Act of a provincial legislature to constitute the offence of high treason in any of his Majesty's plantations. The crime may be prosecuted in the Superior Court of New Hampshire (which by 11 *W.* 3 hath the full criminal jurisdiction within that government which his Majesty's Court of King's Bench exercises here), or in this country under the statutes of 35 *H.* 8 as the occasion may require." (14 Ap. 1775.)

1 *Mary, st.* 1, *c.* 1, *s.* 1.]—*No act to be treason or misprision of treason but such as was declared to be so by* 25 *Edw.* 3, *st.* 5, *c.* 2 (*ante*, p. 928).

1 *& 2 Ph. & M. c.* 10, *s.* 6—*Trial of treason.*] . . . All trials hereafter to be had, awarded, or made for any treason shall be had and used only according to the due order and course of the common laws of this realm, and not otherwise. [*See Fost.* 237 : *R.* v. *Vaughan*, 13 *St. Tr.* 485, 533, *per Holt*, C.J.]

Sect. 8—*Misprision of treason.*]—Provided always . . that concealment or keeping secret of any high treason be deemed and taken only misprision of treason, and the offenders therein to forfeit and suffer as in cases of misprision of treason hath heretofore been used, anything above mentioned to be the contrary notwithstanding.

7 *& 8 W.* 3, *c.* 3 (*Treason Act*, 1695), *s.* 1—*Indictment and defence by counsel.*]— . . . (*From and after* 25*th March*, 1696.) All and every person and persons whatsoever that shall be accused and indicted for high treason whereby any corruption of blood may or shall be made to any such offender or offenders or to any the heir or heirs of [any] such offender or offenders or for misprision of such treason shall have a true copy of the whole indictment (*as to the caption, see post*, p. 941), delivered unto them or any of them "five days" (*now ten days*: 7 *Anne*, *c.* 21, *s.* 14 (*post*, p. 933); 6 *G.* 4, *c.* 50, *s.* 21, *post*, p. 935) "at the least" before he or they shall be tried for the same whereby to enable them or any of them respectively to advise with counsel thereupon to plead and make their defence his or their attorney or attorneys agent or agents of any of them requiring the same and paying the officer his reasonable fees for writing thereof not exceeding five shillings for the copy of every such indictment. And that every such person so accused and indicted arraigned or tried for any such treason as aforesaid or for misprision of such treason from and after the said time shall be received and admitted to make his and their full defence by counsel learned in the law and to make any proof that he or they can produce by lawful witness or witnesses who shall then be upon oath for his and their just defence in that behalf. And in case any person or persons so accused or indicted shall desire counsel the court before whom such person or persons shall be tried or some judge of that court shall and is hereby authorised and required immediately upon his or their request to assign to such person and persons such and so many counsel not exceeding two as the person or persons shall desire to whom such counsel shall have free access at all seasonable hours any law or usage to the contrary notwithstanding.

Sect. 2—*Corroboration—Challenge of jurors.*]—And (*from and after* 25*th March*, 1696) no person or persons whatsoever shall be indicted tryed or attainted of high treason whereby any corruption of blood may or shall be made to any such offender or offenders or to any the heir or heirs of any such offender or offenders or of misprision of such treason but by and upon the oaths and testimony of two lawful witnesses either both of them to the same overt act or one of them to one and another of them to another overt act of the same treason unless the party indicted and arraigned or tried shall willingly without violence in open court confess the same or shall stand mute or refuse to plead or in cases of high treason shall peremptorily challenge above the number of thirty-five of the jury any law statute or usage to the contrary notwithstanding. [*This altered the law as laid down in Sir W. Raleigh's case*, 2 *St. Tr.* 15; *and see* 2 *Hawk*, *c.* 43, *s.* 5.]

Sect. 3—*Proviso as to outlawry.*]—*See ante*, p. 109; *post*, p. 937.

Sect. 4—*Corroboration as to overt acts.*]—And . . . if two or more distinct treasons of diverse heads or kinds shall be alleged in one bill of indictment one witness produced to prove one of the said treasons and another witness produced to prove another of the said treasons shall not be deemed or taken to be two witnesses to the same treason within the meaning of this Act.

Sect. 5—*Limitation of prosecution.*]—And to the intent that the terror and dread of such criminal accusations may in some reasonable time be removed be it further enacted [by the authority aforesaid] that from and after the said five and twentieth day of March in the year of our Lord one thousand six hundred and ninety-six no person or persons whatsoever shall be indicted tried or prosecuted for any such treason as aforesaid or for misprision of such treason that shall be committed or done within the kingdom of England dominion of Wales or town of Berwick upon Tweed after the said five and twentieth day of March in the year of our Lord one thousand six hundred and ninety-six unless the same indictment be found by a grand jury within three years next after the treason or offence done and committed. . . . (*See ante*, p. 95.)

Sect. 6—*Exceptions to s.* 5.]—Always provided and excepted that if any person or persons whatsoever shall be guilty of designing endeavouring or attempting any assassination on the body of the king by poison or otherwise such person or persons may be prosecuted at any time notwithstanding the aforesaid limitation. [*See post*, 36 *G.* 3, *c.* 7; 39 & 40 *G.* 3, *c.* 93; 5 & 6 *Vict. c.* 51, *s.* 1.]

Sect. 7—*Jury panel.*]—And that all and every person and persons who shall be accused indicted [or] tried for such treason as aforesaid or for misprision of such treason after the said five and twentieth day of March in the year of our Lord one thousand six hundred and ninety-six shall have copies of the panel of the jurors who are to try them duly returned by the sheriff and delivered unto them and every of them so accused and indicted respectively two days at the least before he or they shall be tried for the same. And that all persons so accused and indicted for any such treason as aforesaid shall have the like process of the court where they shall be tried to compel their witnesses to appear for them at any such trial or trials as is usually granted to compel witnesses to appear against them. [*See* 6 *G.* 4, *c.* 50, *s.* 21, *post*, p. 935.]

Sect. 8—*No evidence of overt acts not pleaded.*]—And . . . no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment against any person or persons whatsoever.

Sect. 9—*Defects in indictments.*]—Provided also . . . that no indictment for any of the offences aforesaid nor any process or return thereupon shall be quashed on the motion of the prisoner or his counsel for miswriting misspelling false or improper Latin unless exception concerning the same be taken and made in the respective court where such trial shall be by the prisoner or his counsel assigned before any evidence given in open court upon such indictment. Nor shall any such miswriting misspelling false or improper Latin after conviction on such indictment be any cause to stay or arrest judgment thereupon. But nevertheless any judgment given upon such indictment shall and may be liable to be

reversed upon a writ of error in the same manner and no other than as if this Act had not been made. [*The provisions of* 14 & 15 *Vict. c.* 100, *ss.* 23 (*ante*, pp. 35, 67), 24 (*ante*, p. 54), *as to special venue and immaterial averments, apply to indictments for any offence, as do those of s.* 25 (*ante*, p. 55), *as to objections to and amendments of formal defects; where however there is a variance between the statement in an indictment for treason and the evidence offered in proof thereof, it would seem that the court has no power to amend, as the operation of s.* 1 *of* 14 & 15 *Vict. c.* 100 (*ante*, p. 52), *is confined to indictments for felony and misdemeanor.*]

Sect. 10—*Proceedings on trial of peers.*] *As to mode of trying peers, see ante*, p. 183.

Sect. 11.]—*Procedure on impeachment not affected by the Act.*

1 *Anne, st.* 2, *c.* 21, *s.* 3.]—*High treason to attempt by overt acts to hinder the succession to the crown as limited by the Act of Settlement* (12 & 13 *W.* 3, *c.* 2).

6 *Anne, c.* 41 (*Succession to the Crown Act*, 1707), *s.* 1.]—*High treason to maintain by writing or printing that any person has a right to the crown, except in accordance with* 1 *W. & M. sess.* 2, *c.* 2; 12 & 13 *W.* 3, *c.* 2; *and* 6 *Anne, c.* 11.

7 *Anne, c.* 21 (*Treason Act*, 1708), *s.* 14 (*s.* 11 *in Ruffhead*)—*List of witnesses.*]—And . . . that . . . when any person is indicted for high treason or misprision of treason a list of the witnesses that shall be produced on the trial for proving the said indictment, *and of the jury*, mentioning the names, profession, and abode of the said witnesses *and jurors*, be also given at the same time that the copy of the indictment is delivered to the party indicted, and that copies of all indictments for the offences aforesaid, with such lists, shall be delivered to the party indicted ten days before the trial, and in the presence of two credible witnesses, any law, statute, or custom to the contrary notwithstanding. [*This section is repealed as to the list of the jury in England by* 6 *G.* 4, *c.* 50, *s.* 62, *and replaced by s.* 21 *of that Act* (*post*, p. 935).]

20 *G.* 2, *c.* 30.]—*Counsel allowed to persons impeached for treason by the House of Commons.*

30 *G.* 3, *c.* 48 (*Treason Act*, 1790), *s.* 1—*Punishment of female traitors.*]—. . . From and after the 5th day of June, 1790, the judgment to be given and awarded against any woman or women convicted of the crime of high treason, *or of the crime of petit treason, or of abetting, procuring, or counselling any petit treason*, shall not be that such woman or women shall be severally drawn to the place of execution and there burned to death, but that such woman or women shall be severally drawn to the place of execution, and be there hanged by the neck until she or they be severally dead, any law or usage to the contrary thereof in any wise notwithstanding. [*As to this Act, see* 33 & 34 *Vict. c.* 23, *s.* 31, *post*, p. 937. *The part in italics is virtually repealed by* 24 & 25 *Vict c.* 100, *s.* 8, *ante*, p. 776.]

36 *G.* 3, *c.* 7 (*Treason Act*, 1796), *s.* 1 (*Preamble*)—*Plots to kill, etc., the sovereign or his or her heirs and successors.*]—If any person or persons whatsoever, after the day of the passing of this Act (18th December, 1795), during the natural life of our most gracious sovereign lord the

king, . . . and until the end of the next session of parliament after a demise of the crown, shall, within the realm or without, compass, imagine, invent, devise or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint, of the person of his majesty, his heirs and successors (*part here omitted rep.* 11 & 12 *Vict. c.* 12, *s.* 1), . . . and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed, being legally convicted thereof upon the oaths of two lawful and credible witnesses upon trial, or otherwise convicted or attainted by due course of law, then every such person and persons so as aforesaid offending shall be deemed, declared and adjudged to be a traitor and traitors, and shall suffer pains of death, and also lose and forfeit as in cases of high treason. [*Made perpetual by* 57 *G.* 3, *c.* 6, *s.* 1, *post*, p. 935.]

Sect. 2.]—*Persons accused of offences against s.* 1, *to be entitled to benefit of* 7 & 8 *W.* 3, *c.* 3 (*ante*, p. 931), *and* 7 *Anne, c.* 21 (*ante*, p. 933).

Sect. 6.]—*Act not to prevent prosecution at common law if no prior prosecution under Act.* [*Cf.* 52 & 53 *Vict. c.* 63, *s.* 33, *ante*, p. 170.]

39 & 40 *G.* 3, *c.* 93 (*Treason Act*, 1800), *s.* 1—*Trial for plots against the King's life, etc.*]— . . . In all cases of high treason in compassing or imagining the death of the king, and of misprision of such treason, where the overt act or overt acts of such treason which shall be alleged in the indictment for such offence shall be assassination or killing of the king, or any direct attempt against his life, or any direct attempt against his person whereby his life may be endangered or his person may suffer bodily harm, the person charged with such offence shall and may be indicted, arraigned, tried, and attainted in the same manner and according to the same evidence, and according to the same course and order of trial in every respect and upon the like evidence, as if such person or persons stood charged with murder; [7 & 8 *W.* 3, *c.* 3 (*ante*, p. 931), and 7 *Anne, c.* 21 (*ante*, p. 933), *not to apply*]; but upon conviction upon such indictment judgment shall be nevertheless given, and execution done, as in other cases of high treason.

54 *G.* 3, *c.* 146 (*Treason Act*, 1814), *s.* 1—*Punishment.*]—Whereas in certain cases of high treason, as the law now stands, the sentence or judgment required by law to be pronounced or awarded against persons convicted or adjudged guilty of the said crime in such cases is that they should be drawn on a hurdle to the place of execution and there be hanged by the neck, but not until they are dead, but that they should be taken down again, and that when they are yet alive their bowels should be taken out and burnt before their faces, and that afterwards their heads should be severed from their bodies, and their bodies be severed in four quarters, and their heads and quarters to be at the king's disposal: And whereas it is expedient in the said cases of high treason to alter the sentence or judgment now required by law: Be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that in all cases of high treason in which as the law now stands the sentence or judgment ordained by law is as aforesaid, the sentence or judgment to be pronounced or awarded from and after the passing of this Act against any person convicted or adjudged guilty shall be that such person shall *be*

drawn on a hurdle to the place of execution, and be there hanged by the neck until such person be dead, *and that afterwards the head shall be severed from the body of such person, and the body, divided into four quarters, shall be disposed of as his majesty and his successors shall think fit.* [*The italicized parts of this section are repealed as to England and Ireland by* 33 & 34 *Vict. c.* 23, *s.* 31, *post*, p. 937. *For old form of sentence, see R.* v. *Walcot*, 1 *Eng. Rep.* 87.]

Sect. 2—*Power to alter mode of execution.*]—And be it further declared and enacted, that in case his majesty or his successors shall so think fit, his majesty or his successors, after such sentence or judgment shall be pronounced or awarded, may, by warrant under his or their sign manual, countersigned by one of his majesty's principal secretaries of state, declare it to be his or their will and pleasure, and may direct and order that such person as aforesaid shall not be drawn, but shall be taken in such manner as in the said warrant shall be expressed to the place of execution, and that such person shall not be hanged by the neck, but that instead thereof the head shall be there severed from the body of such person whilst alive, *and in such warrant may direct and order how and in what manner the body, head, and quarters of such person shall be disposed;* and it shall be lawful for the sheriff or other person or persons to whom such warrant shall be addressed, and whom it shall concern, to carry the same into execution accordingly. [*The italicized portions of this section are repealed as to England and Ireland by* 33 & 34 *Vict. c.* 23, *s.* 31, *post*, p. 937.]

57 *G.* 3, *c.* 6 (*Treason Act*, 1817), *s.* 1.]—*Recites* 36 *G.* 3, *c.* 7, *and enacts that* "all and every the hereinbefore recited provisions which relate to the heirs and successors of his majesty the sovereign of these realms shall be and the same are hereby made perpetual." [*The portions of this Act referring to the portions of* 36 *G.* 3, *c.* 7, *repealed by* 11 & 12 *Vict. c.* 12, *s.* 1, *are repealed by the latter statute.*]

Sect. 4.]—*Persons tried under the Act to be entitled to the benefit of* 7 & 8 *W.* 3, *c.* 3, *and* 7 *Anne*, *c.* 21 (*ante*, pp. 931–933), "save and except in cases of high treason in compassing or imagining the death of any heir or successor of his majesty, and of misprision of such treason, where the overt act or overt acts of such treason which shall be alleged in the indictment for such offence shall be assassination or killing of any heir or successor of his majesty, or any direct attempt against the life of any heir or successor of his majesty, or any direct attempt against the person of any heir or successor of his majesty whereby the life of such heir or successor may be endangered or the person of such heir or successor may suffer bodily harm." [*See* 39 & 40 *G.* 3, *c.* 93, *ante*, p. 934.]

Sect. 5.]—*Act not to prevent prosecutions to which persons would have been subject if the Act had not passed, unless the party is first prosecuted under the Act.* [*Cf.* 52 & 53 *Vict. c.* 63, *s.* 33, *ante*, p. 170.]

Sect. 6.]—54 *G.* 3, *c.* 146 (*ante*, p. 934), *extended to sentences for offences under this Act.*

6 *G.* 4, *c.* 50 (*Juries Act*, 1825), *s.* 21—*Jury panel.*]—When any person is indicted for high treason or misprision of treason in any court other than the Court of King's Bench, a list of the petit jury, mentioning the names, profession, and place of abode of the jurors, shall be given at the same time that the copy of the indictment is delivered to the party

indicted, which shall be ten days before the arraignment, and in the presence of two or more credible witnesses; and when any person is indicted for high treason or misprision of treason in the Court of King's Bench, a copy of the indictment shall be delivered within the time and in the manner aforesaid; but a list of the petit jury, made out as aforesaid, may be delivered to the party indicted at any time after the arraignment, so that the same be delivered ten days before the day of trial: Provided always, that nothing herein contained shall anyways extend to any indictment for high treason in compassing or imagining the death of the king, or for misprision of such treason, where the overt act or overt acts of such treason alleged in the indictment shall be assassination or killing of the king, or any direct attempt against his life, or any direct attempt against his person, whereby his life may be endangered or his person may suffer bodily harm; [*see* 39 & 40 *G.* 3, *c.* 93 (*ante*, p. 934); 57 *G.* 3, *c.* 6, *s.* 1 (*ante*, p. 935); *the rest of* 6 *G.* 4, *c.* 50, *s.* 21, *relates to treason by counterfeiting coin, great seal, privy seal, sign manual, etc., which is abolished. As to challenge of jurors on an indictment for treason, see* 7 & 8 *W.* 3, *c.* 3. *s.* 2 (*ante*, p. 931), *and* 6 *G.* 4, *c.* 50, *s.* 29 (*ante*, p. 199].

5 & 6 *Vict. c.* 51 (*Treason Act*, 1842, *s.* 1.]—In all cases of high treason in compassing or imagining any bodily harm tending to the death or destruction, maiming, or wounding of the [King], and in all cases of misprision of any such treason where the overt act or overt acts of such treason alleged in the indictment shall be any attempt to injure in any manner whatsoever the person of the [King], the person or persons charged with such offence shall and may be indicted, arraigned, tried, and attainted in the same manner and according to the same course and order of trial in every respect upon the like evidence as if such persons stood charged with murder [7 & 8 *W.* 3, *c.* 3 (*ante*, p. 931); 7 *Anne*, *c.* 21 (*ante*, p. 933); 6 *G.* 4, *c.* 50, *s.* 21 (*ante*, p. 935), *not to apply*]; but upon conviction upon such indictment judgment shall nevertheless be given, and execution be done, as in other cases of high treason, any law, statute, or usage to the contrary notwithstanding.

11 & 12 *Vict. c.* 12 (*Treason Felony Act*, 1848), *s.* 2.]—Such of the said recited provisions [of 36 *G.* 3, *c.* 7 (*ante*, p. 933)] made perpetual by the said Act of the 57 *G.* 3 [*c.* 6 (*ante*, p. 934)] as are not hereby repealed shall extend to and be in force in that part of the United Kingdom called Ireland.

Sects. 3, 5–8, 10.]—*Post*, pp. 948, 949.

17 & 18 *Vict. c.* 26.]—*After reciting the Treason Act*, 1708 (7 *Anne*, *c.* 21), *s.* 14 (*ante*, p. 933) *enacts that* "the enactments in the *Treason Act*, 1708, contained and hereinbefore recited shall apply to Ireland, and that as fully as if the same enactments were here repeated." [*As to former law in Ireland, see O'Brien* v. *R.*, 7 *St. Tr., N. S.* 1; 2 *H. L. C.* 465.]

33 & 34 *Vict. c.* 23 (*Forfeitures Act*, 1870), *s.* 1.]—From and after the passing of the Act (4th July, 1870) no confession, verdict, inquest, or judgment of or for any treason . . . shall cause any attainder or corruption of blood or any forfeiture or escheat: provided that nothing in this Act shall affect the law of forfeiture consequent on outlawry. [*This section does not appear to affect the mode of trial for treason. See* 7 & 8 *W.* 3, *c.* 3 (*ante*, pp. 931, 932).]

Sect. 31.]—From and after the passing of this Act (4th July, 1870) such portions of the *Treason Act*, 1796 (30 *G.* 3. *c.* 48, *ante*, p. 933), and the *Treason Act*, 1814 (54 *G.* 3, *c.* 146, *ante*, p. 934), as enact that the judgment required by law to be awarded against persons adjudged guilty of high treason shall include the drawing of the person on a hurdle to the place of execution, and after execution the severing of the head from the body and the dividing of the body into four quarters shall be and are hereby repealed. [*Spent, and rep. S. L. R.* 1893. *As to effect of repeal, see* 52 *&* 53 *Vict. c.* 63, *s.* 38, *sub-s.* 2.]

Indictment for compassing the King's Death. (25 *Edw.* 3, *st.* 5, *c.* 2, *ante*, p. 928.)

———, to wit:—The jurors for our lord the King, upon their oath present, that J. S., being a subject of our said lord the King, [not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil,] as a false traitor against our said lord the King, and wholly withdrawing the allegiance, fidelity, and obedience which every true and faithful subject of our said lord the King should and of right ought to bear towards our said lord the King, on the first day of June, in the year of our Lord ——, and on divers other days as well before as after, maliciously and traitorously, together with divers other false traitors to the jurors aforesaid unknown, did compass, imagine, devise, and intend to depose our said lord the King from the royal state, title, power, and government of this realm, and from the style, honour, and kingly name of the imperial crown thereof, and to bring and put our said lord the King to death: and the said treasonable compassing, imagination, device, and intention maliciously and traitorously did express, utter, declare, and evince, by divers overt acts and deeds hereinafter mentioned, that is to say: IN ORDER TO FULFIL, PERFECT, AND BRING TO EFFECT his most evil and wicked treason, and treasonable compassing, imagination, device, and intention aforesaid, he the said J. S., as such false traitor as aforesaid, afterwards, to wit, on the said first day of August in the year aforesaid, and on divers other days as well before as after, maliciously and traitorously did conspire, consult, consent, and agree with one A. B., C. D., and divers other false traitors to the jurors aforesaid unknown, to raise, levy, and make insurrection, rebellion, and war within this kingdom, against our said lord the King; AND FURTHER TO FULFIL, PERFECT, AND BRING TO EFFECT his most evil and wicked treason, and treasonable compassing, imagination, device, and intention aforesaid, he, the said J. S., as such false traitor as aforesaid, afterwards, to wit, [*etc., etc., so proceeding to state other overt acts in the same manner: and then conclude the count thus*]; in contempt of our said lord the King and his laws, to the evil example of all others in like case offending, contrary to the duty of the allegiance of him the said J. S.; against the form [*as ante*, p. 465].

By "overt act" is meant any act manifesting the criminal intention or tending to accomplish the criminal object in respect whereof the indictment is framed. See R. v. *Thistlewood*, 33 *St. Tr.* 685.(*a*) *Any number of overt acts may be laid in the same count, but proof of any one sufficient overt act will*

(*a*) Except where otherwise specially stated, the references to the State Trials in the present edition of this work are to *Howell's State Trials*, and to *State Trials* (*New Series*). For table showing references to *Hargrave's State Trials*, see vol. 34 of *Howell*.

maintain the count. Kel. (J.) 8; 1 *Hale*, 122; *Fost.* 294. *It is not necessary that the overt act be laid to have been committed "traitorously," because that is not the offence; but if the treason consists not in the intention but in the act, as in levying war, then it must be laid to have been done "traitorously." Eden, P. L.* 106: *R.* v. *Cranburne*, 2 *Salk.* 633. *As to whether the accused should be described as a subject of the King, see* 26 *St. Tr.* 819; *and R.* v. *Jameson* [1896] 2 *Q. B.* 425. *A copy of the indictment must be delivered to the accused ten days before his arraignment, except in cases where the overt act of treason is assassination or a direct attempt on the life or person of the King.* 6 *G.* 4, *c.* 50, *s.* 21 (*ante*, p. 935). *As to a copy of the caption, see R.* v. *Burke*, 10 *Cox*, 519.

The punishment of high treason is death by hanging, unless the King by warrant under the sign manual, countersigned by a secretary of state, substitutes death by decapitation. 30 *G.* 3, *c.* 48, *s.* 1 (*ante*, p. 933); 54 *G.* 4, *c.* 146 (*ante*, p. 934); 33 *&* 34 *Vict. c.* 23, *s.* 31 (*ante*, p. 937).

High treason, misprision of treason, offences against the King's title, prerogative, person, or government, or against either house of parliament, are not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Venue.]—*As to the venue in cases of compassing the King's death out of the realm, see* 35 *H.* 8, *c.* 2, *s.* 1 (*ante*, p. 929). *Most of the cases cited infra*, p. 946, *from the St. Tr. as containing counts for adhering to the King's enemies, contain also counts for compassing the King's death in this country; in the following cases the offence of "compassing, etc.," is charged as having been committed "in parts beyond the seas," viz., R.* v. *Hesketh, K. B. Roll*, 1592: *R.* v. *Assheton, Id.*: *R.* v. *Skinner, id.*: *R.* v. *Smith, Baga de Secretis*, 1713.

Liability of aliens.]—Alien friends may be convicted of high treason (*R.* v. *De la Motte*, 21 *St. Tr.* 687, 814), but alien enemies cannot (*Calvin's case*, 7 *Co. Rep.* 1, 6 *b*; *and see* 4 *St. Tr.* 1182; *Forsyth, Cas. Const. Law*, 200), unless they accept British protection during the war (*Fost.* 185). A British subject is not exempt from the penalties of treason because he holds a commission in the enemy's forces, *Napper Tandy's case*, 27 *St. Tr.* 1191; *Macdonald's case, Fost.* 59, 183; 18 *St. Tr.* 857; *Townley's case, Fost.* 7; 18 *St. Tr.* 1329; *and see post*, p. 947.

Overt acts.]—The following acts have been decided or have been deemed by writers upon the subject to be sufficient overt acts of compassing the death of the sovereign within the *Treason Act*, 1351 (*ante*, p. 928). The statute is said to be declaratory of the common law (*ante*, p. 929); but all the law of treason now rests on statute, and the doctrine of constructive treason is discouraged, if not exploded. *See* 1 *Mary, st.* 1, *c.* 1, *s.* 1 (*ante*, p. 931); *and* 3 *St. Tr.* 368, 1466, 1472; 6 *St. Tr.* 902, *n.*; 15 *St. Tr.* 522; 15 *St. Tr.* 522, *n.*; 24 *St. Tr.* 877; 32 *St. Tr.* 431.

Everything wilfully or deliberately done or attempted, whereby the King's life may be endangered, is an overt act of compassing his death. *Fost.* 195. Killing the King is an overt act of compassing his death, and was so laid in the case of the regicides. *Kel. (J.)* 8. So, going armed for the purpose of killing the King; *R.* v. *Somerville*, 1 *Anderson*, 104; providing arms, ammunition, poison, or the like, for the purpose of killing the King; 1 *Hale*, 108; 3 *Co. Inst.* 12; conspirators meeting and consulting on the means of killing the King; *Fost.* 195: *R.* v. *Sir H. Vane, Kel. (J.)* 15; 6 *St. Tr.* 119: *R.* v. *Tonge, Kel. (J.)* 17; 6 *St. Tr.* 225; *and see Kel. (J.)* 81; or of deposing him, or of usurping the powers of government; *R.* v. *Hardy*, 1 *East, P. C.* 60; 24 *St. Tr.* 199; or resolving to do

it; *R.* v. *Rookwood*, 13 *St. Tr.* 139: *R.* v. *Charnock*, 12 *St. Tr.* 1377; 2 *Salk.* 631; acting as counsel against the King, in order to take away his life; *R.* v. *Cook*, *Kel.* (*J.*) 12; 2 *St. Tr.* 1077; *and see R.* v. *Harrison*, 5 *St. Tr.* 1008; 2 *Steph. Hist. Cr. L.* 241: all these, and the like, are sufficient overt acts of compassing the King's death.

So, other species of high treason, which are distinct heads of treason in themselves, may be laid as overt acts of compassing the King's death (*see* 39 & 40 *G.* 3, *c.* 93, *supra*). Thus, the following have been held to be sufficient overt acts of compassing the King's death: levying war *directly* against the King: *Fost.* 197, 210, 211; 1 *Hale*, 122, 123, 151; *Kel.* (*J.*) 21; 3 *Co. Inst.* 12; 13 *St. Tr.* 110, 113: *R.* v. *Hensey*, 19 *St. Tr.* 1341 (but not a mere constructive levying of war, such as pulling down all inclosures, or the like, 1 *Hale*, 123; *see post*, p. 943); or even a conspiracy to levy war directly against the King, for the purpose of dethroning him, or of obliging him to change his measures, or the like; *Fost.* 197, 211; 1 *Hale*, 119, 121: *R.* v. *Freind*, 13 *St. Tr.* 1: *R.* v. *Darrel*, 10 *Mod.* 321: *R.* v. *Layer*, 16 *St. Tr.* 93: *R.* v. *Cammion*, *Sav.* 3: *R.* v. *Lord Russell*, 9 *St. Tr.* 577: *R.* v. *Sidney*, 9 *St. Tr.* 817: *R.* v. *Cook*, 13 *St. Tr.* 311 (but not a conspiracy to effect a rising for the purpose of throwing down all inclosures, or of any other species of constructive levying of war; *Fost.* 213; *per Holt*, C.J., *Holt*, 682; *per Cur.*, 10 *Mod.* 322); adhering to the King's enemies: *Fost.* 196, 197: *R.* v. *Hardina*, 2 *Vent.* 315: *R.* v. *Lord Preston*, 12 *St. Tr.* 645: *R.* v. *Stone*, 25 *St. Tr.* 1155; 6 *T. R.* 527; inciting foreigners to invade the realm: *Fost.* 196; 1 *Hale*, 120; 3 *Co. Inst.* 14: *R.* v. *Dr. Story*, 3 *Dyer*, 298A, 300B; 1 *St. Tr.* 1087 (where the indictment is incorrectly set out (*see K. B. Rolls*, 1571): *R.* v. *Parkyns*, 13 *St. Tr.* 63.

Writings which import a compassing of the King's death are sufficient overt acts of this species of treason, if published; 1 *Hale*, 118; 3 *Co. Inst.* 14; *Fost.* 198; 1 *Hawk. c.* 17, *s.* 31; as, for instance, writings exciting persons to kill the King; *R.* v. *Twyn*, *Kel.* (*J.*) 22; 6 *St. Tr.* 513, *n.*; or the like. *See the cases collected in Pyne's case*, *Cro. Car.* 117. So, words of advice or persuasion are sufficient overt acts of this species of treason, if they advise or persuade to an act which would of itself (if committed) be a sufficient overt act. *Fost.* 195, 200: *R.* v. *Charnock*, 12 *St. Tr.* 1377; 2 *Salk.* 631. So, words may be laid in the indictment to explain an act; as, for instance, an act seemingly innocent in itself may be shown to be an overt act of treason, by its connection with words spoken by the party at the time. 1 *Hale*, 115; *and see R.* v. *Parkyns*, 13 *St. Tr.* 63: *R.* v. *Orohagan*, *Cro. Car.* 332: *R.* v. *Lee*, 1 *St. Tr.* 1403. But loose words which have no reference to any act or design, or which are not words of persuasion or advice, cannot be deemed overt acts of treason. *Fost.* 200–207: *R.* v. *Theving*, 3 *Harg. St. Tr.* 79–90.

Where words or writings are laid as overt acts, it is sufficient to set forth the substance of them; *R.* v. *Francia*, 15 *St. Tr.* 897: *R.* v. *Lord Preston*, 12 *St. Tr.* 645: *R.* v. *Watson*, 2 *Stark.* (*N. P.*) 137; 32 *St. Tr.* 1; for in no case is it necessary that the whole detail of the evidence should be set forth; it is sufficient that the charge be reduced to a reasonable certainty, so that the defendant may be apprised of its nature, and may be prepared to answer it. *Fost.* 194.

Evidence.

The evidence must be applied to the proof of the overt acts, and not to the proof of the principal treason: for the overt act is the charge to which the prisoner must apply his defence. And whether the overt act

proved be a sufficient overt act of the principal treason laid in the indictment, is a matter of law to be determined by the court. No evidence may be admitted of any overt act not laid in the indictment: 7 & 8 *W.* 3, *c.* 3, *s.* 8 (*ante*, p. 932); that is to say, no overt act amounting to a distinct independent charge, although it be an overt act of the species of treason charged, shall be admitted in evidence, unless it be expressly laid in the indictment; but if an overt act not laid amount to a direct proof of any other overt act which is laid, it may be given in evidence to prove such overt act. *R.* v. *Rookwood*, 13 *St. Tr.* 139, 661: *R.* v. *Deacon*, 18 *St. Tr.* 365, 369; *Fost.* 9: *R.* v. *Lowicke*, 13 *St. Tr.* 267: *R.* v. *Layer*, 16 *St. Tr.* 98. Words spoken or written and published may constitute an overt act if relating to a treasonable act or design. 5 *St. Tr.* 983; 10 *St. Tr.* 277, 295; 22 *St. Tr.* 480, *n.*: *R.* v. *Wedderburne*, 18 *St. Tr.* 425; *Fost.* 22: *and see* 1 *St. Tr. xxvi., xxxviii.*

Although unpublished writings cannot be laid as an overt act, yet if they tend to prove an overt act laid, they may be admitted in evidence for that purpose. *R.* v. *Lord Preston*, 12 *St. Tr.* 645: *R.* v. *Layer*, 16 *St. Tr.* 98, 280: *Anderton's case*, 12 *St. Tr.* 1245: *Twyn's case*, 6 *St. Tr.* 513, *n.*: and *R.* v. *Hensey*, 1 *Burr.* 642, 644; 19 *St. Tr.* 1344. In *Algernon Sidney's case* (*Fost.* 198; 9 *St. Tr.* 817), if the papers found in his closet had been plainly referable to the other treasonable practices charged in the indictment, they might indisputably have been read in evidence against him, although not published. And, it is no objection that the writings, or any other articles, were not found until after the apprehension of the defendant. *R.* v. *Watson*, 2 *Stark.* (*N. P.*) 137; 32 *St. Tr.* 1.

Where words of incitement have reference to an act, after giving evidence of the words, you may give evidence of the act, in order fully to explain them. *R.* v. *Lord G. Gordon*, *Doug.* 590, 593: 21 *St. Tr.* 485.

Where a conspiracy is laid as an overt act, the acts of any of the conspirators in furtherance of the common design may be given in evidence against all. *R.* v. *Horne Tooke*, 1 *East*, *P. C.* 98: *R.* v. *Hardy*, 1 *East*, *P. C.* 99; 24 *St. Tr.* 199: *R.* v. *Stone*, 25 *St. Tr.* 1155; 6 *T. R.* 527; 3 *R. R.* 253: *R.* v. *M'Cafferty*, 10 *Cox*, 603; *Ir. Rep.* 1 *C. L.* 363: *and see Kel.* (*J.*) 19, 20 (*and see ante*, p. 306). In such a case, the first thing to be proved is the conspiracy; secondly, evidence must be given to connect the defendant with it; and lastly, if it be intended to give in evidence against the defendant the acts of any other person, you must show that such person was also a member of the same conspiracy, and that the act done was in furtherance of the common design. *See R.* v. *Sidney*, 9 *St. Tr.* 817, *etc.*: *R.* v. *Lord Lovat*, 18 *St. Tr.* 529; *and ante*, p. 306, *et seq.*

Time.]—The time at which the overt acts are alleged to have been committed need not be proved as laid; it is sufficient if they be proved to have been committed at any time within three years before the finding of the indictment. *R.* v. *Charnock*, 1 *Salk*, 288; 12 *St. Tr.* 1377: *Sir H. Vane's case*, 6 *St. Tr.* 123, *Kel* (*J.*). 16: *R.* v. *Lord Balmerino*, 18 *St. Tr.* 441: *R.* v. *Townley*, 18 *St. Tr.* 1329; *Fost.* 7, 8.

Place.]—7 *G.* 4, *c.* 64, *ss.* 12, 13 (*ante*, p. 43), *do not apply to treason.* An overt act must be proved to have been committed in the proper county. *See R.* v. *Lord Preston*, 12 *St. Tr.* 377: *R.* v. *Hensey*, 19 *St. Tr.* 1341, 1345: *Sir H. Vane's case*, 6 *St. Tr.* 123, 129, *n.*: *R.* v. *Hardie*, 1 *St. Tr.*, *N. S.* 609, *and ante*, p. 44. But if any one overt act be proved against the defendant in the proper county, acts of treason tending to prove such overt act laid, though done in a foreign county, may be given

in evidence; and this was done in nearly all the trials of the rebels in the year 1746. *R.* v. *Deacon, Fost.* 9, 10; *R.* v. *Wedderburn, Id.* 22.

Place in foreign treasons.]—As to laying and proving place in cases of treason where all the overt acts are proved to have taken place out of the realm, *see post*, p. 945.

Where several overt acts are laid, proof of any one of them will maintain the count, provided the overt act so proved is a sufficient overt act of the species of treason charged in the indictment. 1 *Hale*, 122; *Fost.* 194.

The prisoner is not bound to show what was the object or meaning of the acts done by him; it is for the Crown to make out that they amount to the treason charged in the indictment. *R.* v. *Frost*, 4 *St. Tr., N. S.* 85 9 *C. & P.* 129.

Corroboration.]—There must be two witnesses to prove the treason, both of them to the same overt act, or one of them to one, and the other of them to another overt act of *the same* treason; unless the defendant shall willingly, without violence, confess the same; 7 & 8 *W.* 3, *c.* 3, *ss.* 2, 4 (*ante*, pp. 931, 932), *and see* 5 *St. Tr.* 977, *n.* But this rule does not apply in cases of high treason in compassing or imagining the death or destruction, maiming or wounding of the King, and of misprision of such treason, where the overt acts alleged in the indictment shall be any attempt upon his person; in which cases the prisoner is triable in the same manner and upon the like evidence as if charged with murder: 39 & 40 *G.* 3, *c.* 93 (*ante*, p. 934); 57 *G.* 3, *c.* 6, *s.* 4 (*ante*, p. 935); 5 & 6 *Vict. c.* 51, *s.* 1 (*ante*, p. 936). If the jury do not give credit to both the witnesses, the defendant shall be acquitted. *R.* v. *Palmer*, 7 *St. Tr.* 1067, 1112. But where the overt act is composite, made up of several circumstances and passing through several stages, it is not necessary that there should be two witnesses to each circumstance and at each stage. It is enough if the joint testimony of two or more witnesses establish the act as a whole. *R.* v. *M'Cafferty, Ir. Rep.* 1 *C. L.* 363; 10 *Cox*, 603. And one witness is sufficient to prove a collateral fact; *Fost.* 242; as, that the defendant is a natural-born subject; *R.* v. *Vaughan*, 13 *St. Tr.* 485; or a matter of inducement, or the like, 13 *St. Tr.* 535. As to proof of confessions by the accused, *R.* v. *Deacon*, 18 *St. Tr.* 369: *Tonge's case*, 6 *St. Tr.* 227, 228: *R.* v. *Crossfield*, 26 *St. Tr.* 57, *and ante*, p. 325. As to evidence of accomplices, *see ante*, p. 390.

List of witnesses.]—On all prosecutions for treason or misprision of treason, except those triable as if the charge were murder, 39 & 40 *G.* 3, *c.* 93; 57 *G.* 3, *c.* 6, *s.* 1; 5 & 6 *Vict. c.* 51, *s.* 1 (*ante*, pp. 934–936); a copy of the indictment and a list of the witnesses for the prosecution must be delivered to the accused ten days before the trial. 7 *Anne, c.* 21, *s.* 14 (*ante*, p. 933). It would seem to have formerly been safer to deliver a copy of the caption with that of the indictment; *Bacon Abr. Treason* (*C. c.*); *but see now R.* v. *O'Connell*, 5 *St. Tr., N. S.* 28: *R.* v. *Burke*, 10 *Cox*, 519. A bill of indictment for treason was found on the 11th December, on the 12th, copies of the indictment and of the jury panel were delivered to the prisoner; and on the 17th, a copy of the list of witnesses was delivered to him. The prisoner was arraigned on the 31st December, and pleaded: and upon the first witness being called for the Crown, it was objected that the list of witnesses had not been delivered according to the statute. Upon a case reserved, it was held, by nine judges to six, that the delivery of the list was not a good delivery

in point of law: but it was also held, by a like majority, that the objection was too late after plea pleaded. And it was agreed by all the judges, that if the objection had been taken in due time, the only effect of it would have been a postponement of the trial, to give time for a proper delivery of the list. *R.* v. *Frost*, 4 *St. Tr., N. S.* 35; 2 *Mood. C. C.* 140; 9 *C. & P.* 129. And so the fact that a true copy of the indictment has not been furnished to the prisoner is not matter for a plea, but is only a ground for postponing the trial. *R.* v. *Burke*, 10 *Cox*, 519.

List of jury.]—7 *Anne*, *c.* 21, *s.* 14 (*s.* 11 *in Ruffhead*), also contained provisions as to a list of the petty jurors which were *repealed* as to England by 6 *G.* 4, *c.* 50, *s.* 62, and replaced by *s.* 21 of that Act, under which the list of the petty jurors, with names, professions, and places of abode, must be delivered in the presence of two credible witnesses ten days before the day of trial, if the trial is in the King's Bench Division, and ten days before the day of arraignment if the trial is in any other court. The obligation does not apply where the particular treason is triable in the same way as murder. *See* 39 & 40 *G.* 3, *c.* 93 (*ante*, p. 934); 6 *G.* 4, *c.* 50, *s.* 21 (*ante*, p. 935); 5 & 6 *Vict. c.* 51, *s.* 1 (*ante*, p. 936).

Form of a Count for levying War. (25 *Edw.* 3, *st.* 5, *c.* 2, *ante*, p. 928.)

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., being a subject of our said lord the King, not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, as a false traitor against our said lord the King, and wholly withdrawing the allegiance, fidelity and obedience which every true and faithful subject of our said lord the King should and of right ought to bear towards our said lord the King, on the said first day of June, in the year aforesaid, together with divers other false traitors to the jurors aforesaid unknown, armed and arrayed in a warlike manner, that is to say, with guns, muskets, blunderbusses, pistols, swords, bayonets, pikes and other weapons, being then unlawfully, maliciously, and traitorously assembled and gathered together against our said lord the King, most wickedly, maliciously and traitorously did levy and make war against our said lord the King within this realm, and did then maliciously and traitorously attempt and endeavour by force and arms to subvert and destroy the constitution and government of this realm, as by law established, and deprive and depose our said lord the King of and from the style, honour and kingly name of the imperial crown of this realm; in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending, contrary to the duty of the allegiance of him the said J. S.; against the form of the statutes in that case made and provided and against the peace, etc.

In this count it is not necessary to set out the particular acts of the defendant; it is sufficient to allege generally, that he assembled with a multitude, armed and arrayed in warlike manner, and levied war. Fost. 220. *For punishment, see ante*, p. 938.

Evidence.

In order to maintain this count, it is necessary to prove that which in law amounts to a levying of war, directly or constructively, against the King in his realm: and to prove that the defendant was either actually

engaged in it, or present aiding and abetting. Levying war in *Ireland* is treason, by force of *Poyning's Act* (10 *H.* 7, *c.* 22, *Ir.*). *Smith O'Brien* v. *R.*, 7 *St. Tr., N. S.* 1; 2 *H. L. C.* 465. As to the meaning of "realm," *see ante*, p. 929.

In order to constitute a levying of war, the number of persons assembled is not material; three or four will constitute it as fully as a thousand. 3 *Co. Inst.* 9. Nor is it necessary that they should be *more guerrino arraiati*, armed with military weapons, with colours flying, etc., although it is usually so stated in the indictment. *Fost.* 208: *and see R.* v. *Dammaree and Purchase*, *Fost.* 208; 15 *St. Tr.* 521, 606, 645. Nor is actual fighting necessary to constitute a levying of war: *Fost.* 218; 1 *Hale*, 144; for, as the court held in *Vaughan's case* (13 *St. Tr.* 485; 2 *Salk.* 634), enlisting and marching are sufficient, without coming to battle. But there must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature. *R.* v. *Frost*, 4 *St. Tr., N. S.* 85; 9 *C. & P.* 129. As to levying war by use of dangerous explosives, *see R.* v. *Gallagher*, 16 *Cox*, 291 (*Ir.*): *R.* v. *Deasy*, 15 *Cox*, 334. After an action has taken place, it is termed *bellum percussum*; before it, *bellum levatum*. *See* 15 *St. Tr.* 525, *n.*

War levied against the King is of two kinds—direct and constructive. It is said to be *direct*, when the war is levied directly against the King or his forces, with intent to do some injury to his person, to imprison him, or the like: 1 *Hale*, 131, 132; such, for instance, as open rebellion, for the purpose of deposing or imprisoning the King, or of getting him into the power of the rebels, or of forcing him to put away his ministers, or the like; 1 *Hale*, 152; *Fost.* 210; *and see R.* v. *The Earls of Essex and Southampton*, *Moore*, 621; 1 *St. Tr.* 1333; holding or defending any of the King's castles, forts, or ships against the King or his forces, or delivering them up to rebels, through treachery; 2 *Co. Inst.* 10; *Fost.* 219; 1 *Hale*, 525, 526. To constitute levying war it is not necessary that great numbers should assemble or military arms or array should be displayed or actual force be used. *R.* v. *Hardie*, 1 *St. Tr., N. S.* 609: *R.* v. *Gallagher*, 16 *Cox*, 291 (*Ir.*). Levying war is said to be *indirect* or *constructive* when it is levied for the purpose of effecting innovations of a public and general nature by an armed force; *Fost.* 211; as, for the purpose of attempting by force to obtain the repeal of a statute, to alter the religion established by law, or to obtain the redress of any other public grievance, real or pretended; 1 *Hawk. c.* 17, *s.* 26; 1 *Hale*, 153; *Fost.* 211; 3 *Co. Inst.* 9, 10: *R.* v. *Lord G. Gordon*, 21 *St. Tr.* 485; 2 *Dougl.* 590: *and see* 13 *St. Tr.* 61; 15 *St. Tr.* 527, *n.*, 606, *n.*; 21 *St. Tr.* 644: *R.* v. *Thistlewood*, 33 *St. Tr.* 681, 955; or an insurrection for the purpose of throwing down all inclosures, pulling down all bawdy houses, opening all prisons, etc., expelling all strangers, enhancing the price of wages generally, or the like. *R.* v. *Dammaree and Purchase*, *Fost.* 213; 1 *Hale*, 132: *R.* v. *Bradshaw*, *Poph.* 122: *R.* v. *Messenger*, *Kel.* (*J.*) 70–79; 6 *St. Tr.* 879. Therefore, where a mob assembled for the purpose of destroying all the Protestant dissenting meeting-houses, and actually pulled down two, it was held to be treason. *R.* v. *Dammaree*, 15 *St. Tr.* 521, 605: *R.* v. *Purchase*, *Id.* 645. A mere rising or tumult is not treasonable, unless for a purpose of a public or general nature. *R.* v. *Hardie*, 1 *St. Tr., N. S.* 609: *R.* v. *Munroe*, *Id.* 1356. Thus an insurrection for the purpose of throwing down the inclosures of a particular manor, park, common, etc., or upon a mere quarrel between private persons, *Fost.* 210; 1 *Hale*, 131, 133, 149, or to deliver one or more particular persons out of prison (they not being imprisoned for treason), 1 *Hale*, 134, or holding a house by force against a sheriff and *posse comitatus*, 1 *Hale*, 146, is not

treason. So, if an armed body of men enter a town, their object being not to take it, or to attack the military force there, but merely to make a demonstration of their strength to the magistracy, in order to procure the liberation or mitigate the punishment of prisoners convicted of some political offence, this, though an aggravated misdemeanor, is not high treason. *R.* v. *Frost*, 4 *St. Tr., N. S.* 85; 9 *C. & P.* 129.

It is said also, in order to maintain this count, proof must be given of a war actually levied, and not merely of a conspiracy to levy it. 1 *Hale*, 141–148; 1 *Hawk. c.* 17, *s.* 27. But, according to *Foster*, the conspiracy may be dealt with as an overt act in compassing the King's death. *Fost.* 195.

In the case of war levied directly against the King, all persons assembled and marching with the rebels are guilty of treason, whether they are aware of the purpose of the assembly, or aid and assist in committing acts of violence, or not; *R.* v. *The Earls of Essex and Southampton*, 1 *St. Tr.* 1333; *Moore*, 621; unless compelled to join and continue with them *pro timore mortis*; *Fost.* 216, 217; 3 *Co. Inst.* 10; 1 *Hale*, 49, 51, 139; and actual compulsion is an excuse for adhering to rebels, but mere apprehension of loss of property or injury not endangering the person is not an excuse. *R.* v. *M'Growther*, 18 *St. Tr.* 391; *Fost.* 18, 217; 1 *East, P. C.* 71: *R.* v. *Gordon*, 1 *East, P. C.* 71; *and see ante*, p. 30. But in the case of a constructive levying of war, those only of the rabble who actually aid and assist in doing those acts of violence which form the constructive treason, are traitors; the rest are merely rioters. *See R.* v. *Messenger*, *Kel.* (*J.*) 70–79; 1 *Sid.* 358; 6 *St. Tr.* 879.

Form of Indictment for adhering to the King's Enemies abroad when tried in the King's Bench Division. (23 *Edw.* 3, *st.* 5, *c.* 2, *ante*, p. 928; 35 *H.* 8, *c.* 2, *s.* 1, *ante*, p. 929.)

County of the county of London and the county of Middlesex, to wit:—The jurors for our lord the King upon their oath present that on the —— day of ——, in the —— year of the reign of our said lord the King, and long before and continually from thence until —— an open and public war was [and is yet] prosecuted and carried on by —— against our said lord the King and his subjects, the said —— then being an enemy of our said lord the King, and that J. S., then being a subject of our said lord the King, and well knowing the premises, but not regarding the duty of his allegiance, nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil, as a false traitor against our said lord the King, and wholly withdrawing the allegiance, fidelity and obedience which every true and faithful subject of our said lord the King should and of right ought to bear towards our said lord the King, and contriving and with all his strength intending to aid and assist the said enemy of our said lord the King [in the prosecution of the said war] against our said lord the King and his subjects heretofore, and during the said war, to wit, on the said first day of June, in the year aforesaid, at —— in —— in parts beyond the seas without this realm of England, and on divers other days as well before as after that day, as well at —— as elsewhere in ——, unlawfully, maliciously and traitorously was adhering to, and aiding and comforting the said ——, the said —— then being an enemy of our said lord the King: AND THAT in the prosecution, performance and execution of his treason and traitorous adhering aforesaid, he the said J. S., as such false traitor as aforesaid, during the said war, to wit, on the said first day of June, in

the year last aforesaid, and on divers, *etc.* [*here set out the overt acts, introducing each overt act thus:* and in further prosecution, performance, and execution of his treason and traitorous adhering aforesaid, he the said J. S., as such false traitor as aforesaid, afterwards, and during the said war, to wit, on, *etc., etc.; and concluding the count thus*]: in contempt of our said lord the King and his laws, to the evil example of all others in like cases offending, contrary to the duty of the allegiance of him the said J. S.; against the form [*as ante*, p. 465]. *See R.* v. *Lynch* [1903] 1 *K. B.* 444; 67 *J. P. Rep.* 41; 20 *Cox*, 468. *The special acts of adherence must be set forth in the indictment as overt acts; but it is not necessary in this or in any other case of treason, that in laying the overt acts the details of the evidence intended to be given at the trial should be stated; it is sufficient if the charge be reduced to a reasonable certainty, so that the defendant may be apprised of the nature of the offence with which he is charged.* *Fost.* 194, 220.

Venue: Where the King's Bench "shall sit and be kept" (35 *H.* 8, *c.* 2, *s.* 1, *ante*, p. 929). *This is now "the county of the county of London and the county of Middlesex."* *By* 51 *&* 52 *Vict. c.* 41, *s.* 89, *sub-s.* 3, *"the county of London and the county of Middlesex shall be deemed to be one county for the purpose of all legal proceedings civil or criminal" . . . in any court except the Court of Quarter Sessions, and power was given for the making of rules of the Supreme Court for the purpose of carrying this section into effect. See the rules, ante*, p. 195. *This offence may also be tried by special commission. See* 35 *H.* 8, *c.* 2, *s.* 1 (*ante*, p. 929). *Punishment, see ante*, p. 938.

In the precedent of a count for the offence of adhering to the King's enemies contained in editions of this work published before the passing of 14 *&* 15 *Vict. c.* 100 (*Criminal Procedure Act*, 1851), *see s.* 23, *ante*, p. 35), *and s.* 24 (*ante*, p. 54), *it was alleged by way of prefatory averment that an open and public war was being carried on "in the county of ——"; as in R.* v. *Stone*, 25 *St. Tr.* 1155, *and other cases. This, however, is not now necessary, and never seems to have been so in cases where both the adherence charged and the enemies adhered to were without the realm.*

The count is proved in the same manner as the count for compassing the King's death (*see ante*, p. 939, *et seq.*), namely, by proving one or more of the overt acts laid. The fact of the persons adhered to being enemies may be proved by the production of the Gazette containing the proclamation, if war were formally proclaimed, or public notoriety is sufficient evidence of it. *Y. B.* 19 *E.* 4, *f.* 5; *Fost.* 219; 1 *Hale*, 164. And whether they are enemies or not, is a matter of fact to be determined by the jury. *Id.*

An actual adherence must be proved. A mere conspiracy or intention to adhere is not treason within this branch of the statute, although probably such a conspiracy might be laid as an overt act of compassing the King's death. But if you can prove such a conspiracy, and connect the defendant with it by evidence, and can prove an act done by any one of the conspirators in furtherance of the common design, you may give it in evidence against the defendant, if it tend to prove any of the overt acts laid in the indictment; for the act of one, in such a case, is the act of all. *R.* v. *Stone*, 25 *St. Tr.* 1155; 6 *T. R.* 527 (*see ante*, p. 940).

Overt acts.]—The words in the *Treason Act*, 1351 (*ante*, p. 928), are—"or be adherent to the enemies of our lord the King in his realm, giving to them aid or comfort in the realm or elsewhere." The offence defined by these words is "adhering to the King's enemies within the land or without, and declaring the same by some overt act;" 3 *Co. Inst.* 3, 10, 11; *Co. Litt.* 261 (*b*); the offence being complete though both the adherence and the enemies adhered to are without the realm. 1 *Hale*,

91, 159, 165, 166; 1 *Hawk. c.* 17, *s.* 28; 1 *East, P. C.* 78; *Holbourne's Readings*, 12, 13; *Bacon, Law Tracts*, 164: *R.* v. *Vaughan*, 13 *St. Tr.* 485, 525, 531, *Holt*, C.J. (a case under 28 *H.* 8, *c.* 15, for treason on the high seas); 18 *G.* 2, *c.* 30 (preamble): *R.* v. *Maclane*, 26 *St. Tr.* 722, 725, *Osgoode*, C.J. (*Quebec*): *Mulcahy* v. *R.*, *L. R.* 3 *H. L.* 306, 317, *Willes*, J.: *R.* v. *Lynch*, [1903] 1 *K. B.* 444; *and see* the records (preserved in the Record Office) of the following cases, all of which contain indictments under 35 *H.* 8, *c.* 2, for adhering to, aiding, and assisting the King's enemies abroad, viz.: *R.* v. *Lord Wentworth* (referred to 4 *St. Tr.* 314): *R.* v. *Grymston*: *R.* v. *Chamberlayn* (1559: for the surrender of Calais, *Baga de Secretis, pouches* 38, 39): *R.* v. *Lord Middleton and John Stafford* (*K. B. Rolls*, 1713: for assisting the King of France in fighting against the British in France): *R.* v. *Duke of Wharton* (1728: for assisting the King of Spain in the siege of Gibraltar, *Baga de S. pouch* 67): *R.* v. *Cundell* (1812: for assisting "the French Government and the men of France under the said Government" in fighting against the British in the Isle of France, *Baga de S. pouch* 89). Every assistance given by the King's subjects to his enemies, unless given from a well-grounded apprehension of immediate death in case of a refusal, is high treason within this branch of the statute. 1 *Hale*, 159. Therefore, if a British subject join the King's enemies in acts of hostility against this country; *Fost.* 216; 1 *Hawk. c.* 17, *s.* 28; or even against the King's allies; *Fost.* 220: *R.* v. *Vaughan*, 2 *Salk.* 635; 13 *St. Tr.* 485; or join the enemy's forces, although no acts of hostility be committed by them either against the King or his allies; *Fost.* 218: *R.* v. *Vaughan*, 2 *Salk.* 634; 13 *St. Tr.* 485; or raise troops for the enemy; *R.* v. *Harding*, 2 *Vent.* 315 (where, after a special verdict, it was held that the indictment did not sufficiently charge an adherence to the King's enemies, as it did not state who those enemies were; but the prisoner was convicted of compassing the King's death); or deliver up the King's castles, forts, or ships of war to the King's enemies through treachery or in combination with them; *Fost.* 219; 3 *Co. Inst.* 10; 1 *Hale*, 168; or even detain the King's castles, etc., from him, if it be done in confederacy with the enemy; *Fost.* 219; 1 *Hale*, 326; or send money, arms, intelligence, or the like, to the King's enemies; *Fost.* 217; although such money, intelligence, etc., be intercepted and never reach them; *R.* v. *Gregg*, 14 *St. Tr.* 1371, 1376, *n*; *Fost.* 217, 218: *R.* v. *Hensey*, 19 *St. Tr.* 1341; 1 *Burr.* 642; *R.* v. *De la Motte*, 21 *St. Tr.* 808: *R.* v. *Lord Preston*, 12 *St. Tr.* 645: *R.* v. *Tyrie*, 21 *St. Tr.* 815; all these are cases containing counts for adhering to the King's enemies, and the parties were guilty of high treason. *See also* the following Irish cases: *R.* v. *Jackson*, 25 *St. Tr.* 783: *R.* v. *Sheares*, 27 *St. Tr.* 255: *R.* v. *Cann*, *Id.* 399: *R.* v. *Byrne*, *Id.* 455: *R.* v. *Bond*, *Id.* 523. And where letters, etc., have been thus intercepted, it is much better to charge them to have been sent from the place where the venue was laid, to be delivered in parts beyond the seas, to the enemy, according to the fact, than to state them to have been sent *in partes transmarinas*, to be delivered to the enemy. *Fost.* 218. In *R.* v. *Stone*, 25 *St. Tr.* 1155; 6 *T. R.* 527, it was objected that the intelligence transmitted by the defendant to the enemy was calculated to dissuade them from invading this country, and was sent with that intent; but Lord *Kenyon*, C.J., said that whether the intelligence were calculated to dissuade or invite the enemy was immaterial; if it were such as was likely to prove useful to them, in enabling them to annoy us, defend themselves, or shape their attacks; sending such intelligence with a view of its reaching the enemy was undoubtedly high treason. If a British subject incite foreigners to invade this country, it is treason, whether the foreigners be enemies or not; if enemies, it is treason within this branch of the statute; if not

enemies, still it is an overt act of compassing the King's death. *Fost.* 196, 197; 1 *Hale*, 167. But if a British subject be in a foreign country when war breaks out between that country and this, and continue to reside there, or if during a truce he go to a foreign country, and return before the truce expires, this is no treason, unless he actually conspire with the enemy, or aid him in forwarding his measures for hostility. 1 *Hale*, 165, 166. Serving in war the king *de facto* is not treason. 11 *H.* 7, *c.* 1 (*ante*, p. 929). This statute appears not to apply in South Africa. *R.* v. *Botha*, 1 *Searle, Cape Supreme Ct.* 149.

Swearing fealty to a hostile power.]—If an Englishman during war between the King of England and France be taken by the French, and there swear fealty to the King of France, if it be done voluntarily, it is an adhering to the King's enemies; but if it be done for fear of his life, and he returns, as soon as he might, to the allegiance of the Crown of England, this is not an adherence to the King's enemies within the Act. 1 *Hale*, 167. And in *R.* v. *Lynch* [1903] 1 *K. B.* 444; 20 *Cox*, 468, the prisoner, a British subject, during the war between Great Britain and the South African Republic, subscribed a declaration of willingness to take up arms on behalf of and took an oath of allegiance to the South African Republic. He then obtained letters of naturalization from the South African Republic, and afterwards engaged in various acts of warfare against the British forces. He was indicted in the King's Bench Division of the High Court for high treason, viz., for adhering to the enemies of the late Queen, and the making of the aforesaid declaration and the taking of the aforesaid oath of allegiance were charged as overt acts, as were his various acts of warfare against the British forces in which he subsequently engaged. It was contended for the defence that the prisoner had by reason of the provisions of the *Naturalization Act*, 1870 (33 & 34 *Vict. c.* 14) *ss.* 4, 6, been guilty of no offence; but the court (Lord *Alverstone*, C.J., *Wills* and *Channell*, JJ.) held that the last mentioned statute does not empower a British subject to become naturalized as a subject of a hostile state in time of war, and that the act of becoming naturalized under such circumstances is itself an act of treason.

Enemies.]—As to the King's enemies within the meaning of this statute;—the subjects of all states against which his Majesty may have proclaimed or declared war, are his enemies; so are the subjects of states in actual hostility with us, whether war have been solemnly proclaimed or not. *Fost.* 219; 1 *Hale*, 162. But merely issuing letters of marque does not create a state of hostility between two states, although nearly equal to a state of war in its consequences. 1 *Hale*, 162. Nor is inciting the subjects of a state in amity with us to invade this country, treason within this branch of the statute, although it certainly would be an overt act of compassing the King's death. 1 *Hale*, 167. But if the subjects of a state in amity with us were to invade the country in a hostile manner, or otherwise commit hostilities against us, they would be enemies within the meaning of this statute, and adhering to them would be treason. *Fost.* 219; 1 *Hale*, 164; 3 *Co. Inst.* 11; 4 *Co. Inst.* 162: *R.* v. *Vaughan*, 2 *Salk.* 634; 13 *St. Tr.* 485. British subjects, however, can never be deemed the King's enemies within the meaning of this Act, and therefore to give relief or assistance to a rebel would not be treason within this branch of the statute. 3 *Co. Inst.* 11; 1 *Hale*, 159; 1 *Hawk. c.* 17, *s.* 28.

It must appear upon the face of the indictment that the persons adhered to were enemies.

Form of a Count on the Treason Act, 1795 (36 *G.* 3, *c.* 7), *s.* 1 (*ante*, p. 933), *for compassing, etc., the Death or Destruction of the King.*

And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S., being a subject of our said lord the King, not regarding the duty of his allegiance, [nor having the fear of God in his heart, but being moved and seduced by the instigation of the devil,] as a false traitor against our said lord the King, and wholly withdrawing the allegiance, fidelity and obedience which every true and faithful subject of our said lord the King should and of right ought to bear towards our said lord the King, on the first day of June, in the year last aforesaid, and on divers other days and times as well before as after, maliciously and traitorously, together with divers other false traitors, to the jurors aforesaid unknown, did compass, imagine, invent, devise, and intend the death and destruction of our said sovereign lord the King; and the said compassing, imagination, invention, device, and intention did then express, utter and declare, by divers overt acts and deeds hereinafter mentioned, that is to say: IN ORDER TO FULFIL, PERFECT, AND BRING TO EFFECT his most evil and wicked treason, and treasonable compassing, imagination, invention, device and intention aforesaid [*etc., etc., setting out the overt acts and concluding the count as in the form ante*, p. 465].

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126). *As to punishment, see* 54 *G.* 3, *c.* 146; 57 *G.* 3, *c.* 6, *s.* 6 (*ante*, pp. 934, 935).

Evidence.

The evidence necessary to support this count may readily be ascertained from the directions given *ante*, p. 939, *et seq.*, the same rules applying equally to this count as to the count for compassing the King's death.

Form of other Counts on the Treason Acts, 1795 *and* 1817. (36 *G.* 3, *c.* 7, *s.* 1; 57 *G.* 3, *c.* 6, *s.* 1, *ante*, pp. 933, 935.)

Commencement ut supra]—did compass, imagine, invent, devise, and intend certain bodily harm tending to the death and destruction of our said sovereign lord the King; and the said compassing, *etc., etc., ut supra.*

Commencement ut supra]—did compass, imagine, invent, devise, and intend to maim and wound our said sovereign lord the King; and the said compassing, *etc., etc., ut supra.*

Commencement ut supra]—did compass, imagine, invent, devise, and intend the imprisonment and restraint of the person of our said sovereign lord the King; and the said compassing, *etc., etc., ut supra.*

SECT. 2.

TREASON FELONY.

Statutes.

11 & 12 *Vict. c.* 12 (*Treason Felony Act*, 1848), *s.* 3.]—If any person whatsoever after the passing of this Act (April 22, 1848) shall, within the United Kingdom or without, compass, imagine, invent, devise, or intend

to deprive or depose our most gracious [lord] the [King], *his heirs or successors*, from the style, honour, or royal name, of the imperial crown of the United Kingdom, or of any other of [his] Majesty's dominions and countries, or to levy war against [his] Majesty, *his heirs or successors*, within any part of the United Kingdom, in order by force or constraint to compel [him] *or them* to change [his] *or their* measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe both houses or either house of parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other [his] Majesty's dominions or countries under the obeisance of [his] Majesty, *his heirs or successors*, and such compassings, imaginations, inventions, devices or intentions, or any of them, shall express, utter, or declare by publishing any printing or writing, *or by open and advised speaking*, or by any overt act or deed, every person so offending shall be guilty of felony, and being convicted thereof shall be liable . . . to be transported beyond the seas for the term of his or her natural life. . . .

[*As to the history of this section, and its relation to the previous law, see R.* v. *Mitchel*, 6 *St. Tr., N. S.* 599, *n. The words in italics were rep.* 54 *&* 55 *Vict. c.* 67, *S. L. R.; the other words omitted were rep.* 55 *&* 56 *Vict. c.* 19 (*S. L. R.*). *By s.* 30 *of the Interpretation Act*, 1889 (52 *&* 53 *Vict. c.* 63), "*unless a contrary intention appears*" *references in a statute whenever passed to the sovereign reigning when the Act was passed are to be read as references to the sovereign for the time being.*]

Sect. 5—*Overt acts.*]—It shall be lawful, in any indictment for any felony under this Act, to charge against the offender any number of the matters, acts, or deeds, by which such compassings, imaginations, inventions, devices or intentions as aforesaid, or any of them, shall have been expressed, uttered, or declared.

Sect. 6—*Not to affect* 25 *Edw.* 3, *st.* 5, *c.* 2.]—Provided always that nothing herein contained shall lessen the force of or in any manner anything enacted by the *Treason Act*, 1351 (25 *Edw.* 3, *st.* 5, *c.* 2), *ante*, p. 928.

Sect. 7—*Indictment, etc., valid, though facts amount to treason.*]—Provided also that if the facts or matters alleged in an indictment for any felony under this Act shall amount in law to treason, such indictment shall not by reason thereof be deemed void, erroneous, or defective; and if the facts or matters proved on the trial of any person indicted for any felony under this Act shall amount in law to treason, such person shall not by reason thereof be entitled to be acquitted of such felony; but no person tried for such felony shall be afterwards prosecuted for treason upon the same facts.

Sect. 8—*Punishment of accessories.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable: and every accessory after the fact to any such felony shall on conviction be liable to be imprisoned, with or without hard labour, for any term not exceeding two years.

Sect. 10—*No costs to prosecutor or witnesses.*]—It shall not be lawful for any court before which any person shall be prosecuted or tried for any felony under this Act, to order payment to the prosecutor or the

witnesses of any costs which shall be incurred in preferring or prosecuting any such indictment. [*See ante*, p. 246.]

Indictment. (11 & 12 *Vict. c.* 12, *s.* 3, *ante*, p. 948.)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., A. B., and C. D., not regarding the duty of their allegiance, but wholly withdrawing the love, obedience, fidelity and allegiance which every true and faithful subject of our said lord the King does and of right ought to bear towards our said lord the King, at the parish of A., in the county of L. and within the jurisdiction of the said court, on the first day of June, in the year of our Lord ——, and on divers other days as well before as after that day, together with divers other evil-disposed persons to the jurors aforesaid unknown, feloniously and wickedly did compass, imagine, invent, devise, and intend to deprive and depose our said lord the King from the style, honour, and royal name of the imperial crown of the United Kingdom of Great Britain and Ireland; and the said felonious compassing, imagination, invention, device, and intention, then feloniously and wickedly did express, utter, and declare by divers overt acts and deeds hereinafter mentioned, that is to say:—In order to fulfil, perfect, and bring to effect their felonious compassing, imagination, invention, device, and intention aforesaid, they the said J. S., A. B., and C. D. afterwards, to wit, on the said first day of June, in the year aforesaid, and on divers other days and times as well before as after that day, feloniously and wickedly did conspire, consult, confederate, assemble and meet together with divers other evil-disposed persons to the jurors aforesaid unknown, to raise, make and levy insurrection and rebellion against our said lord the King within this realm: and further to fulfil, perfect, and bring to effect [*etc., proceeding to state other overt acts in the like manner; and conclude the count thus*]: in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending; against the form [*as ante*, p. 465]. *Add counts charging a compassing to levy war, in order to compel the King to change his measures and counsels, or otherwise according to the facts. If the overt acts consisted in the publishing of any printing or writing, state them thus:*—"did express, utter and declare, by then feloniously publishing in a certain newspaper, called the ——, certain printed matter, that is to say" [*setting it out*]. *Where the indictment charges the prisoners with "compassing, imagining, inventing, devising and intending to deprive and depose our lord the King," etc., it is sufficient to allege as an overt act that the prisoners conspired to commit that offence. Mulcahy* v. *R.*, *L. R.* 3 *H. L.* 306; *Ir. Rep.* 1 *C. L.* 12. *Where there are several overt acts charged in one count, and a judgment is given on a general verdict of guilty on that count, such judgment will be sustained, though some of the matters alleged as overt acts may be improperly so alleged, provided that the count contains allegations of overt acts that are sufficient, and are sufficiently alleged. Id. The allegation, in one count, of several different overt acts of felony, is not objectionable under* 11 & 12 *Vict. c.* 12. *Id. Sending or supplying arms to be used in aid of a treasonable confederacy, having for its object the overthrow of the King's government, in any part of the United Kingdom, by force of arms, is a sufficient overt act expressing a compassing to depose or deprive the King. And it is not the less so because the arms are sold, and the motive of the sale is pecuniary profit, provided it is known that they are to be used in aid of insurrection. Secret storing of arms and sending them, under feigned*

addresses, into districts where the confederacy exists, with various contrivances to conceal their ultimate destination, and with knowledge of the confederacy, is evidence of the offence. And bringing arms to London, with a view to their transmission for such purpose, is a sufficient overt act within the jurisdiction of the Central Criminal Court. *R.* v. *Davitt*, 11 *Cox*, 676.

Venue: see R. v. *Meany*, 10 *Cox*, 506; *Ir. Rep.* 1 *C. L.* 500 (*C. C. R. Ir.*). *The following seem to be all the other reported cases on this statute:—R.* v. *Mitchel*, 6 *St. Tr., N. S.* 599; 3 *Cox*, 1: *R.* v. *O'Doherty*, 6 *St. Tr., N. S.* 831: *R.* v. *Dowling*, 7 *St. Tr., N. S.* 381; 3 *Cox*, 509: *R.* v. *Cuffey*, 7 *St. Tr., N. S.* 467; 3 *Cox*, 517; *R.* v. *Cumming*, 7 *St. Tr., N. S.* 485: *R.* v. *Duffy*, 7 *St. Tr., N. S.* 795: *R.* v. *Mullins*, 7 *St. Tr., N. S.* 1110; 3 *Cox*, 526: *R.* v. *Constantine*, 7 *St. Tr., N. S.* 1127: *R.* v. *Gallagher*, 15 *Cox*, 291: *R.* v. *Deasy*, 15 *Cox*, 334; *and see the charge to a grand jury on the Act by Alderson*, B., 6 *St. Tr., N. S.* 1129.

Felony: penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, not exceeding two years. 11 *&* 12 *Vict. c.* 12, *s.* 3; 20 *&* 21 *Vict. c.* 3 (*ante*, p. 235); 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to the evidence, see ante*, p. 939, *et seq. It is no objection that the facts proved amount in law to high treason.* 11 *&* 12 *Vict. c.* 12, *s.* 7 (*ante*, p. 949).

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

The costs of prosecution are not payable out of the local rate. 11 *&* 12 *Vict. c.* 12, *s.* 10 (*see ante*, pp. 246, 949).

Sect. 3.

Attempts to injure or alarm the Sovereign.

Statute.

5 *&* 6 *Vict. c.* 51 (*Treason Act*, 1842), *s.* 2.]—If any person shall wilfully discharge or attempt to discharge, or point, aim, or present at or near to the person of the [King], any gun, pistol, or any other description of fire-arms, or of other arms whatsoever, whether the same shall or shall not contain any explosive or destructive material, or shall discharge or cause to be discharged, or attempt to discharge or cause to be discharged, any explosive substance or material near to the person of the [King], or if any person shall wilfully strike or strike at, or attempt to strike or to strike at, the person of the [King], with any offensive weapon or in any other manner whatsoever, or if any person shall wilfully throw or attempt to throw any substance, matter or thing whatsoever, at or upon the person of the [King], with intent in any of the cases aforesaid to injure the person of the [King], or with intent in any of the cases aforesaid to break the public peace, or whereby the public peace may be endangered, or with intent in any of the cases aforesaid to alarm [his] Majesty: or if any person shall, near to the person of the [King], wilfully produce or have any gun, pistol, or any other description of fire-arms, or other arms whatsoever, or any explosive, destructive, or dangerous matter or thing whatsoever, with intent to use the same to injure the person of the [King], or to alarm [his] Majesty, every such person so offending shall be guilty of a high misdemeanor, and being convicted thereof in due course of law shall be liable, at the discretion of the court before which the said person shall be so

convicted, to be transported beyond the seas for the term of seven years, or to be imprisoned, . . . and during the period of such imprisonment to be publicly or privately whipped, as often and in such manner and form as the said court shall order and direct, not exceeding thrice. [*As to whipping, see ante*, p. 239. *It is submitted that the references in this Act to "the Queen" should be read as references to the sovereign for the time being. Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63, *s.* 30, *ante*, p. 949).]

For indictments and trials under this Act, see R. v. Bean, 4 *St. Tr., N. S.* 1382: *R. v. Hamilton*, 7 *St. Tr., N. S.* 1130: *R. v. Pate*, 8 *St. Tr., N. S.* 1: *R. v. O'Connor* [1872] *Cent. Cr. Ct. Sess. Pap.* p. 44.

Sect. 3.]—Provided, that nothing herein contained shall be deemed to alter in any respect the punishment which by law may now be inflicted, upon persons guilty of high treason or misprision of treason. [*See ante*, pp. 934, 935, 938.]

Indictment for presenting a Pistol at the King. (5 & 6 *Vict. c.* 51, *s.* 2.)

Commencement as ante, p. 433]—a certain pistol ("*any gun, pistol, or any description of fire-arms or of other arms whatsoever, whether the same shall or shall not contain any explosive or destructive material*") unlawfully and wilfully did point, aim, and present at ("*at or near to*") the person of our lord the King, with intent thereby then to alarm our said lord the King; against the form [*as ante*, p. 465]. *Add other counts varying the intent according to the terms of the statute.*

Misdemeanor: penal servitude for not more than seven and not less than three years, or imprisonment, with or without hard labour, not exceeding two years, with whipping during such imprisonment, as often and in such manner as the court shall order, not exceeding thrice. 5 & 6 *Vict. c.* 51, *s.* 2; 20 & 21 *Vict. c.* 3 (*ante*, p. 235); 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant presented the pistol at or near to the person of the King, as the case may be: and the intent as directed *ante*, pp. 303, 308, 339. It is immaterial whether the weapon was loaded or not.

Indictment for throwing at the Person of the King. (5 & 6 *Vict. c.* 51, *s.* 2.)

Commencement as ante, p. 433]—unlawfully and wilfully did throw ("*throw or attempt to throw*") at ("*at or upon*") the person of our lord the King, a certain substance, to wit, a certain stone ("*any substance, matter, or thing whatsoever*"), with intent thereby then to alarm our said lord the King; against the form [*as ante*, p. 465]. *Add counts varying the intent.*

Misdemeanor: see the last precedent.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

SECT. 4.

OFFENCES AGAINST THE FOREIGN ENLISTMENT ACT, 1870.

Statute.

33 & 34 *Vict.* c. 90, *s.* 1.]—This Act may be cited for all purposes as the "*Foreign Enlistment Act*, 1870." [*The Act took the place of* 59 *G.* 3, c. 69 (*rep.*). *As to its history, see* 1 *Steph. Hist. Cr. L.* 257; 7 *St. Tr., N. S.* 979, *n. In Ex parte Crawshay*, 8 *Cox*, 356, *the Court of Queen's Bench refused leave to a private prosecutor to file an information under* 59 *G.* 3, c. 69. *But an indictment was preferred in R.* v. *Granatelli*, 7 *St. Tr., N. S.* 979, *at the instance of a foreign ambassador. Corporations were held not subject to indictment under that Act. King of Two Sicilies* v. *Wilcox*, 7 *St. Tr., N. S.* 1049; 1 *Sim.* (*N. S.*) 334; 19 *L. J.* (*Ch.*) 481. *But see* 52 & 53 *Vict.* c. 63, *s.* 2, *sub-s.* 1, *and sched.*]

Sect. 2—*Application of Act.*]—This Act shall extend to all the dominions of [his] Majesty, including the adjacent territorial waters.

Sect. 3—*Commencement of Act.*]—This Act shall be proclaimed in every British possession by the governor thereof as soon as may be after he receives notice of this Act, and shall come into operation in that British possession on the day of such proclamation, and the time at which this Act comes into operation in any place is, as respects such place, referred to as the commencement of this Act. [*See R.* v. *Jameson* [1896] 2 *Q. B.* 425, *and as to proof of proclamation, ante*, pp. 348, 351.]

Sect. 4—*Penalty on enlistment in service of foreign state.*]—If any person, without the licence of [his] Majesty, being a British subject, within or without [his] Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with [his] Majesty, and in this Act referred to as a friendly state, or whether a British subject or not, within [his] Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid, he shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour. [*See R.* v. *Granatelli*, 7 *St. Tr., N. S.* 979: *Burton* v. *Pinkerton*, *L. R.* 2 *Ex.* 340.]

Sect. 5—*Penalty on leaving* [*his*] *Majesty's dominions with intent to serve a foreign state.*]—If any person, without the licence of [his] Majesty, being a British subject, quits or goes on board any ship with a view of quitting [his] Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state, or, whether a British subject or not, within [his] Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting [his] Majesty's dominions with the like intent, he shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Sect. 6—*Penalty on embarking persons under false representations as to service.*]—If any person induces any other person to quit [his] Majesty's dominions or to embark on any ship within [his] Majesty's dominions under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state, he shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

Sect. 7—*Penalty on taking illegally enlisted persons on board ship.*—If the master or owner of any ship, without the licence of [his] Majesty, knowingly either takes on board, or engages to take on board, or has on board such ship within [his] Majesty's dominions any of the following persons, in this Act referred to as illegally enlisted persons; that is to say,

(1) Any person who, being a British subject within or without the dominions of [his] Majesty, has, without the licence of [his] Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign state at war with any friendly state;

(2) Any person, being a British subject, who, without the licence of [his] Majesty, is about to quit [his] Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state;

(3) Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign state at war with a friendly state;

Such master or owner shall be guilty of an offence against this Act, and the following consequences shall ensue; that is to say,

(1) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour; and

(2) Such ship shall be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate or magistrates having the authority of two justices of the peace; and

(3) All illegally enlisted persons shall immediately on the discovery of the offence be taken on shore, and shall not be allowed to return to the ship.

Sect. 8—*Penalty on illegal Ship-building and illegal Expeditions.*]—If any person within [his] Majesty's dominions, without the licence of [his] Majesty, does any of the following acts; that is to say,

(1) Builds or agrees to build, or causes to be built any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state; or

(2) Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be

employed in the military or naval service of any foreign state at war with any friendly state; or

(3) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state; or

(4) Despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state;

Such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue:

(1) The offender shall be punishable by fine and imprisonment, or either of such punishments at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour;

(2) The ship in respect of which any such offence is committed, and her equipment, shall be forfeited to [his] Majesty:

Provided that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following; (that is to say):

(1) If forthwith upon a proclamation of neutrality being issued by [his] Majesty he gives notice to the secretary of state that he is so building, causing to be built, or equipping such ship, and furnishes such particulars of the contract and of any matters relating to, or done, or to be done under the contract as may be required by the secretary of state;

(2) If he gives such security, and takes and permits to be taken such other measures, if any, as the secretary of state may prescribe for ensuring that such ship shall not be despatched, delivered, or removed without the licence of [his] Majesty until the termination of such war as aforesaid. [*See The Gauntlet*, *L. R.* 4 *P. C.* 184: *The International*, *L. R.* 3 *A. & E.* 321.]

Sect. 9—*Presumption as to evidence in case of illegal ship.*]—Where any ship is built by order of or on behalf of any foreign state when at war with a friendly state, or is delivered to or to the order of such foreign state, or any person who to the knowledge of the person building is an agent of such foreign state, or is paid for by such foreign state, or such agent, and is employed in the military or naval service of such foreign state, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign state.

Sect. 10—*Penalty on aiding the warlike equipment of foreign ships.*]—If any person within the dominions of [his] Majesty, and without the licence of [his] Majesty—by adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting the warlike force of any ship which at the time of her being within the dominions of [his] Majesty was a ship in the military or naval service of any foreign state at war with any friendly state,—such person shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or

either of such punishments, at the discretion of the court before which the offender is convicted ; and imprisonment, if awarded, may be either with or without hard labour.

Sect. 11—*Penalty on fitting out naval or military expeditions without licence.*]—If any person within the limits of [his] Majesty's dominions, and without the licence of [his] Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue :

(1) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted ; and imprisonment, if awarded, may be either with or without hard labour ;

(2) All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to [his] Majesty.

[*It is not necessary to constitute an offence under this section that the expedition should be completely fitted out in this country. Any act of preparation of the expedition in this country is within the section. R.* v. *Sandoval*, 16 *Cox*, 206; 3 *T. L. R.* 411, 436, 498. *Therefore where the defendant had purchased guns and ammunition in this country, and had shipped them on a general ship here for the purpose of being put on board another ship in a foreign port, with the knowledge that they were to be used in a hostile demonstration against a friendly state, it was held that he was guilty of having prepared a naval expedition within the meaning of this section. Id.*

If an expedition is unlawfully prepared within the King's dominions, a British subject who assists therein, even without such dominions, is liable under this section. R. v. *Jameson* [1896] 2 *Q. B.* 425; 65 *L. J.* (*M. C.*) 218; *and see The Salvador, L. R.* 3 *P. C.* 218: *Att.-Gen.* v. *Sillem*, 2 *H. & C.* 431, *decided on* 59 *G.* 3, *c.* 69, *s.* 7 (*rep.*).]

Sect. 12—*Punishment of accessories.*]—Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender.

Sect. 13—*Limitation of term of imprisonment.*]—The term of imprisonment to be awarded in respect of any offence against this Act shall not exceed two years.

Sect. 14 *relates to the restoration of prize brought into British waters in breach of the neutrality of the realm, or by vessels equipped in breach of the Act.*

Sect. 15—*Licence by* [*his*] *Majesty, how granted.*]—For the purposes of this Act, a licence by [his] Majesty shall be under the sign manual of [his] Majesty, or be signified by order in council or by proclamation of [his] Majesty.

Sect. 16—*Jurisdiction in respect of offences by persons against Act.*]—Any offence against this Act shall, for all purposes of and incidental to the trial and punishment of any person guilty of any such offence, be deemed to have been committed either in the place in which the offence was wholly or partly committed, or in any place within [his] Majesty's dominions in which the person who committed such offence may be.

Sect. 17—*Venue in respect of offences by persons.*]—Any offence against this Act may be described in any indictment or other document relating to such offence, in cases where the mode of trial requires such a description, as having been committed at the place where it was wholly or partly committed, or it may be averred generally to have been committed within [his] Majesty's dominions, and the venue or local description in the margin may be that of the county, city, or place in which the trial is held. [*As to the necessary statements in the indictment, see R.* v. *Jameson* [1896] 2 *Q. B.* 425; 65 *L. J.* (*M. C.*) 218; 18 *Cox*, 392.]

Sect. 18—*Power to remove offenders for trial.*]—The following authorities, that is to say, in the United Kingdom any judge of a superior court, in any other place within the jurisdiction of any British court of justice, such court, or, if there are more courts than one, the court having the highest criminal jurisdiction in that place, may, by warrant, or instrument in the nature of a warrant in this section included in the term "warrant," direct that any offender charged with an offence against this Act shall be removed to some other place in [his] Majesty's dominions for trial in cases where it appears to the authority granting the warrant that the removal of such offender would be conducive to the interests of justice, and any prisoner so removed shall be triable at the place to which he is removed, in the same manner as if his offence had been committed at such place. Any warrant for the purposes of this section may be addressed to the master of any ship or to any other person or persons, and the person or persons to whom such warrant is addressed shall have power to convey the prisoner therein named to any place or places named in such warrant, and to deliver him, when arrived at such place or places, into the custody of any authority designated by such warrant. Every prisoner shall, during the time of his removal under any such warrant as aforesaid, be deemed to be in the legal custody of the person or persons empowered to remove him.

Sect. 19—*Jurisdiction in respect of forfeiture of ships for offences against Act.*]—All proceedings for the condemnation and forfeiture of a ship, or ship and equipment, or arms and munitions of war, in pursuance of this Act shall require the sanction of the secretary of state or such chief executive authority as is in this Act mentioned, and shall be had in the Court of Admiralty, and not in any other court; and the Court of Admiralty shall, in addition to any power given to the court by this Act, have in respect of any ship or other matter brought before it in pursuance of this Act all powers which it has in the case of a ship or matter brought before it in the exercise of its ordinary jurisdiction.

Sect. 20—*Regulations as to proceedings against the offender and against the ship.*]—Where any offence against this Act has been committed by any person by reason whereof a ship, or ship and equipment, or arms and munitions of war, has or have become liable to forfeiture, proceedings may be instituted contemporaneously or not, as may be thought fit, against the offender in any court having jurisdiction of the offence, and against the ship, or ship and equipment, or arms and munitions of war, for the forfeiture in the Court of Admiralty; but it shall not be necessary to take proceedings against the offender because proceedings are instituted for the forfeiture, or to take proceedings for the forfeiture because proceedings are taken against the offender.

Sects. 21–26 *relate to seizure of ships and search of ships and dockyards; s.* 27, *to appeals from decisions of Admiralty Court; ss.* 28, 29, *to protection*

of officers and secretary of state. The secretary of state for foreign affairs at present (1905) *exercises the power of issuing warrants given by s.* 23.

Sect. 30—*Interpretation of terms.*]—In this Act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them; that is to say,

"*Foreign state*" includes any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people:

"*Military service*" shall include military telegraphy (*see The International, L. R.* 3 *A. & E.* 321) and any other employment whatever, in or in connection with any military operation:

"*Naval service*" shall, as respects a person, include service as a marine, employment as a pilot in piloting or directing the course of a ship of war or other ship when such ship of war or other ship is being used in any military or naval operation, and any employment whatever on board a ship of war, transport, store ship, privateer or ship under letters of marque; and as respects a ship, include any user of a ship as a transport, store ship, privateer or ship under letters of marque:

"*United Kingdom*" includes the Isle of Man, the Channel Islands, and other adjacent islands:

"*British possession*" means any territory, colony, or place being part of [his] Majesty's dominions, and not part of the United Kingdom, as defined by this Act:

"*The secretary of state*" shall mean any one of [his] Majesty's principal secretaries of state (*see note, ante,* p. 957):

"*The governor*" shall as respects India mean the governor general or the governor of any presidency, and where a British possession consists of several constituent colonies, mean the governor general of the whole possession or the governor of any of the constituent colonies, and as respects any other British possession it shall mean the officer for the time being administering the government of such possession; also any person acting for or in the capacity of a governor shall be included under the term "governor:"

"*Court of Admiralty*" shall mean the High Court of Admiralty of England or Ireland, the Court of Session of Scotland, or any Vice-Admiralty Court within [his] Majesty's dominions:

"*Ship*" shall include any description of boat, vessel, floating battery, or floating craft; also any description of boat, vessel, or other craft or battery, made to move either on the surface of or under water, or sometimes on the surface of and sometimes under water:

"*Building*" in relation to a ship shall include the doing any act towards or incidental to the construction of a ship, and all words having relation to building shall be construed accordingly:

"*Equipping*" in relation to a ship shall include the furnishing a ship with any tackle, apparel, furniture, provisions, arms, munitions, or stores, or any other thing which is used in or about a ship for the purpose of fitting or adapting her for the sea or for naval service, and all words relating to equipping thall be construed accordingly:

"*Ship and equipment*" shall include a ship and everything in or belonging to a ship:

"*Master*" shall include any person having the charge or command of a ship.

Sect. 31.]—*Repeals Foreign Enlistment Act,* 59 *G.* 3, *c.* 69.

Sect. 32.]—*Saving as to commissioned ships of foreign states.*

Sect. 33—*Penalties not to extend to persons entering into military service in Asia.*]—Nothing in this Act contained shall extend or be construed to extend to subject to any penalty any person who enters into the military service of any prince, state, or potentate in Asia, with such leave or licence as is for the time being required by law in the case of subjects of [his] Majesty entering into the military service of princes, states, or potentates in Asia.

Indictments and Evidence.

For precedents, see R. v. *Jameson* [1896] 2 *Q. B.* 425; 65 *L. J.* (*M. C.*) 218; 18 *Cox*, 392: *R.* v. *Sandoval*, 16 *Cox*, 206.

Sect. 5.

COINAGE OFFENCES.

General Provisions.

Statute.

Until 1832 (2 *&* 3 *W.* 4, *c.* 34), *counterfeiting the King's gold or silver money was high treason under* 25 *Edw.* 3, *st.* 5, *c.* 2 (*ante*, p. 928). 1 *Hale*, 211; 1 *East, P. C.* 159; 1 *Hawk. c.* 17, *s.* 57; 2 *Chit. Cr. L.* 103, *n. The only relics of the old law are the unrepealed provisions of* 6 *G.* 3, *c.* 53, *s.* 3, *and* 6 *G.* 4, *c.* 50, *s.* 21, *that the procedure on the trial of high treason is not to apply to treason by counterfeiting coin.*

24 *&* 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 1—*Interpretation of terms.*]—In the interpretation of and for the purposes of this Act,

Current gold and silver coin]—the expression "the [King's] current gold or silver coin" shall include any gold or silver coin coined in any of [his] Majesty's mints *or* lawfully current, *by virtue of any proclamation or otherwise*, in any part of [his] Majesty's dominions, whether within the United Kingdom or otherwise;

Current copper coin]—and the expression "the [King's] copper coin" shall include any copper coin and any coin of bronze or mixed metal coined in any of [his] Majesty's mints, *or* lawfully current, *by virtue of any proclamation or otherwise*, in any part of [his] Majesty's said dominions;

False or counterfeit coin]—and the expression "false or counterfeit coin resembling or apparently intended to resemble or pass for any of the [King's] current gold or silver coin" shall include any of the current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble, or pass for, any of the [King's] current coin of a higher denomination;

Current coin]—*and the expression "the [King's] current coin" shall include any coin coined in any of [his] Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of [his] Majesty's said dominions, and whether made of gold, silver, copper, bronze, or mixed metal.* [*This definition of "current coin" was new in* 1861. *It includes colonial coin. As to offences in colonies, see* 16 *&* 17 *Vict. c.* 48. *It does not include token coinage*

(*see* 33 & 34 *Vict.* c. 10, s. 5), *but does include foreign coin lawfully current. See Chalmers, Colonial Currency; and for the proclamations in force at the end of* 1903, *making certain coin current in different parts of the King's dominions, see Statutory Rules and Orders Revised* (ed. 1904), *vol.* 2, *tits.* "*Coin,*" *and* "*Coin, Colonies.*" *Those since issued are to be found in the subsequent annual volumes of the Statutory Rules and Orders. These works being published* "*by authority*" *can be put in evidence in the manner provided ante,* p. 348.]

Criminal possession]—and where the having any matter in the custody or possession of any person is *mentioned* in this Act, *it shall include* not only the having of it by himself in his personal custody or possession, but also *the knowingly and wilfully having it in the actual custody or possession of any other person,* and also the knowingly and wilfully having it in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit or for that of any other person. [*This section re-enacts* 2 & 3 *W.* 4, *c.* 34, *s.* 21, *and* 22 & 23 *Vict. c.* 30, *with the additions italicized. The definition of* "*possession*" *was altered to get rid of doubts expressed in R.* v. *Rogers,* 2 *Mood. C. C.* 85: *R.* v. *Gerrish,* 2 *M. & Rob.* 219: *and R.* v. *Williams, C. & Mar.* 259.]

Sect. 27.]—*Provision for discovery and seizure of counterfeit coin and coining tools.*

Sect. 28—*Venue for uttering.*]—*Where any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other county or jurisdiction, either on the day of such first-mentioned tendering, uttering, or putting off, or within the space of ten days next ensuing, or* where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this Act, every such offender may be dealt with, indicted, tried, and punished, and the offence laid and charged to have been committed, in any one of the said counties or jurisdictions, in the same manner in all respects as if the offence had been actually and wholly committed within such one county or jurisdiction. [*See ante,* pp. 44, 47. *The latter part of this section re-enacts* 2 & 3 *W.* 4, *c.* 34, *s.* 15. *The italicized part was new in* 1861.]

Sect. 29—*Proof of coin being counterfeit.*]—Where, upon the trial of any person charged with any offence against this Act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of [his] Majesty's Mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness. [*This section re-enacts* 2 & 3 *W.* 4, *c.* 34, *s.* 17.]

Sect. 30—*When the counterfeiting shall be complete.*]—Every offence of falsely making or counterfeiting any coin, *or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter, or put off, any false or counterfeit coin,* against the provisions of this Act, shall be deemed to be complete, although the coin so made or counterfeited, *or bought, sold, received, paid, tendered, uttered, or put off, or offered to be bought, sold, received, paid, uttered, or put off,* shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished

or perfected. [*This section re-enacts* 2 & 3 *W.* 4, *c.* 34, *s.* 3, *with the additions in italics, inserted to overrule R.* v. *Bradford,* 2 *Cr. & Dix. (Ir. Circ. Rep.)* 41.]

Sect. 31—*Apprehension of offenders.*]—It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, or crime and offence, against this Act, and to convey or deliver him to some peace officer, constable, or officer of police, in order to his being conveyed as soon as reasonably may be before a justice of the peace or some other proper officer, to be dealt with according to law. [*This was new law in* 1861.]

Sect. 35—*Accessories, etc.*]—In the case of every felony punishable under the Act, every principal in the second degree and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour. [*This section re-enacts* 2 & 3 *W.* 4, *c.* 34, *s.* 18; *and see* "*Accessories,*" *post, Book II. Part IV.*]

Sect. 36—*Admiralty offences.*]—All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if the same had been actually committed in that county or place; and in any indictment for any such offence, or for being accessory to any such offence, the venue in the margin shall be the same as if such offence had been committed in such county or place, and the offence itself shall be averred to have been committed "on the high seas;" *and where any of the crimes and offences, or high crimes and offences, mentioned in this Act, shall be committed at sea, and the vessel in which the same shall be committed shall be registered in Scotland, or touch at any part thereof, the courts of criminal law of Scotland may inquire, try, and determine the same in the same manner as if such crime and offence, or high crime and offence, had been committed in Scotland;* provided that nothing herein contained shall alter or affect any of the laws relating to the government of [his] Majesty's land or naval forces. [*This section re-enacts* 2 & 3 *W.* 4, *c.* 34, *s.* 20; *and* 7 & 8 *Vict. c.* 2, *with the addition of the provisions as to Scotland.*]

Sect. 37—*Proof of former convictions.*]—Where any person shall have been convicted of any offence against this Act, or any former Act relating to the coin, and shall afterwards be indicted for any offence against this Act committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence, purporting to be signed by the clerk of the court or other officer having or purporting to have the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity

of the person of the offender, be sufficient evidence of the previous conviction, without proof of the signature or official character or authority of the person appearing to have signed the same, or of his custody or right to the custody of the records of the court; and for every such certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows; (that is to say), the offender shall, in the first instance, be arraigned upon so much only of the indictment, as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall he charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted the court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry; Provided that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor in answer thereto to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence. [*This section was new law in* 1861. *As to alternative modes of proving previous convictions, see ante*, p. 360.]

Sect. 38—*Fine and sureties.*]—Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any felony punishable under this Act, the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized; Provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year. [*This clause was new law in* 1861.]

Sect. 42—*Costs of prosecutions.*]—In all prosecutions for any offence against this Act in England, which shall be conducted under the direction of the solicitors of [his] Majesty's Treasury, the court before which such offence shall be prosecuted or tried shall allow the expenses of the prosecution in all respects as in cases of felony;

And in all prosecutions for any such offence in England which shall not be so conducted it shall be lawful for such court, in case a conviction shall take place, but not otherwise, to allow the expenses of the prosecution in like manner; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony. [*See ante*, p. 246, *et seq.*]

COUNTERFEITING COIN.

Statute.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 2—*The* [*King's*] *gold or silver coin.*]—Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the [King's] current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 2 & 3 *W.* 4, *c.* 34, *s.* 3.]

Sect. 14—*The* [*King's*] *copper coin.*]—Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the [King's] current copper coin . . . shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . . [*This provision re-enacts* 2 & 3 *W.* 4, *c.* 34, *s.* 12. *For the rest of the section, see post*, pp. 970, 980.]

Sect. 18—*Foreign gold and silver coin.*]—Whosoever shall make or counterfeit any kind of coin not being the [King's] current gold or silver coin, but resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . . [*This section re-enacts* 37 *G.* 3, *c.* 126, *s.* 2.]

Sect. 22—*Other foreign coin.*]—Whosoever shall falsely make or counterfeit any kind of coin not being the [King's] current coin, but resembling or apparently intended to resemble or pass for any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin, of any foreign prince, state, or country, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable . . . for the first offence to be imprisoned for any term not exceeding one year, and for the second offence to be kept in penal servitude for any term not exceeding seven years. . . . [*This section re-enacts* 43 *G.* 3, *c.* 139, *s.* 3.]

[*As to coining tools, see post*, p. 980. *As to sale of counterfeit coin, etc., see post*, p. 969.]

Indictment. (24 & 25 *Vict. c.* 69, *s.* 2.)

Central Criminal Court, to wit:—The jurors for our lord the King on their oath present that J. S., on the first day of June, in the year of our Lord ——, at the parish of A., in the county of L., and within the jurisdiction of the said court, ten pieces of [false and counterfeit] coin, each piece thereof resembling and apparently intended to resemble and pass for ("*resembling or apparently intended to resemble or pass for*") a piece of the King's current gold ("*gold or silver*") coin, called a sovereign, falsely and feloniously did make and counterfeit ("*make or counterfeit*"); against

the form [*as ante*, p. 465]. *The words* "false and counterfeit" *appeared in the precedent in editions of this work prior to the 22nd: but seem unnecessary, and are not in the clauses of the Act. As to the venue, see ante*, pp. 44, 47, 960.

Felony: penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 99, *s.* 2; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 & 25 *Vict. c.* 99, *s.* 38 (*ante*, p. 962).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

An indictment for counterfeiting foreign coin, or the King's copper coin, can be framed from the above form, with the necessary changes.

Felonies: penal servitude for not less than three nor more than seven years, or imprisonment, with or without hard labour, for not more than two years. 24 & 25 *Vict. c.* 99, *ss.* 14, 18; 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235). *As to recognizances and sureties, see* 24 & 25 *Vict. c.* 99, *s.* 38 (*ante*, p. 962).

These offences are not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

It is rarely the case that the counterfeiting can be proved directly by positive evidence; it is usually made out by circumstantial evidence, such as finding the necessary coining tools in the defendant's house, together with some pieces of the counterfeit money in a finished, some in an unfinished state, or such other circumstances as may fairly warrant the jury in presuming that the defendant either counterfeited, or caused to be counterfeited, or was present aiding and abetting in counterfeiting the coin in question. Under the present statutes only the party who actually counterfeits would be the principal felon, and the others accessories before the fact, although triable as principals; *see ante*, pp. 16–19, 961. Before the modern statutes which reduced the offence of coining from treason to felony, if several conspired to counterfeit the King's coin, and one of them actually did so in pursuance of the conspiracy, it was treason in all, and they might have all been indicted for counterfeiting the King's coin generally. 1 *Hale*, 214.

A variance between the indictment and the evidence, in the number of the pieces of coin alleged to be counterfeited, is immaterial; but a variance as to the denomination of such coin, as sovereigns, shillings, pennies, etc., would be fatal unless amended. *See ante*, p. 296, *et seq.*

By 24 & 25 *Vict. c.* 99, *s.* 30 (*ante*, p. 960), the offence of counterfeiting is to be deemed complete, although the coin made or counterfeited is not in a fit state to be uttered, or the counterfeiting thereof is not finished or perfected. *See R.* v. *Hermann*, 4 *Q. B. D.* 284; 48 *L. J.* (*M. C.*) 106; 14 *Cox*, 279 (*post*, p. 975), from which it would appear that the addition of a new milling to a genuine sovereign, which has been fraudulently filed at the edges so as to reduce its weight and destroy the original milling, is the counterfeiting of a sovereign, and within *s.* 2 (*ante*, p. 963).

By the old law, the counterfeit coin produced in evidence must have appeared to have that degree of resemblance to the real coin, that it would be likely to be received as the coin for which it was intended to pass, by persons using the caution customary in taking money. *See R.* v. *Varley*, 2 *W. Bl.* 682; 1 *East, P. C.* 164, *and R.* v. *Harris*, 1 *Leach*, 135; 1 *Hale*, 215: *R.* v. *Wilson*, 1 *Leach*, 285: *R.* v. *Welsh*, *Id.* 364. In *R.* v. *Byrne*, 6 *Cox*, 475 (*Ir.*), where the alleged coin bore some resemblance to a good half-sovereign, with Queen Victoria's head on one side and on the other the Prince of Wales' plume, and an inscription, "Prince of Wales'

model half-sovereign," the court ruled that it was for the jury to say whether it resembled or was intended to resemble current coin, and to pass as such, or was merely meant as a card-marker, counter, or medal.

Any credible witness may prove the coin to be counterfeit, and it is not necessary for this purpose to produce any moneyer or other officer from the Mint. 24 & 25 *Vict. c.* 99 *s.* 29 (*ante*, p. 960).

If it become a question whether the coin which the counterfeit money was intended to imitate be the King's coin, it is not necessary to produce the proclamation to prove its legitimation; it is a mere question of fact to be left to the jury upon evidence of usage, reputation, etc. 1 *Hale*, 196, 212, 213. As to the proclamations and their proof, *see ante*, pp. 348, 351, 960.

It is not necessary to prove that the counterfeit coin was uttered or attempted to be uttered. 1 *Hale*, 215, 229; 3 *Co. Inst.* 16; 1 *East, P. C.* 165.

COLOURING, ETC., COIN OF THE REALM.

Statute.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 3.]—Whosoever shall gild or silver, or shall with any wash or materials capable of producing the colour or appearance of gold or of silver, *or by any means whatsoever* wash, case over, or colour any coin whatsoever resembling or apparently intended to resemble or pass for any of the [King's] current gold or silver coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or of silver, *or by any means whatsoever* wash, case over, or colour any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin resembling or apparently intended to resemble or pass for any of the [King's] current gold or silver coin; or shall gild, or shall, with any wash or materials capable of producing the colour or appearance of gold, *or by any means whatsoever* wash, case over, or colour any of the [King's] current silver coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the [King's] current gold coin; or shall gild or silver, or shall, with any wash or materials capable of producing the colour or appearance of gold or silver, *or by any means whatsoever* wash, case over, or colour any of the [King's] current copper coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the [King's] current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . .

This section re-enacts 2 & 3 *W.* 4, *c.* 34, *s.* 4, *with the additions italicized. The introduction of the words* "capable of producing" *and* "by any means whatsoever" *appear to remove the doubts expressed on* 8 & 9 *W.* 3, *c.* 26, *s.* 4 (*rep.*), *and* 12 *G.* 2, *c.* 28 (*rep.*), *as to whether the word* "colouring" *was confined to superficial application. See R.* v. *Lavey*, 1 *Leach*, 153; 1 *East, P. C.* 166.]

Indictment for colouring the King's Coin. (24 & 25 *Vict.* c. 99, *s.* 3.)

Commencement as ante, p. 963]—feloniously did gild ("*gild or silver*") [*or* wash ("*by any means whatsoever wash, case over, or colour*") with a certain wash ("*any wash or materials*") capable of producing the colour and appearance of gold ("*gold or silver*")] a certain false and counterfeit coin resembling ("*resembling or apparently intended to resemble or pass for*") a certain piece of the King's current gold coin ("*any of the King's current gold or silver coin*") called a sovereign; against the form [*as ante*, p. 465]. *As to the venue, see ante*, pp. 43, 47, 960. *In earlier editions of this work the words* "falsely and deceitfully" *appear in precedents for indictments for coinage offences; they have been omitted from the present edition in all cases where they are not in the statute creating the offence, as being clearly unnecessary. See* 3 *Chit. Cr. L.* 1042.

Felony: penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict.* c. 99, *s.* 3; 54 & 55 *Vict.* c. 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict.* c. 99, *s.* 38 (*ante*, p. 962).

This offence is not triable at quarter sessions. 5 & 6 *Vict.* c. 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the gilding, etc., or colouring, as stated in the indictment. In *R.* v. *Case*, 1 *Leach*, 154, *n*; 1 *East, P. C.* 165, the defendant was apprehended in the act of making counterfeit shillings, by steeping round blanks, composed of brass and silver, in *aqua fortis*, none of which were finished, but exhibited the appearance of lead, though by rubbing they readily acquired the appearance of silver, and would pass current; a conviction under 12 *G.* 2, c. 28 (*rep.*), was held to be right. Under 2 & 3 *W.* 4, c. 34 (*rep.*), it was held that where a wash or material is alleged to have been used by the defendant, it must be shown either from the application by the defendant, or from an examination of their properties, that they are capable of producing the colour of gold or silver. But an indictment, charging the use of such material, will be supported by proof of a colouring with gold itself. *R.* v. *Turner*, 2 *Mood. C. C.* 32.

Indictment for colouring Metal, etc. (24 & 25 *Vict.* c. 99, *s.* 3, *ante*, p. 965.)

Commencement as ante, p. 963]—feloniously did gild ("*gild or silver*") [*or* wash ("*by any means whatsoever wash, case over, or colour*") with a certain wash ("*any wash or materials*") capable of producing the colour and appearance of gold ("*gold or silver*")] ten pieces of silver ("*any piece of silver or copper, or of coarse gold, or coarse silver, or of any metal or mixture of metals*"), each piece thereof being respectively of a fit size and figure to be coined, and with intent that each of the said pieces of silver respectively should be coined into false and counterfeit coin resembling ("*resembling or apparently intended to resemble or pass for*") a piece of the King's current gold coin, called a sovereign; against the form [*as ante*, p. 465].

2 & 3 *W.* 4, c. 34, *s.* 4 (*rep.*), *applied also to the gilding or colouring of any silver coin, with intent to make the same resemble or pass for gold coin, and to gilding or colouring any copper coin, with intent to make the same resemble or pass for gold or silver coin. An indictment under* 2 & 3 *W.* 4, c. 34 (*rep.*),

charging the gilding of sixpences "with materials capable of producing the colour of gold" was held good, and to be supported by proof of colouring sixpences with gold. R. v. *Turner*, 2 *Mood. C. C.* 42.

Felony: 24 & 25 *Vict. c.* 99, *s.* 3. *See the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the colouring, etc., as in the last case, and the intent as stated in the indictment. For this purpose it may be proved that the defendant had the instruments for coining, or that other counterfeit money was found in his possession, or other circumstances may be given in evidence from which the jury may infer the intent. (*See ante*, pp. 303, 308–312, 340.)

Indictment for filing or altering the King's Coin. (24 & 25 *Vict. c.* 99, *s.* 3, *ante*, p. 965.)

Commencement as ante, p. 963]—ten pieces of the King's current silver coin, called sixpences, feloniously did file ("*file, or in any manner alter*"), with intent to make each of the said pieces respectively resemble ("*resemble or pass for*") a piece of the King's current gold coin called a half-sovereign; against the form [*as ante*, p. 465].

Felony: 24 & 25 *Vict. c.* 99, *s.* 3. *See the last precedent but one. The statute also applies to the filing or altering any of the King's copper money, with intent to make the same resemble or pass for any of the King's current gold or silver coin.*

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the filing and altering as stated in the indictment, and the intent by circumstances from which it may be inferred by the jury. (*See ante*, pp. 303, 308–312, 340.

IMPAIRING, ETC., BRITISH GOLD AND SILVER COIN.

Statute.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 4.]—Whosoever shall impair, diminish, or lighten any of the [King's] current gold or silver coin, with intent *that* the coin so impaired, diminished, or lightened, *may* pass for the [King's] current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding fourteen years. . . . [*This section re-enacts* 2 & 3 *W.* 4, *c.* 34, *s.* 5, *with the alterations italicized.*]

Sect. 5.—*Unlawful possession of filings and clippings of gold or silver coin.*]—Whosoever shall unlawfully have in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained

by impairing, diminishing, or lightening any of the [King's] current gold or silver coin, knowing the same to have been so produced or obtained, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . . [*This section was new law in* 1861.]

Indictment. (24 & 25 *Vict. c.* 99, *s.* 4.)

Commencement as ante, p. 963]—ten pieces of the King's current gold ("*gold or silver*") coin, called sovereigns, feloniously did impair ("*impair, diminish, or lighten*") with intent that each of the said pieces so impaired [diminished and lightened] might pass for a piece of the King's current gold ("*gold or silver*") coin called a sovereign; against the form [*as ante*, p. 465]. *As to the venue, see ante*, pp. 43, 47, 960.

Felony: penal servitude for not more than fourteen and not less than three years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 99, *s.* 4; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 99, *s.* 88 (*ante*, p. 962).

Evidence.

Prove the impairing, etc., by direct or presumptive evidence, as that the defendant was in possession of filings of impaired coin, or of the instruments for filing. Prove, also, the intent, by evidence from which it may be inferred by the jury; as, for instance, that the defendant attempted to pass the coin, or had passed other coin so impaired, or that he carried it about with him mixed with other money, particularly if it was not so impaired as apparently to affect its currency.

DEFACING BRITISH COIN.

Statute.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 16.]—Whosoever shall deface any of the [King's] current gold, silver, or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and an offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour. [*This section re-enacts* 16 & 17 *Vict. c.* 102, *s.* 1, *with certain omissions.*]

Sect. 17—*Defaced coin not legal tender—Prosecution.*]—No tender of payment in money made in any gold, silver, or copper coin so defaced by stamping, as in the last preceding section mentioned, shall be allowed to be a legal tender; and whosoever shall tender, utter, or put off any coin so defaced, shall, on conviction thereof, before two justices, be liable to forfeit and pay any sum not exceeding forty shillings: provided that it shall not be lawful for any person to proceed for any such last-mentioned penalty,

without the consent, in England or Ireland, of [his] Majesty's attorney-general for England or Ireland respectively, or in Scotland of the lord advocate. [*This section re-enacts* 16 & 17 *Vict. c.* 102, *s.* 2.]

Indictment for defacing British Coin. (24 & 25 *Vict. c.* 99, *s.* 16.)

Commencement as ante, p. 963]—one piece of the King's current silver ("*gold, silver, or copper*") coin, called a half-crown, unlawfully [and wilfully] did deface, by then stamping thereon certain names and words ("*any names or words*"); against the form [*as ante*, p. 465]. *The precedent given in editions of this work prior to the 22nd, contained the words* "and wilfully," *sed quære, as the words are not in the statute.*

Misdemeanor: imprisonment, with or without hard labour, not exceeding one year. 24 & 25 *Vict. c.* 99, *s.* 16. *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour, Id. s.* 38 (*ante*, p. 962).

Evidence.

Prove that the defendant defaced the coin in question, by stamping on it any names or words, or both. Although the word "wilfully" is not in the present statute, it is submitted that the defacing to be punishable must be not merely accidental. It is not necessary to prove that the coin was thereby diminished or lightened. The defaced coin is no longer a legal tender, and any person uttering it is liable to a penalty not exceeding forty shillings, which, however, cannot be proceeded for without the consent of the attorney-general or lord advocate. 24 & 25 *Vict. c.* 99, *s.* 17 (*ante*, p. 968).

BUYING OR SELLING, ETC., COUNTERFEIT BRITISH COIN AT A LOWER VALUE.

Statute.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 6—[*King's*] *gold or silver coin.*]—Whosoever, *without lawful authority or excuse* (*the proof whereof shall lie on the party accused*), shall buy, sell, receive, pay or put off, or offer to buy, sell, receive, pay or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the [King's] current gold or silver coin, at or for a lower rate of value than the same imports *or was apparently intended to import*, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life; . . . *and in any indictment for any such offence as in this section aforesaid it shall be sufficient to allege that the party accused did buy, sell, receive, pay, or put off, or did offer to buy, sell, receive, pay, or put off, the false or counterfeit coin at or for a lower rate or value than the same imports or was apparently intended to import, without alleging at or for what rate, price, or value the same was bought, sold, received, paid, or put off, or offered to be bought, sold, received, paid, or put off.*

[*The first part of this section re-enacts* 2 & 3 *W.* 4, *c.* 34, *s.* 6, *with the addition of the words in italics to protect officers engaged in detecting offences against the coin. The latter part of the section was new in* 1861, *and was framed to*

get rid of the decisions in R. v. Joyce, Car. Supp. 184; 3 *C. & P.* 411, *n.*: *R. v. Hedges,* 3 *C. & P.* 410; *and R. v. Wooldridge,* 1 *Leach,* 307; 1 *East, P. C.* 179.

Sect. 14—*Copper coin.*]—Whosoever . . . shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the [King's] current copper coin, at or for a lower rate of value than the same imports *or was apparently intended to import,* shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . .

[*For other offences created by the section, see ante,* p. 963, *post,* p. 980. *The section re-enacts* 2 *&* 3 *W.* 4, *c.* 34, *s.* 12, *with the additions italicized.*]

Indictment for buying or selling Counterfeit Gold or Silver British Coin at a Lower Rate than by its Denomination it imports. (24 *&* 25 *Vict. c.* 99, *s.* 6.)

Commencement as ante, p. 963]—ten pieces of false and counterfeit coin, each piece thereof resembling ("*resembling or apparently intended to resemble or pass for*") a piece of the King's current gold ("*gold or silver*") coin, called a sovereign, feloniously and without lawful authority or excuse, did put off ("*buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off*") to one J. N., at and for a lower rate and value than the same did then import ("*import or was apparently intended to import*"); against the form [*as ante,* p. 465].

As to the venue, see ante, pp. 43, 47, 960. *The indictment need not state at what rate the coin was bought, sold, etc.*

Felony: penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, not exceeding two years. 24 *&* 25 *Vict. c.* 99, *s.* 6; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante,* p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 *&* 25 *Vict. c.* 99, *s.* 38 (*ante,* p. 962).

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s,* 1 (*ante,* p. 126).

The indictment for an offence against 24 *&* 25 *Vict. c.* 99, *s.* 14, *may be framed from the above form, with the substitution of copper for gold or silver, and change of the denomination. It seems also necessary to state the rate at which copper coin was sold. See R. v. Joyce, Car. Supp.* 184.

Felony: penal servitude for not less than three nor more than seven years, or imprisonment, with or without hard labour, for not more than two years. 24 *&* 25 *Vict. c.* 99, *s.* 15; 54 *&* 55 *Vict. c.* 69, *s.* 1 (*ante,* p. 235). *As to recognizances and sureties, see* 24 *&* 25 *Vict. c.* 99, *s.* 38 (*ante,* p. 962).

Evidence.

Prove that the defendant put off, etc., the counterfeit coin, as mentioned in the indictment. By "putting off" is meant an actual passing or getting rid of the coin, and not a mere attempt to do so by tendering to another who refuses to accept and returns it. 1 *East, P. C.* 179. The proof of lawful authority or excuse for the act lies on the defendant.

It must also be proved that the coin was sold at a lower rate than it imports, but the precise rate at which it was sold need not now be stated

in the indictment in the case of gold or silver coin. 24 & 25 *Vict.* c. 99, s. 6 (*ubi supra*).

IMPORTING OR EXPORTING COUNTERFEIT COIN.

Statute.

24 & 25 *Vict.* c. 99 (*Coinage Offences Act*, 1861), s. 7—*Importing counterfeit of British gold or silver coin.*]—Whosoever, *without lawful authority or excuse* (*the proof whereof shall lie on the party accused*), shall import or receive into the United Kingdom from beyond the seas any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the [King's] current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 2 & 3 *W.* 4, c. 34, s. 6, *with additions italicized.*]

Sect. 8—*Exporting counterfeit British coin.*]—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall export, or put on board any ship, vessel, or boat for the purpose of being exported from the United Kingdom, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the [King's] current coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. . . . [*This section was new law in* 1861. *It appears to apply to counterfeit colonial coin. Greaves, Crim. Law Cons. Acts* (2nd ed.), p. 324.]

Sect. 19—*Importing foreign counterfeit gold or silver coin.*]—Whosoever, *without lawful authority or excuse* (*the proof whereof shall lie on the party accused*), shall bring or receive into the United Kingdom any such false or counterfeit coin (*i.e. any kind of coin not being the* [*King's*] *current gold or silver coin, s.* 18) resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . . [*This section re-enacts* 37 *G.* 3, c. 126, s. 3, *with the additions italicized.*]

39 & 40 *Vict.* c. 36 (*Customs Consolidation Act*, 1876), s. 150—*Importation of base coin into certain colonies prohibited.*]—Base or counterfeit coin is hereby absolutely prohibited to be imported or brought, either by sea or inland carriage or navigation, into the British possessions in America or the Mauritius.

Sect. 151.]—*Act to extend to British possessions abroad.*

Indictment for importing Counterfeit Gold or Silver Coin. (24 & 25 *Vict. c.* 99, *s.* 7, *ante*, p. 971.)

Commencement as ante, p. 963]—ten thousand pieces of false and counterfeit coin, each piece thereof resembling ("*resembling or apparently intended to resemble or pass for*") a piece of the King's current silver ("*gold or silver*") coin, called a shilling, feloniously, and without lawful authority or excuse, did import from beyond the seas into that part of the United Kingdom called England, he the said J. S., at the said time when he so imported the said pieces of false and counterfeit coin, well knowing the same to be false and counterfeit; against the form [*as ante*, p. 465]. *As to the venue, see ante*, pp. 43, 47, 960.

Felony: 24 & 25 *Vict. c.* 99, *s.* 7. *See the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant imported the counterfeit coin. The terms of *s.* 7 appear to include importation from any place beyond the seas, whether within or without the King's dominions; *but see* 1 *Hawk. c.* 17, *s.* 87; 1 *East, P. C.* 175. Prove also the defendant's guilty knowledge: for unless that be averred in the indictment, and proved, it is no offence. 1 *Hale*, 228; 1 *East, P. C.* 175. The proof of lawful authority or excuse (if any) lies on the defendant. 24 & 25 *Vict. c.* 99, *s.* 7 (*ante*, p. 971).

UTTERING COUNTERFEIT COIN.

Statute.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 9—*Uttering counterfeit British gold or silver coin.*]—Whosoever shall tender, utter or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the [King's] current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour. . . . [*This section re-enacts* 2 & 3 *W.* 4, *c.* 34, *s.* 7.]

Sect. 10—*Uttering counterfeit British coin accompanied by possession of other counterfeit coin, or followed by a second uttering.*]—Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the [King's] current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering or putting off, have in his custody or possession, besides the false or counterfeit coin so tendered, uttered, or put off, any other piece of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the [King's] current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the [King's] current gold or

silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour. . . . [*This section re-enacts* 2 *&* 3 *W.* 4, *c.* 34, *s.* 7.]

Sect. 11.]—*See post*, p. 978.

Sect. 12—*Uttering after former conviction.*]—Whosoever having been convicted, *either before or after the passing of this Act*, of any such misdemeanor or crime and offence as in any of the last three preceding sections mentioned, *or of any felony or high crime and offence against this or any former Act relating to the coin*, shall afterwards commit any of the misdemeanors or crimes and offences in any of the said sections mentioned, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 2 *&* 3 *W.* 4, *c.* 34, *ss.* 7, 8, *with the alterations italicized.*]

Sect. 13—*Uttering spurious coin, medals, etc., as current coin.*]—Whosoever shall, with intent to defraud, tender, utter or put off as or for any of the [King's] current gold or silver coin, any coin not being such current gold or silver coin, or any medal or piece of metal or mixed metals, resembling in size, figure and colour the current coin as or for which the same shall be so tendered, uttered, or put off, such coin, medal, or piece of metal or mixed metals so tendered, uttered, or put off being of less value than the current coin as or for which the same shall be so tendered, uttered or put off, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour. . . . [*This section was new law in* 1861. *The defendant knowingly passed as and for a half-sovereign a medal of about the same size and colour as a half-sovereign. On the obverse side was Queen Victoria's head, as on a half-sovereign, but with a different inscription. The coin itself was not produced to the jury, and there was no evidence as to the appearance of the reverse side. It was held that there was some evidence that the medal was one, in size, figure and colour, resembling a half-sovereign. R.* v. *Robinson, L. & C.* 604; 34 *L. J.* (*M. C.*) 176.]

Sect. 15—*Uttering counterfeit British copper coin.*]—Whosoever shall tender, utter or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the [King's] current copper coin, knowing the same to be false or counterfeit, . . . (*as to possession, see post*, p. 978), shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labour. . . . [*This section re-enacts* 2 *&* 3 *W.* 4, *c.* 34, *s.* 12.]

Sect. 20—*Uttering foreign counterfeit gold or silver coin.*]—Whosoever shall tender, utter or put off any such false or counterfeit coin (*as mentioned in s.* 19, *ante*, p. 971) resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall, in England

and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding six months, with or without hard labour. [*This section re-enacts* 37 *G.* 3, *c.* 126, *s.* 4.]

Sect. 21—*Uttering foreign counterfeit gold or silver coin after former* conviction.]—Whosoever, having been so convicted as in the last preceding section mentioned, shall afterwards commit the like offence of tendering, uttering or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement (*see ante*, p. 237): and whosoever, having been so convicted of a second offence, shall afterwards commit the like offence of tendering, uttering or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 37 *G.* 3, *c.* 126, *s.* 4.]

Indictment for uttering Counterfeit British Gold or Silver Coin.
(24 & 25 *Vict. c.* 99, *s.* 9, *ante*, p. 972.)

Commencement as ante, p. 963]—one piece of false and counterfeit coin resembling ("*resembling or apparently intended to resemble or pass for*") a piece of the King's current gold ("*gold or silver*") coin, called a sovereign, unlawfully did utter ("*tender, utter or put off*"), he the said J. S. at the time he so uttered the said piece of false and counterfeit coin well knowing the same to be false and counterfeit; against the form [*as ante*, p. 465].

Misdemeanor: imprisonment, with or without hard labour, not exceeding one year. 24 & 25 *Vict. c.* 99, *s.* 9. *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour, Id. s.* 38 (*ante*, p. 962).

Evidence.

1. Prove the tendering, uttering or putting off the sovereign in question, and prove it to be a base and counterfeit sovereign. *R.* v. *Wooldridge*, 1 *Leach*, 307. Where a good shilling was given to a boy for fruit, and he put it into his mouth, under pretence of trying whether it was good, and then taking a bad shilling out of his mouth instead of it, returned it to the prosecutor saying it was not good; this (which is called ringing the changes) was held to be an uttering within the meaning of 16 *G.* 2, *c.* 28 (*rep.*). *R.* v. *Franks*, 2 *Leach*, 644.

It is submitted that to be within the statute the uttering must at least amount to a holding forth of the thing uttered as current coin for the purpose of currency, and that it would not include use of a false coin as a means of cheating at play. *See R.* v. *McMahon* [1894] 18 *N. S. W. Rep. Law, at* p. 137, *Foster, J.*; *and cf. R.* v. *Shukard*, *R.* & *R.* 200.

The giving of a piece of counterfeit coin in charity was held not to be an uttering within 2 *W.* 4, *c.* 34, *s.* 7 (*rep.*), although the party knew it to

be counterfeit; for that there must be some intention to *defraud*. *R.* v. *Page*, 8 *C. & P.* 122; 1 *Russ. Cr.* (6th ed.) 240. But this case was doubted by Mr. Greaves; *see* 1 *Russ. Cr.* (6th ed.) 240, *n.*; and appears to have been treated as erroneous. *See R.* v. *Ion*, 2 *Den.* 475, 484, *Alderson*, B., *and Anon.*, 1 *Cox*, 250, where the giving of a counterfeit coin to a woman, as the price of connection with her, was held to be "uttering."

It is an "uttering and putting off," as well as a "tendering," if the counterfeit coin be offered in payment, though it be refused by the person to whom it is offered. *R.* v. *Welch*, 2 *Den.* 78; 20 *L. J.* (*M. C.*) 101: *see R.* v. *Radford*, 1 *Den.* 59: *R.* v. *Ion*, 2 *Den.* 475; 21 *L. J.* (*M. C.*) 166.

As there are no accessories in misdemeanors, all persons who are engaged in the common purpose of uttering counterfeit coin, although the uttering in pursuance of that common purpose be by one only of such persons in the absence of the others, may be jointly convicted, or any of such persons may be separately convicted, of that offence of uttering. 24 & 25 *Vict. c.* 94, *s.* 8 (*ante*, p. 16): *R.* v. *Greenwood*, 2 *Den.* 453; 21 *L. J.* (*M. C.*) 127: *see R.* v. *Hurse*, 2 *M. & Rob.* 360. These decisions overrule a series of cases in which it had been held that persons not present at the actual uttering could not be convicted of it, unless they were within such a distance as to be able to render assistance to the actual utterer, and which appear to have been decided without consideration of the distinction between felonies and misdemeanors as to principals and accessories, *see ante*, pp. 12–21.

A genuine sovereign, which has been fraudulently filed at the edges to such an extent as to reduce the weight by one twenty-fourth part, and to remove the milling entirely, or almost entirely, and to which a new milling has been added in order to restore the appearance of the coin, is a false and counterfeit coin within 24 & 25 *Vict. c.* 99, *s.* 9. *R.* v. *Hermann*, 4 *Q. B. D.* 284; 48 *L. J.* (*M. C.*) 106.

A coin made by splitting two genuine coins, and joining the heads together so as to make a double-headed coin, has been held counterfeit. *R.* v. *McMahon* [1894] 15 *N. S. W. Rep. Law*, 131, 136.

2. Prove that the defendant knew it to be a counterfeit sovereign at the time he uttered it. This, of course, must be done by circumstantial evidence. (*See ante*, pp. 303, 308–312, 340). If, for instance, it be proved that he uttered, either on the same day or at other times, whether before or after the uttering charged, base money, either of the same or a different denomination, to the same or to a different person, or had other pieces of base money about him when he uttered the counterfeit money in question: this will be evidence from which the jury may presume a guilty knowledge. *R.* v. *Whiley*, 2 *Leach*, 983: *R.* v. *Forster*, *Dears.* 456; 24 *L. J.* (*M. C.*) 134. (*See ante*, p. 720.)

Indictment for uttering Counterfeit British Coin, having at the same time Counterfeit Coin in Possession. (24 & 25 *Vict. c.* 99, *s.* 10, *ante*, p. 972.)

The same as in the last precedent, to the words "well knowing the same to be false and counterfeit." *Then proceed thus*]:—And that he the said J. S., at the time when he so uttered ("*tender, utter or put off*") the said piece of false and counterfeit coin as aforesaid, had in his possession, besides the said piece of false and counterfeit coin so uttered, one other piece of false and counterfeit coin resembling ("*resembling or apparently intended to resemble or pass for*") a piece of the King's current silver ("*gold or silver*") coin called a shilling; against the form [*as ante*, p. 465].

Misdemeanor: imprisonment, with or without hard labour, not exceeding

two years. 24 & 25 *Vict.* c. 99, s. 10. *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour, Id.* s. 38 (*ante*, p. 962).

Evidence.

Prove the offence of uttering as directed *ante*, p. 974, and prove that the defendant at the same time had about him one or more pieces of the counterfeit money specified in the indictment. The guilty knowledge may reasonably be implied from the possession of the other counterfeit coin. 24 & 25 *Vict.* c. 99, s. 1 (*ante*, p. 960), enacts that "where the having any matter in the custody or possession of any person is mentioned in this Act, it shall include not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person." Even prior to this enactment it had been held that where two persons went to a shop, and one of them went in and uttered a bad piece of money, having no more in her possession, and the other stayed outside the shop, having other bad money, both might be convicted, the uttering and the possession being joint; *R.* v. *Skerrit*, 2 *C.* & *P.* 427; and that where one of two persons in company (or, as it seems, apart from each other) utters counterfeit coin, and other counterfeit coin is found on the other, both are guilty of the aggravated offence of acting in concert, and both knowing of the possession. *R.* v. *Gerrish*, 2 *M.* & *Rob.* 219. *See R.* v. *Rogers*, 2 *Mood. C. C.* 85: *R.* v. *Williams*, *C.* & *Mar.* 259 (*post*, p. 980): *R.* v. *Greenwood*, *R.* v. *Hurse* (*ante*, p. 975).

Indictment for uttering twice within Ten Days. (24 & 25 *Vict.* c. 99, s. 10, *ante*, p. 972.)

Proceed as in the precedent ante, p. 974, *to the words* "well knowing the same to be false and counterfeit" *inclusive, and then proceed thus*]:—And that the said J. S. afterwards, on the same day, that is to say, on the said third day of August, in the year last aforesaid [*or* afterwards and within the space of ten days then next ensuing, to wit, on the 6th day of August, in the year last aforesaid], one other piece of false and counterfeit coin, resembling ("*resembling or apparently intended to resemble or pass for*") a piece of the King's current silver ("*gold or silver*") coin, called a shilling, unlawfully did utter ("*tender, utter or put off*"), he the said J. S., at the time when he so uttered the said last-mentioned piece of false and counterfeit coin, well knowing the same to be false and counterfeit; against the form [*as ante*, p. 465]. *The double uttering must be charged in one count of the indictment. R.* v. *Tandy*, 2 *Leach*, 833: *see R.* v. *Martin*, 2 *Leach*, 923.

Misdemeanor: 24 & 25 *Vict.* c. 99, s. 10. *See the last precedent.*

On a conviction for two separate offences of uttering, in two counts, one judgment for two years' imprisonment, under s. 10, *would be bad. R.* v. *Robinson*, 1 *Mood. C. C.* 413. *But a sentence of one year's imprisonment, under* s. 9, *may in such a case be passed for each offence, and the commencement of the second year's imprisonment may be postponed until the termination of the first. Id.*

Evidence.

Prove the two offences as directed *ante*, p. 974, and prove them to have been committed on the same day, or within the space of ten days according as it is alleged in the indictment.

Indictment for a Subsequent Uttering, after a Previous Conviction, under 24 & 25 Vict. c. 99, ss. 9, 10, 11, for Uttering. (24 & 25 *Vict. c.* 99, *s.* 12, *ante*, p. 973.)

Commencement as ante, p. 963]—one piece of false and counterfeit coin resembling and apparently intended to resemble and pass for a piece of the King's current gold coin, called a sovereign [or of the gold ("*gold or silver*") coin of —— ("*foreign prince, state, or country*," *s.* 21)], unlawfully did utter ("*tender, utter or put off*"), he the said J. S. then knowing the same to be false and counterfeit; against the form [*as ante*, p. 465]. And the jurors aforesaid, upon their oath aforesaid, do say that heretofore and before the committing of the offence hereinbefore charged and stated, to wit, at the general quarter sessions of the peace for the county of ——, holden at ——, on the —— day of ——, in the year of our Lord ——, the said J. S. was in due form of law convicted on a certain indictment against him for [*here state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence*]. And so the jurors aforesaid, upon their oath aforesaid, do say that the said J. S., on the day and year first aforesaid, feloniously and unlawfully did utter the said piece of false and counterfeit coin, in manner and form aforesaid, and against the form [*as ante*, p. 465]. (*2nd Count*)—And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S. afterwards, to wit, on the first day of June, in the year of our Lord ——, one piece of false and counterfeit coin resembling and apparently intended to resemble and pass for a piece of the King's current gold coin called a sovereign, unlawfully and feloniously did utter and put off, he, the said J. S. then knowing the same to be false and counterfeit; against the form [*as ante*, p. 465]. And the jurors aforesaid, upon their oath aforesaid, do say that heretofore and before the committing of the offence in this count charged and stated, to wit, at the general quarter sessions of the peace for the county of ——, holden at ——, on the —— day of ——, in the year of our Lord ——, the said J. S. was in due form of law convicted on a certain indictment against him for [*here state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence*].

A similar provision is made by s. 21 (*ante*, p. 974) *as to uttering foreign gold or silver coin. An indictment for the latter offence can be framed from the above precedent.* 24 & 25 *Vict. c.* 99, *s.* 37 (*ante*, p. 961), *enacts that "where any person shall have been convicted of any offence against this Act, or any former Act relating to the coin, and shall afterwards be indicted for any offence against this Act committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence," etc. It seems clear from this that it was intended that the subsequent offence should always be first charged, and in both counts of the above form of indictment that course has been adopted. The mode of framing the indictment and the proceedings at the trial are regulated by s.* 37 *of* 24 & 25 *Vict. c.* 99, *which is analogous to s.* 116 *of* 24 & 25 *Vict. c.* 96 (*ante*, p. 430), *and the reader is referred to* pp. 486, 487, *ante, for an explanation of the mode in which the above indictment is drawn.*

To commit any of the misdemeanors mentioned in ss. 9, 10 (*ante*, p. 972), *or s.* 11 (*post*, p. 978), *after a conviction for any one of those offences respectively, is felony: penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, not exceeding two years.* 24 & 25 *Vict. c.* 99, *s.* 12; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances*

and find sureties for keeping the peace, 24 & 25 *Vict. c.* 99, *s.* 38 (*ante*, p. 962).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the subsequent offence, as directed under the last three precedents. Before the prisoner has pleaded guilty or is found guilty of the subsequent offence, the previous conviction cannot be given in evidence, except under the provisions of *s.* 1 (*f*) of the *Criminal Evidence Act*, 1898 (*ante*, p. 395), or under 24 & 25 *Vict. c.* 99, *s.* 37 (*ante*, p. 961). *R.* v. *Martin*, *L. R.* 1 *C. C. R.* 214; 39 *L. J.* (*M. C.*) 31 (overruling on this point *R.* v. *Goodwin*, 10 *Cox*, 534). It is not necessary that any judgment should have been pronounced against the prisoner on the first conviction. *R.* v. *Blaby* [1894] 2 *Q. B.* 170; 18 *Cox*, 5. If the prisoner pleads guilty, or is found guilty of the subsequent offence, prove the former conviction in manner directed by 24 & 25 *Vict. c.* 99, *s.* 37 (*ante*, p. 961), and the identity of the prisoner with the person described in the former conviction. The course of proceedings at the trial as to arraignment, etc., is also regulated by that section. *R.* v. *Martin*, *ubi supra*.

If the prisoner is found guilty of the subsequent offence, and then upon being asked whether he has been previously convicted, denies that he has, and the jury after inquiry find that he has not been so previously convicted, he is entitled to be acquitted of the whole charge laid against him in the indictment and cannot be convicted, under *s.* 9, of the *misdemeanor* of uttering counterfeit coin. *R.* v. *Thomas*, *L. R.* 2 *C. C. R.* 141; 44 *L. J.* (*M. C.*) 42. He may, however, after such acquittal be indicted for the misdemeanor alone, and cannot to such indictment plead *autrefois acquit*. *Id.*, *Mellor*, J.

POSSESSION OF COUNTERFEIT COIN.

Statute.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 11—*Having in possession three or more pieces of counterfeit British gold or silver coin.*]—Whosoever shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the [King's] current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same *or any of them*, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude. . . . [*This section re-enacts* 2 & 3 *W.* 4, *c.* 34, *s.* 8, *with the additions italicized.*]

Sect. 15—*Having in possession three or more pieces of counterfeit British copper coin.*]—Whosoever . . . shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the [King's] current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, *or any of them*, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime or offence, and being convicted thereof shall be liable, at the discretion of the court, to be

imprisoned for a term not exceeding one year, with or without hard labour. . . . [*For rest of section, see ante*, p. 973. *The above provision re-enacts* 2 & 3 *W.* 4, *c.* 34, *s.* 12, *with the additions italicized.*]

Sect. 23—*Having possession of more than five pieces of counterfeit foreign coin.*]—Whosoever, without lawful *authority or* excuse (*the proof whereof shall lie on the party accused*), shall have in his custody or possession any greater number of pieces than five pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, or any such copper or other coin as in the last preceding section (*s.* 22, *ante*, p. 963) mentioned, shall, on conviction thereof before any justice of the peace, forfeit and lose all such false and counterfeit coin, which shall be cut in pieces and destroyed by order of such justice, and shall for every such offence forfeit and pay any sum of money not exceeding forty shillings nor less than ten shillings for every such piece of false and counterfeit coin which shall be found in the custody or possession of such person, one moiety to the informer, and the other moiety to the poor of the parish where such offence shall be committed; and in case any such penalty shall not be forthwith paid, it shall be lawful for any such justice to commit the person who shall have been adjudged to pay the same to the common gaol or house of correction, there to be kept to hard labour for the space of three months, or until such penalty shall be paid.

[*This section was framed from* 37 *G.* 3, *c.* 126, *s.* 6, *and* 43 *G.* 3, *c.* 139, *s.* 6, *with the alterations italicized.*]

Indictment for Possession of Counterfeit British Gold or Silver Coin.
(24 & 25 *Vict. c.* 99, *s.* 11, *ante*, p. 978.)

Commencement as ante, p. 963]—unlawfully had in his custody and possession four pieces of false and counterfeit coin resembling ("*resembling or apparently intended to resemble or pass for*") the King's current silver ("*gold or silver*") coin, called shillings, with intent to utter ("*tender, utter, or put off*") the said pieces of false and counterfeit coin, he the said J. S. then well knowing the said pieces of false and counterfeit coin to be false and counterfeit; against the form [*as ante*, p. 465].

Misdemeanor: penal servitude for not less than three years and not exceeding five years, or imprisonment, with or without hard labour, not exceeding two years. 24 & 25 *Vict. c.* 99, *s.* 11; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour*, 24 & 25 *Vict. c.* 99, *s.* 38 (*ante*, p. 962). *This offence, after a previous conviction for the like offence, or for any of the misdemeanors mentioned in ss.* 9 *and* 10, *or for any felony against* 24 & 25 *Vict. c.* 99, *or any former Act relating to the coin, is felony: penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, not exceeding two years.* 24 & 25 *Vict. c.* 99, *s.* 12; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *An indictment for that offence may be easily framed from this and the last precedent. Indictment for Possession of Counterfeit British Copper Coin* (24 & 25 *Vict. c.* 99, *s.* 15).

An indictment for possessing counterfeit British copper coin may be in the same form, with substitution of copper and the denomination for gold or silver.

Misdemeanor: imprisonment, with or without hard labour, for any term not exceeding one year. 24 & 25 *Vict. c.* 99, *s.* 15 (*ante*, p. 978). *As to fine and recognizances, see* 24 & 25 *Vict. c.* 99, *s.* 38 (*ante*, p. 962).

Evidence.

Prove that the defendant had in his custody or possession three or more pieces of counterfeit gold or silver coin. They will be deemed to be in his custody or possession if he have them in his personal custody or possession, or knowingly and wilfully have them in the actual custody or possession of any other person, or knowingly and wilfully have them in any dwelling-house or other building, lodging, apartment, field, or other place, open or enclosed, whether belonging to or occupied by himself or not, and whether they be had for his own use or benefit, or for that of another. 24 & 25 *Vict. c.* 99, *s.* 1 (*ante*, p. 960). So, also, when pieces of counterfeit coin are found on one of two persons acting in guilty concert, and both knowing of the possession, both are guilty under this section. *R.* v. *Rogers*, 2 *Mood. C. C.* 85: *R.* v. *Williams*, *C. & Mar.* 259 (*see ante*, p. 976). Prove also the defendant's knowledge that the coin was counterfeit, and his intent to utter it. These, of course, can only be proved by circumstances; as, for instance, by evidence of former utterings, or by the fact of the defendant's having in his possession a large quantity of counterfeit coin of like date, and made in the same mould, wrapped up in separate papers, and distributed in different pockets of his dress. *R.* v. *Jarvis*, *Dears.* 552; 25 *L. J.* (*M. C.*) 30. *See R.* v. *Fuller*, *R. & R.* 308.

At common law, it was no offence to have possession of counterfeit coin with intent to utter it; *R.* v. *Stewart*, *R. & R.* 288: *R.* v. *Heath*, *Id.* 184; but to *procure* it with that intent was a misdemeanor. *R.* v. *Fuller*, *R. & R.* 308: *see R.* v. *Roberts*, *Dears.* 539; 25 *L. J.* (*M. C.*) 17 (*post*, p. 982): *cf. Dugdale* v. *Reg.*, *Dears.* 64. And proof that the defendant was the coiner was an answer to an indictment for the common law misdemeanor for procuring (*see* 1 *Russ. Cr.* (6th ed.) 198); but this would not be so under the present statute.

MAKING, ETC., COINING TOOLS.

Statute.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 14—*Tools for counterfeiting British copper coin.*] . . . Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any instrument, tool, or engine adapted and intended for the counterfeiting any of the [King's] current copper coin . . . shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for any term not exceeding seven years. . . . [*For other offences created by this section, see ante*, pp. 963, 970. *The section re-enacts* 2 & 3 *W.* 4, *c.* 34, *s.* 12.]

Sect. 24—Tools for counterfeiting British gold or silver coin, or any foreign coin.]—Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or shall be *adapted and* intended to make or impress the figure, stamp, or apparent resemblance of both or either of the sides of any of the [King's] current gold or silver coin, *or of any coin of any foreign prince, state or country* (*see post*, p. 984), or any part or parts of both or either of such sides; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any edger, edging *or other* tool, collar, instrument or engine adapted and intended for the marking of coin round the edges with letters, grainings or other marks or figures apparently resembling those on the edges of any such coin as in this section aforesaid, knowing the same to be so adapted and intended as aforesaid; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any press for coinage, or any cutting engine for cutting by force of a screw, or of any other contrivance, round blanks out of gold, silver, or other metal *or mixture of metals, or any other machine*, knowing such press to be a press for coinage, or knowing such engine or machine to have been used, or to be intended to be used, for or in order to the false making or counterfeiting of any such coin as in this section aforesaid, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section re-enacts* 2 *&* 3 *W.* 4, *c.* 34, *s.* 10, *with the additions italicized. A galvanic battery is a machine within this section. R. v. Gover*, 9 *Cox*, 282.]

Indictment for making, etc., a Puncheon, etc., for Coining Gold and Silver Coin. (24 *&* 25 *Vict. c.* 99, *s.* 24.)

Commencement as ante, p. 963]—one puncheon ("*any puncheon, counter-puncheon, matrix, stamp, die, pattern or mould*") in and upon which there was then made and impressed ("*in or upon which there shall be made or impressed, or which will make or impress, or which shall be adapted and intended to make or impress*") the figure ("*figure, stamp, or apparent resemblance*") of one of the sides ("*of both or either of the sides, or any part or parts of both or either of such sides*"), that is to say, the head side of a piece of the King's current silver ("*gold or silver*") coin, commonly called a shilling,* feloniously, and without lawful authority or excuse, did knowingly make ("*make or mend, or begin or proceed to make or mend, or buy or sell*"); against the form [*as ante*, p. 465]. *As to the venue, see ante*, pp. 43, 47, 960. *As to the words* "without lawful authority or excuse" *in the precedent, see R. v. Harvey* (*post*, p. 983). *The words* "knowingly, falsely, and deceitfully," *which appeared in the precedent in the* 21*st edition of this work at* p. 875, *are not in the statute.*

Felony: penal servitude for life or for not less than three years, if the offence relates to British current gold or silver coin or any foreign coin, and penal servitude for not less than three nor more than seven years, if it relates to British current copper coin; 24 *&* 25 *Vict. c.* 99, *ss.* 14, 24; 54 *&* 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235); *or in either case, imprisonment, with or without hard labour, not exceeding two years.* 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2

(*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 99, *s.* 38 (*ante*, p. 962).

These offences are not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126.

Evidence.

Prove that the defendant made, etc., a puncheon, etc., as stated in the indictment; and prove that the instrument in question is a puncheon or other instrument described in the indictment, and included in the statute. The words in the statute "upon which there shall be made or impressed," etc., apply to the puncheon, which, being convex, bears upon it the figure of the coin; and the words "which will make and impress," etc., apply to the counter-puncheon, etc., which, being concave, will make and impress. Although it is more accurate to describe the instruments according to their actual use, even under earlier statutes they might be described either way. *R.* v. *Lennard*, 1 *Leach*, 85, 90; 1 *East, P. C.* 170; 2 *W. Bl.* 807. It is not necessary that the instrument should be capable of making an impression of the whole of one side of the coin; for the words "or any part or parts," etc., are introduced into this statute, and consequently the difficulty in *R.* v. *Sutton*, 2 *Str.* 1074, where the instrument was capable of making the sceptre only, cannot now occur. And on an indictment for making a mould "intended to make and impress the figure and apparent resemblance of the obverse side" of a shilling, it is sufficient to prove that the prisoner made the mould, and a part of the impression, though he had not completed the entire impression. *R.* v. *Foster*, 7 *C. & P.* 495. It is not necessary to prove, under this branch of the statute, the *intent* of the defendant; the mere similitude is treated by the legislature as evidence of the intent; neither is it essential to show that money was actually made with the instrument in question. *R.* v. *Ridgeley*, 1 *East, P. C.* 171, 172. The proof of lawful authority or excuse (if any) for the act lies on the defendant. 24 & 25 *Vict. c.* 99, *s.* 24. *See Dickins* v. *Gill* [1896] 2 *Q. B.* 310.

Where the defendant employed a die-sinker to make, for a pretended innocent purpose, a die calculated to make shillings; and the die-sinker, suspecting fraud, informed the authorities at the Mint, and under their directions made the die for the purpose of detecting the prisoner; it was held that the die-sinker was an innocent agent, and the defendant was rightly convicted as a principal under 2 *W.* 4, *c.* 34, *s.* 10 (*rep.*). *R.* v. *Bannen*, 2 *Mood. C. C.* 309; 1 *C. & K.* 295.

The *making* and *procuring* dies and other materials, with intent to use them in coining Peruvian half-dollars in England, not in order to utter them here, but by way of trying whether the apparatus would answer before sending it out to Peru, to be there used in making the counterfeit coin for circulation in that country, was held to be an indictable misdemeanor at common law. *R.* v. *Roberts*, *Dears.* 539; 25 *L. J.* (*M. C.*) 17 (*see ante*, p. 980). As to the liability of a wife for implements found in a room occupied by her husband, *see R.* v. *Boober*, 4 *Cox*, 272.

Indictment for having a Puncheon, etc., in Possession. (24 & 25 *Vict. c.* 99, *s.* 24, *ante*, p. 981.)

Proceed as in the last precedent to the asterisk *, *and then thus*].—feloniously, and without lawful excuse, did knowingly have in his custody and possession; against the form [*as ante*, p. 465]. *See* [*note to last*

precedent (*ante*, p. 981). *An indictment which charged that the defendant feloniously had in his possession a mould, "upon which said mould was made and impressed the figure and apparent resemblance" of the obverse side of a sixpence, was held bad on demurrer, as not sufficiently showing that the impression was on the mould at the time when he had it in his possession. R.* v. *Richmond*, 1 *C. & K.* 240. *In the above precedent the prisoner's possession is averred to have been "without lawful authority or excuse;" it is sufficient, however, if the possession is averred to have been "without lawful excuse," on the ground that there can be no authority which would not also be an excuse, and therefore to negative excuse is to negative authority. R.* v. *Harvey, L. R.* 1 *C. C. R.* 284; 40 *L. J.* (*M. C.*) 63. *An indictment which does not expressly or impliedly, as in the case last mentioned, aver the prisoner's possession to have been without lawful authority or excuse, would be bad. Id. As to the venue, see ante*, pp. 43, 47, 960.

Felony: 24 *& 25 Vict. c.* 99, *s.* 24. *See the last precedent.*

This offence is not triable at quarter sessions. 5 *& 6 Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the custody or possession, that is, that the defendant had the instrument either in his personal custody or possession, or in the actual custody or possession of any other person, or in some dwelling-house or building, lodging, apartment, field or other place, open or enclosed, whether belonging to or occupied by himself or not, and whether the instrument was had for his own use or benefit, or for that of another. 24 *& 25 Vict. c.* 99, *s.* 1 (*ante*, p. 960); *see R.* v. *Rogers*, 2 *Mood. C. C.* 85 (*ante*, p. 980). To prove the guilty knowledge, evidence may be given of the defendant's having previously uttered counterfeit money. *R.* v. *Weeks, L. & C.* 18; 30 *L. J.* (*M. C.*) 141. The guilty knowledge required is the being knowingly in possession of the instrument contrary to the provisions of the statute, *i.e.*, without lawful authority or excuse. A guilty intention in reference to the use or possession of the instrument is not necessary under the statute. *R.* v. *Harvey, L. R.* 1 *C. C. R.* 284; 40 *L. J.* (*M. C.*) 63; 11 *Cox*, 662. Where the prisoner ordered of a die-sinker two dies having an apparent resemblance to the sides of a sovereign, whereupon the die-sinker communicated with the police, who in consequence of orders from the Mint told him to furnish the dies to the prisoner, which he accordingly did; it was held that these facts constituted no lawful authority or excuse for the prisoner's possession of the dies. *Id.* The lawful authority or excuse, if any, must be proved by the defendant. 24 *& 25 Vict. c.* 99, *s.* 24. *See Dickins* v. *Gill* [1896] 2 *Q. B.* 310. It must also be proved that the puncheon or instrument is such as is specified in the indictment, and included in the statute. Where the prisoner was indicted for having in his possession a mould on which was impressed a resemblance of the obverse side of a shilling, it was held that, in order to convict, the jury must be satisfied, that, at the time he had it in his possession, the *whole* of the obverse side of the shilling was impressed on the mould. *R.* v. *Foster*, 7 *C. & P.* 494. The police, entering prisoner's house in his absence, took from some persons inside a plaster-of-Paris mould of a half-crown, part of which was still wet, after resistance on their part, and an attempt by them to destroy the mould. Materials suitable for melting lead and making plaster-of-Paris moulds were found in various parts of the house. Shortly afterwards the prisoner came in. He had passed a bad half-crown thirteen days before, but there was no evidence to show that it was made in the mould seized. It was held, that this evidence warranted the conviction

of the prisoner for knowingly and without lawful excuse feloniously having in his custody and possession a mould on which was impressed the figure and apparent resemblance of the obverse side of a half-crown. *R.* v. *Weeks* (*ubi supra*).

Indictment for making, etc., a Collar, etc. (24 & 25 *Vict. c.* 99, *s.* 24, *ante*, p. 981.)

Commencement as ante, p. 963]—one collar ("*any edger, edging or other tool, collar, instrument, or engine*") adapted and intended for the marking of coin round the edges with grainings ("*letters, grainings, or other marks or figures*") apparently resembling those on the edges of a piece of the King's current gold ("*gold or silver*") coin called a sovereign, feloniously, and without lawful authority or excuse, did make ("*make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession*"), he the said J. S. then well knowing the same to be so adapted and intended as aforesaid; against the form [*as ante*, p. 465]. *From this and the last precedent an indictment for having possession of such tools may be easily framed.*

Felony: 24 & 25 *Vict. c.* 99, *s.* 24. *See the precedent ante*, p. 981.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

The evidence upon this indictment will be the same as on the last two respectively, except that it must also be proved that the defendant knew the instrument to be adapted and intended for the marking of coin round the edge. This was a new provision introduced into 2 *W.* 4, *c.* 34 (*rep.*), and was substituted for the words "not of common use in any trade," in the former statute, upon which much difficulty arose. *See R.* v. *Moore*, 2 *C. & P.* 235.

Indictment for making, etc., a Press, etc., for Coinage. (24 & 25 *Vict. c.* 99, *s.* 24, *ante*, p. 981.)

Commencement as ante, p. 963]—one press for coinage ("*any press for coinage, or any cutting-engine for cutting, by force of a screw or any other contrivance, round blanks out of gold, silver, or other metal or mixture of metals, or any other machine*") feloniously, and without lawful authority or excuse, did make ("*make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession*"), he the said J. S. then well knowing such press to be a press for coinage [*or* such engine to have been used or to be intended to be used for and in order to the counterfeiting of the King's current gold and silver coin]; against the form [*as ante*, p. 465]. *As to the venue, see ante*, pp. 43, 47, 960. *From this and the precedent ante*, p. 982, *an indictment may be easily framed for having possession of a coining-press or instrument for cutting. As to the words* "without lawful authority or excuse," *see R.* v. *Harvey* (*ante*, p. 983).

Felony: 24 & 25 *Vict. c.* 99, *s.* 24. *See the precedent ante*, p. 981.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

The evidence will be the same as under the last precedent. In *R.* v. *Bell*, 1 *East, P. C.* 169; *Fost.* 430, it was held that a coining-press used

to make *Louis d'or* was not within the meaning of similar words in 8 & 9 *W.* 3, *c.* 26 (*rep.*), contrary to the opinion of *Ryder*, C.J., and *Foster*, J., in which Lord *Mansfield* concurred; but 24 & 25 *Vict. c.* 99, *s.* 24 (*ante*, p. 981), expressly applies to instruments used or intended to be used for counterfeiting any coin of "any foreign prince, state or country."

CONVEYING COINING TOOLS OR COINS OUT OF THE MINT.

Statute.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 25.]—Whosoever, without lawful authority *or excuse* (the proof whereof shall lie on the party accused), shall knowingly convey out of any of [his] Majesty's Mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging *or other* tool, collar, instrument, press, or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable . . . to be kept in penal servitude for life. . . . [*This section is taken from* 2 & 3 *W.* 4, *c.* 34, *s.* 11, *with alterations italicized.*]

Indictment.

An indictment for offences against this section can readily be framed from the precedents ante, pp. 981–984.

MAKING, ETC., MEDALS RESEMBLING CURRENT COIN.

Statute.

46 & 47 *Vict. c.* 45 (*Counterfeit Medal Act*, 1883), *s.* 2—*Punishment for making, etc., medals resembling current gold or silver coin.*]—If any person, without due authority or excuse [*see R.* v. *Harvey*, *ante*, p. 983] (the proof whereof shall lie on the person accused), makes or has in his possession for sale, or offers for sale, or sells, any medal, cast, coin, or any other like thing made wholly or partially of metal or any metallic combination and resembling in size, figure, and colour any of the [King's] current gold or silver coin, or having thereon a device resembling any device on any of the [King's] current gold or silver coin, or being so formed that it can by gilding, silvering, colouring, washing, or other like process, be so dealt with as to resemble any of the [King's] current gold or silver coin, he shall be guilty, in England and Ireland, of a misdemeanor, and in Scotland of a crime and offence, and on being convicted thereof shall be liable to be imprisoned for any term not exceeding one year, with or without hard labour. [*See also* 24 & 25 *Vict. c.* 99, *s.* 13 (*ante*, p. 973).]

Sect. 3—*Interpretation.*]—"The [King's] current gold or silver coin" includes any gold or silver coin coined in or for any of [his] Majesty's Mints, or lawfully current by virtue of any proclamation or otherwise in

any part of [his] Majesty's dominions, whether within the United Kingdom or otherwise. [*See ante*, p. 959.]

Sect. 6.

Sedition (including seditious libel).

Statutes.

13 *Car.* 2, *st.* 1, *c.* 1, *s.* 3.]—*Maliciously and advisedly, by writing, printing, preaching, or express words, declaring or affirming that parliament has legislative authority without the King: punishable by penalties of præmunire under* 16 *Ric.* 2, *c.* 5.

Sect. 4.]—*Limitation of prosecution: three months: no prosecution without special order of King or council.*

6 *Anne*, *c.* 41, *s.* 2.]—*Maliciously and advisedly, by preaching, teaching, or advised speaking, declaring, maintaining or affirming that any person has right or title to the crown otherwise than in accordance with the Acts of Settlement and Union: punishable by penalties of præmunire. Limitation of prosecution: three days: two credible witnesses necessary for conviction.*

32 *G.* 3, *c.* 60—*Functions of juries on trial of indictment for libel.*]—*See post*, p. 1118.

37 *G.* 3, *c.* 123; 54 *G.* 3, *c.* 104—*Taking or administering oaths for seditious purposes.*]—*See post*, pp. 999, 1002.

39 *G.* 3, *c.* 79; 57 *G.* 3, *c.* 19, *s.* 23—*Unlawful societies.*]—*See post*, p. 1000.

60 *G.* 3 & 1 *G.* 4, *c.* 8 (*Criminal Libel Act*, 1820), *s.* 1—*Search for and seizure after verdict of blasphemous and certain kinds of seditious libel.*]—In every case in which any verdict or judgment by default shall be had against any person for composing, printing, or publishing any blasphemous libel, or any seditious libel tending to bring into hatred or contempt the person of his Majesty or the government and constitution of the United Kingdom as by law established, or either house of parliament, or to excite his Majesty's subjects to attempt the alteration of any matter in Church or State as by law established, otherwise than by lawful means, it shall be lawful for the judge or the court before whom or in which such verdict shall have been given, or the court in which such judgment by default shall be had, to make an order for the seizure and carrying away and detaining in safe custody, in such manner as shall be directed in such order, all copies of the libel which shall be in the possession of the person against whom such verdict or judgment shall have been had, or in the possession of any other person named in the order for his use, evidence upon oath having been previously given to the satisfaction of such court or judge, that a copy or copies of the said libel is or are in the possession of such other person for the use of the person against whom such verdict or judgment shall have been had as aforesaid; and in every such case it shall be lawful for any justice of the peace, or for any constable or other

peace officer, acting under any such order, or for any person or persons acting with or in aid of any such justice of the peace, constable, or other peace officer, to search for any copies of such libel in any house, building, or other place whatsoever belonging to the person against whom any such verdict or judgment shall have been had, or to any other person so named, in whose possession any copies of any such libel, belonging to the person against whom any such verdict or judgment shall have been had, shall be; and in case admission shall be refused or not obtained within a reasonable time after it shall have been first demanded, to enter by force by day into any such house, building, or place whatsoever, and to carry away all copies of the libel there found, and to detain the same in safe custody until the same shall be restored under the provisions of this Act, or disposed of according to any further order made in relation thereto.

Sect. 2—*Disposal of copies seized.*]—If in any such case as aforesaid judgment shall be arrested, or if, after judgment shall have been entered, the same shall be reversed upon any writ of error, all copies so seized shall be forthwith returned to the person or persons from whom the same shall have been so taken as aforesaid, free of all charge and expense, and without the payment of any fees whatever; and in every case in which final judgment shall be entered upon the verdict so found against the person or persons charged with having composed, printed, or published such libel, then all copies so seized shall be disposed of as the court in which such judgment shall be given shall order and direct.

Sect. 4—*Punishment.*]—If any person shall be legally convicted of having composed, printed, or published any blasphemous libel or any such seditious libel as aforesaid, and shall after being so convicted offend a second time, and be thereof legally convicted before any commission of oyer and terminer or gaol delivery, or in his Majesty's Court of King's Bench, such person may, on such second conviction, be adjudged, at the discretion of the court, to suffer such punishment as may now by law be inflicted in cases of high misdemeanors. . . . [*So much of this section as inflicted banishment on a second conviction was repealed by* 11 *G.* 4 *&* 1 *W.* 4, *c.* 73, *s.* 1.]

Sect. 7—*Certificate of conviction.*]—The clerk of assize, clerk of the peace, or other clerk or officer of the court having the custody of the records where any offender shall have been convicted of having composed, printed, or published any blasphemous or seditious libel, shall, upon request of the prosecutor on his Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, to the justices of assize, oyer and terminer, great sessions, or gaol delivery, where such offender or offenders shall be indicted for any second offence of composing, printing, or publishing any blasphemous or seditious libel; for which certificate six shillings and eightpence and no more shall be paid, and which certificate shall be sufficient proof of the conviction of such offender.

6 *&* 7 *Vict. c.* 96 (*Libel Act*, 1843), *s.* 7—*Rebutting primâ facie case of publication by agent.*]—Whensoever, upon the trial of an indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from any want of due care or

caution on his part. [*See R.* v. *Holbrook*, 3 *Q. B. D.* 60; 4 *Q. B. D.* 42; 47 *L. J.* (*Q. B.*) 35; 48 *L. J.* (*Q. B.*) 113.]

44 & 45 *Vict. c.* 60, *s.* 6—*All libels to be within Vexatious Indictments Act.*]—*Ante*, p. 7, *et seq.*

54 & 55 *Vict. c.* 64, *s.* 8—*No prosecution for libel in newspaper without a judge's order.*]—*Post*, p. 1122.

40 & 41 *Vict. c.* 21 (*Prison Act*, 1877), *s.* 40—*Treatment of prisoners convicted of sedition or seditious libel.*]—The prison commissioners shall see that any prisoner under sentence inflicted on conviction for sedition or seditious libel shall be treated as a misdemeanant of the first division within the meaning of *s.* 67 of the *Prisons Act*, 1865 (28 & 29 *Vict. c.* 126), notwithstanding any statute, provision, or rule to the contrary. [*See ante*, p. 239.]

28 & 29 *Vict. c.* 126 (*Prison Act*, 1865), *s.* 67—*Misdemeanants of first division.*]—*Repealed on May* 1, 1899, *on the coming into force of the Prison Rules*, 1899, *made under* 61 & 62 *Vict. c.* 41, *infra*. *See s.* 15 (2) *of that Act, ante*, p. 239.

61 & 62 *Vict. c.* 41 (*Prison Act*, 1898), *s.* 6 (5).]—References in *ss.* 40 and 41 of the *Prison Act*, 1877, to a misdemeanant of the first division within the meaning of *s.* 67 of the *Prison Act*, 1865, shall be construed as references to an offender of the first division within the meaning of this section. *See ante*, p. 239.

Indictment for a Seditious Libel (Common Law).

Kent, to wit:—The jurors for our lord the King, upon their oath present that J. H. [late of the parish of B., in the county of M., clerk], being a wicked, malicious, seditious, and ill-disposed person, and being greatly disaffected to our said lord the King, and to his administration of the government of this kingdom, and the dominions thereunto belonging, and wickedly, maliciously, and seditiously contriving, devising, and intending to stir up and excite discontents and seditions amongst his Majesty's subjects, and to alienate and withdraw the affection, fidelity and allegiance of his said Majesty's subjects from his said Majesty and cause it to be believed that divers of his Majesty's innocent and deserving subjects had been inhumanly murdered by his said Majesty's troops, in the province, colony, or plantation of the Massachusetts Bay in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly to seduce and encourage his Majesty's subjects in the said province, colony, or plantation, to resist and oppose his Majesty's government, on the eighth day of June, in the fifteenth year of the reign of our sovereign lord George the Third [with force and arms], at the parish aforesaid, in the county aforesaid, wickedly, maliciously, and seditiously did write and publish, and cause and procure to be written and published, a certain [false], wicked, malicious, scandalous, and seditious libel of and concerning his said Majesty's government, and the employment of his troops, according to the tenor and effect following: that is to say, "King's Arms Tavern, Cornhill, June 7, 1775.—At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed that a subscription should be immediately entered into by such of the members present who might approve the

purpose, for raising the sum of one hundred pounds, to be applied to the relief of the widows, orphans and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the King's (meaning his said Majesty's) troops at Lexington and Concord, in the province of Massachusetts (meaning the said province, colony, or plantation of the Massachusetts Bay, in New England, in America), on the nineteenth of last April: which sum being immediately collected, it was thereupon resolved, that Mr. H. (meaning himself, the said J. H.) do pay to-morrow into the hands of Messrs. B. & C., on account of Dr. F., the said sum of one hundred pounds; and that Dr. F. be requested to apply the same to the above-mentioned purpose.—J. H." (meaning himself, the said J. H.): in contempt of our said lord the King, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. *There were other counts charging that the defendant "printed and published, and caused and procured to be printed and published" in several newspapers, the same libel; and other counts, charging the printing and publishing of part of the same libel, setting it out to the words, "the nineteenth of last April," inclusive; and lastly, a count charging the defendant with having written and published another but similar libel.—This indictment was framed from the ex-officio information in the case of R.* v. *Horne*, 2 *Cowp.* 672; 20 *St. Tr.* 651. *See also the precedent in R.* v. *Finerty*, 26 *St. Tr.* 901, 923 (*Ir.*), *and two precedents*, 4 *Wentw.* 190, 200. *For an indictment for seditious libel, see* 4 *Wentw.* 199, 200: *R.* v. *Cobbett*, 2 *St. Tr., N. S.* 789, 791: *R.* v. *Collins*, 3 *St. Tr., N. S.* 1149; 9 *C. & P.* 456. *In R.* v. *Horne, ubi supra, the defendant himself moved in arrest of judyment, and made several objections, the principal of which was, that it was not averred that the employment of the troops was by the King's authority; but the court, after much consideration, declared themselves clearly of opinion that the information was sufficient. See also R.* v. *Burdett*, 1 *St. Tr., N. S.* 1; 4 *B. & Ald.* 314. *The word* "false" *seems unnecessary, as truth is no defence. See post*, p. 997. *It has been held in R.* v. *McHugh* [1901] 2 *Ir. Rep.* 369, *that the words "seditious" and "seditiously" are not essential.*

Misdemeanor: fine and imprisonment. 60 *G.* 3 & 1 *G.* 4, *c.* 8, *s.* 4 (*ante*, p. 987). *As to the treatment of prisoners convicted of seditious libel, see* 40 & 41 *Vict. c.* 21, *s.* 40; 61 & 62 *Vict. c.* 41, *s.* 6 (*ante*, p. 988). *Seditious libel is within the provisions of the Vexatious Indictments Act*, 1859, *as extended by the Criminal Law Amendment Act*, 1867 (*ante*, p. 7, *et seq.*); 44 & 45 *Vict. c.* 60, *s.* 6 (*post*, p. 1121).

The offence of composing, printing, or publishing blasphemous, or seditious, or defamatory libels, is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

It seems that no prosecution of persons concerned in the publication of a seditious libel ("any libel") appearing in a newspaper, as defined by 44 & 45 *Vict. c.* 60, *s.* 1 (*post*, p. 1120), *and* 51 & 52 *Vict. c.* 64, *s.* 1 (*post*, p. 1121), *may be instituted without the order of a judge of the High Court in chambers. See* 51 & 52 *Vict. c.* 64, *s.* 8 (*post*, p. 1122).

Sedition defined.]—Sedition, whether by words spoken or written, or by conduct, is a misdemeanor indictable at common law, punishable by fine and imprisonment. *See Stroud's case*, 3 *St. Tr.* 235; *and cf.* 22 *St. Tr.* 477, *n.* It embraces all those practices, whether by word, deed, or writing, which fall short of high treason (1 *Hale*, 77), but directly tend or have for their object to excite discontent or dissatisfaction; to excite ill-will

between different classes of the King's subjects; to create public disturbance, or to lead to civil war; to bring into hatred or contempt the sovereign or the government, the laws or constitution of the realm, and generally all endeavours to promote public disorder; *R.* v. *Fussell*, 6 *St. Tr., N. S.* 723; 3 *Cox*, 291: *R.* v. *Lovett*, 3 *St. Tr., N. S.* 1177, *Littledale*, J.: *R.* v. *O'Brien*, 6 *St. Tr., N. S.* 571, 591, *n.*, *Crampton*, J.: *R.* v. *Sullivan*, *R.* v. *Pigott*, 11 *Cox*, 44, 45, 51, 60, *Fitzgerald*, J.: *and see* 33 *St. Tr.* 342, 394; 1 *St. Tr., N. S.* 751; *Steph. Dig. Cr. L.* (6th ed.) p. 70; or to incite people to unlawful associations, or assemblies, insurrections, breaches of the peace, or forcible obstruction of the execution of the law. *R.* v. *Jones*, 6 *St. Tr., N. S.* 783, *Wilde*, C.J.: *R.* v. *O'Donnell*, 7 *St. Tr., N. S.* 637, *Erle*, J.: *R.* v. *Feargus O'Connor*, 4 *St. Tr., N. S.* 1352, 1364: *R.* v. *Bronterre O'Brien*, *Id.* 1341, 1343, *Coleridge*, J. This definition does not include candid, full, and free discussion of any public matter, which is the right of every citizen, unless the discussion takes place under circumstances calculated or intended to incite tumult; *R.* v. *Collins*, 3 *St. Tr., N. S.* 1149; 9 *C. & P.* 456; or the statements made are an appeal to the passions of the hearers and an incitement to violence or outrage. *R.* v. *Burdett*, 1 *St. Tr., N. S.* 1; 3 *B. & Ald.* 717. A writer may criticize or censure the conduct of the servants of the crown or the acts of the government,—he can do it freely and liberally, but it must be without malignity, and not imputing corrupt or malicious motives; he may also freely criticize the proceedings of courts of justice and of individual judges. The law does not seek to put any narrow construction on the expressions used, and only interferes when plainly and deliberately the limits are passed of frank and candid and honest discussion. *R.* v. *Sullivan*, *R.* v. *Pigott*, *ubi supra*. These cases were followed and approved in *R.* v. *Burns*, 16 *Cox*, 355, *Cave*, J. The exciting ill-will between different classes of his Majesty's subjects may amount to sedition; whether it does so or not in any particular case is a question for the jury after taking into consideration all the circumstances of the case. *R.* v. *Burns*, *ubi supra*. Political writings and words may be classed under three heads: those which are overt acts of treason; those which are seditious; and those which are allowable and justifiable. We have seen what political writings and words amount to overt acts of high treason (*ante*, p. 939). On the other hand, a man may lawfully discuss and criticize the measures adopted by the King and his ministers for the government of the country, provided he do it fairly, temperately, with decency and respect, and without imputing to them any corrupt or improper motive. *See R.* v. *Lambert & Perry*, 2 *Camp.* 398; 11 *R. R.* 748. All political writings and words between these extremes may be deemed seditious. As, for instance, if a man curse the King, wish him ill, give out scandalous stories concerning him (*see R.* v. *Harvey* (*a*), 2 *St. Tr., N. S.* 1; 2 *B. & C.* 257; 26 *R. R.* 337), or do anything that may lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people; or if he deny the King's right to the throne, in common and unadvised discourse (for if it be by advisedly speaking, it amounts to *præmunire*, 6 *Anne*, *c.* 41, *s.* 2 (*ante*, p. 986); all these are sedition. 4 *Bl. Com.* 423. In *R.* v. *Tutchin* (14 *St. Tr.* 1095; *Holt*, 424), Lord *Holt* said, that "if men shall not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe unless it be punished." And Lord *Ellenborough*, in *R.* v. *Cobbett*, 29

(*a*) This was an indictment for defamatory, not for seditious, libel.

St. Tr. 1, 49; *Holt on Libel* (2nd ed.), 114; *Starkie on Libel* (6th ed.), 653, said that if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient resorted to be ridicule or obloquy, the writer, publisher, etc., are punishable. And whether the defendant really intended by his publication to alienate the affections of the people from the government, or not, is not material; if the publication be calculated to have that effect, it is a seditious libel. *R.* v. *Burdett*, 1 *St. Tr., N. S.* 1; 4 *B. & Ald.* 95. It is also a seditious libel if published with an intention (or if calculated, *cf. R.* v. *Grant*, 7 *St. Tr. N. S.* 507: *R.* v. *Hicklin*, *L. R.* 3 *Q. B.* 360) to inflame the minds of the labourers and working people, and to incite them to acts of violence, riot, and disorder, and to the burning and destruction of corn, machines, and other property. *R.* v. *Cobbett*, 2 *St. Tr., N. S.* 789, 899, *Tenterden*, L.C.J. To impute corruption to judges has been said to be seditious. *R.* v. *Lord George Gordon*, 22 *St. Tr.* 177. But it would seem to be properly punishable as contempt of court or defamatory libel. (*See post*, pp. 1094, 1118.) So also as to a libel on the clergy of a diocese. *See R.* v. *Williams*, 1 *St. Tr., N. S.* 1291; 5 *B. & Ald.* 595; 24 *R. R.* 480: *R.* v. *Harvey*, 2 *St. Tr., N. S.* 1; 2 *B. & C.* 257, where the indictment is framed without the word "seditious." But statements about the King which if published of subjects would be defamatory appear to be regarded as seditious and incapable of justification. *See Odgers on Libel* (3rd ed.), 500, 501: *Ex parte O'Brien*, 12 *L. R. Ir.* 29; 15 *Cox*, 180: *R.* v. *Duffy* [1846] 6 *St. Tr., N. S.* 303; 9 *Ir. L. R.* 329.

Secondly, as to the form of the indictment.—As to the merely formal part, it is sufficient to refer to the precedent *ante*, p. 988.

1. The indictment must charge a publication; composing or writing a seditious libel merely does not seem to be an offence, unless the libel be afterwards published. *See R.* v. *Burdett*, 1 *St. Tr., N. S.* 1; 4 *B. & Ald.* 95. As to venue, *see post*, p. 992.

2. Such part of the publication as is seditious, or as the prosecutor chooses to set out, must be set out correctly, as the powers of amendment under 14 & 15 *Vict. c.* 100; 11 & 12 *Vict. c.* 46; 14 & 15 *Vict. c.* 100, *ss.* 1, 18 (*ante*, pp. 51–55), seem not to apply, and the full strictness of the common law system of pleading continues. *Re Crowe*, 3 *Cox*, 123: *R.* v. *Fussell*, 6 *St. Tr., N. S.* 723; 3 *Cox*, 291: *Bradlaugh* v. *R.*, 3 *Q. B. D.* 607; 48 *L. J.* (*M. C.*) 5. (*See ante*, pp. 75, 302.) If parts of the publication be selected, they should be set forth thus: "In a certain part of which said —— there were and are contained certain false, wicked, malicious, scandalous, seditious, and libellous matters, of and concerning, etc., according to the tenor and effect following; that is to say: —— And in a certain other part," etc., etc. If the libel be in a foreign language, it must be set out in such language verbatim, together with a correct translation. *Zenobio* v. *Axtell*, 6 *T. R.* 162: *R.* v. *Peltier*, 28 *St. Tr.* 529.

3. And besides setting out the seditious passages of the publication, the indictment should also contain such averments and innuendoes as may be necessary to render it intelligible, and its application to the King or his government, etc., evident. *See R.* v. *Yates*, 12 *Cox*, 233. When the statement of an intrinsic fact is necessary in order to render the libel intelligible, or to show its seditious quality, such intrinsic fact must be averred in the introductory part of the indictment; but where it is necessary merely to explain a word by reference to something which has preceded it, this is done by an innuendo. And an innuendo can explain only in cases where something already appears upon the record to ground the explanation; it cannot, of itself, change, add to, or enlarge the sense of expressions beyond their usual acceptation and meaning. *R.* v. *Horne*,

20 *St. Tr.* 651; 2 *Cowp.* 652: *R.* v. *Burdett*, 1 *St. Tr., N. S.* 1. See further on this subject, "*Defamatory Libel*" (*post*, pp. 1118, *et seq.*). In *R.* v. *Tutchin*, 14 *St. Tr.* 1095, one part of the libel ran thus: "The mismanagements of the *navy* have been a greater tax upon the merchants than the duties raised by parliament." In order to explain what was meant by the navy, the introductory part of the information charged the libel to have been written "of and concerning the royal navy of this kingdom, and the government of the said navy;" and when, in stating the libel, it came to the word "navy," it explained it by an innuendo, thus: meaning "the royal navy of this kingdom:" which, being coupled with the averment in the introductory part of it, made the sense and the charge complete. In *R.* v. *Matthews*, 15 *St. Tr.* 1323, the words of the libel were: "From the solemnity of the Chevalier's birth, and if hereditary right be any recommendation, he has that to plead in his favour." It was there objected—What Chevalier? who is he? what recommendation? and to what? But in the introductory part of the information the libel was charged to have been written "of and concerning the Pretender, and of and concerning his right to the crown of Great Britain:" and it was held that the innuendoes in the middle of the libel, explaining the words "Chevalier, etc.," to mean the Pretender, and his hereditary right to the crown of Great Britain, when connected with the averment in the introductory part, of its being written "of and concerning the Pretender, and his right to the crown of Great Britain," were a sufficient explanation to make good the charge.

Evidence for the Prosecution.

On the eighth day of June, etc.]—The day on which the libel is alleged to have been written and published is not material, and need not be proved as laid; but a variance between the indictment and evidence, in any dates alleged and mentioned in the libel, would be fatal unless amended. (*See ante*, p. 302.)

In the county aforesaid: Venue.]—Subject to the provisions of 7 *G.* 4, c. 64, s. 12 (*ante*, p. 43), the offence must be proved to have been committed in the county named as the venue in the margin, and in which the trial is had. If a letter containing the libel reach the party to whom it is directed in the proper county, *see R.* v. *Johnson*, 7 *East*, 65; 29 *St. Tr.* 81; 8 *R. R.* 597: even though addressed to him at a place out of the county, *R.* v. *Watson*, 1 *Camp.* 215, or even if a sealed letter, containing the libel, be put into the post office in the proper county, *R.* v. *Burdett*, 1 *St. Tr., N. S.* 1; 4 *B. & Ald.* 95, *by three judges, Bayley*, J., *dub.*, it is a sufficient publication of the libel in that county: and in the last case the three judges held, that if a man write and compose a libel in L., with intent to publish it, and afterwards publish it in M., he may be indicted for a misdemeanor in either county; *and see R.* v. *Williams*, 2 *Camp.* 506. As to these decisions, *see R.* v. *Ellis* [1899] 1 *Q. B.* 230 (*ante*, p. 44). In *R.* v. *Watson*, 1 *Camp.* 215, Lord *Ellenborough* held that the post-mark of a particular place within the county, upon a letter containing the libel, was no evidence of a publication in that county; for the post-mark might be forged. But this case is not now followed (*see Stocken* v. *Collin*, 7 *M. & W.* 529; 10 *L. J.* (*Ex.*) 227), and it would seem that post-marks are evidence that the letters on which they are were in the office to which the post-mark belongs, at the date thereby specified. *See R.* v. *Plumer*, *R. & R.* 264; 15 *R. R.* 741: *R.* v. *Johnson*, 7 *East*, 65; 29 *St. Tr.* 81; 8 *R. R.* 597: *Warren* v. *Warren*, 1 *Cr. M. & R.* 250; 4 *Tyrw.* 850: *and Odgers on Libel* (3rd ed.), 590.

Wickedly, maliciously, and seditiously.]—The malice, etc., may be inferred from the libel itself, without any extrinsic evidence of it. *R.* v. *Creevey*, 1 *M. & Sel.* 273, 282; 14 *R. R.* 427: *R.* v. *Lord Abingdon*, 1 *Esp.* 226; 5 *R. R.* 733: *Stockdale* v. *Hansard*, 3 *St. Tr., N. S.* 723, 882, 896: *Bromage* v. *Prosser*, 4 *B. & C.* 247, 255 (*ante*, p. 343). So, in order to prove the malicious or seditious intent, evidence is admissible of the defendant's having published other copies of the same libel, *Plunkett* v. *Cobbett*, 5 *Esp.* 136, or other libels, *R.* v. *Pearce*, *Peake* (3rd ed.), 106, provided that they expressly refer to the subject of the libel set out in the indictment. *Finnerty* v. *Tipper*, 2 *Camp.* 72: *see Chubb* v. *Westley*, 6 *C. & P.* 436.

Did write and publish, etc.]—A publication must be proved. Upon a count charging the defendant with having composed, printed, and published a libel, proof that he composed and published it, *R.* v. *Williams*, 2 *Camp.* 646, or even that he only published it, *R.* v. *Hunt*, 2 *Camp.* 583; 31 *St. Tr.* 367, 408, will be sufficient to maintain the count.

The publication may be by selling the libel, distributing it gratis, reading it to others (if he knew the tendency of it before), or by sending it and having it delivered to another person, or even to the party libelled by it. *See Bac. Abr. Libel* (B. 2); 1 *Hawk, c.* 73, *s.* 11. So, evidence of the defendant's procuring another person to publish the libel, is sufficient to maintain a count charging the defendant with having published it: and therefore evidence of the libel's being purchased in a bookseller's shop, or at a newspaper office, or the office of a newsvendor, from a servant there, in the course of business, will support a count charging the master with having published it (4 *Bac. Abr. Libel* (B. 2): *R.* v. *Almon*, 20 *St. Tr.* 803, 839; 5 *Burr.* 2686), even although it be proved that the master was not privy to it. *R.* v. *Walter*, 3 *Esp.* 21: *R.* v. *Gutch*, *M. & M.* 433; 31 *R. R.* 744: *Att.-Gen.* v. *Siddon*, 1 *Cr. & J.* 220. But the presumption created by such evidence can now be rebutted by evidence under 6 *& 7 Vict. c.* 96, *s.* 7 (*ante*, p. 987). As to publication through an innocent agent, *see ante*, p. 12. As to what may amount to evidence against the editor of a newspaper of conspiring to pervert the course of justice with the author of certain articles appearing therein, *see R.* v. *Tibbits* [1902] 1 *K. B.* 77; 20 *Cox*, 60 (*C. C. R.*).

The delivery of a newspaper to the officer of a stamp office was held to be sufficient publication to sustain an indictment for a libel in that paper, inasmuch as the officer would at all events have an opportunity of reading the libel himself. *R.* v. *Amphlit*, 4 *B. & C.* 35; 6 *D. & R.* 125; 28 *R. R.* 206. And if the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, though there is no express evidence that he authorized the printing or publishing. *R.* v. *Beare*, 1 *Ld. Raym.* 414: *Lamb's case*, 9 *Co. Rep.* 59: *R.* v. *Lovett*, 3 *St. Tr., N. S.* 1117; 9 *C. & P.* 462.

Where the libel is contained in a newspaper, and the defendant was indicted for having published it, the fact that the defendant is the *proprietor* of the newspaper may now be proved in the manner provided by *s.* 15 (*post*, p. 1121) of the *Newspaper Libel and Registration Act*, 1881 (44 *& 45 Vict. c.* 60): *and see Odgers on Libel* (3rd ed.), 591. The provisions of 6 *& 7 W. 4, c.* 76, *ss.* 8, 13, as to proving the defendant to have *printed and published* the paper, were repealed by 33 *& 34 Vict. c.* 99. Under 39 *G. 3, c.* 79, *s.* 28 (now incorporated in the second schedule to the *Newspaper, etc., Repeal Act*, 1869 (32 *& 33 Vict. c.* 24)), the printer of a newspaper is liable to penalties for printing and publishing without the

name of the printer, and required to keep copies with the name and address of the person for whom he printed.

A certain [false], wicked, seditious, and malicious libel.]—The libel itself must be produced in evidence, and must correspond in substance with the indictment. (*See ante*, pp. 75, 302.) If the libel be in a foreign language, and be set out in that language, together with a translation (*see ante*, p. 991), the translation must be proved to be correct. *R.* v. *Peltier*, 28 *St. Tr.* 529; 2 *Sel.* (*N. P.*) 1048. A seditious libel does not necessarily consist of written or printed matter, but it may be evidenced by a woodcut or engraving. *R.* v. *Sullivan*, *R.* v. *Piggott*, 11 *Cox*, 44, 51.

It is not necessary to prove the libel to be false. *See post*, p. 997.

Meaning his said Majesty.]—In strictness all the innuendoes must be proved by some persons acquainted with the nature of the libel, and who can swear that they understood such and such words to mean so and so, or to have reference to such and such persons, things, or facts, as described by the innuendo. In many cases, however, the truth of the innuendo appears so evident from the context of the libel itself, that further proof is deemed unnecessary, and it is left to the jury upon a consideration of the libel alone. In an action for libel it is the judge's duty to determine, upon the evidence adduced at the trial, whether the words complained of are reasonably capable of the meaning ascribed to them by the innuendoes, and if they are not, he is bound to withdraw the case from the jury and to direct either a non-suit or a verdict for the defendant. *Hunt* v. *Goodlake*, 43 *L. J.* (*C. P.*) 54: *Mulligan* v. *Cole*, *L. R.* 10 *Q. B.* 549; 44 *L. J.* (*Q. B.*) 153.

Evidence for the Defence.

The defendant may prove that he did not write or publish the libel at all; or he may contend that the publication is not seditious; or that he was privileged in publishing it.

1. He may prove that he was not concerned in the writing or publishing of the libel in question; and in the case of a newspaper, he may prove that he is neither printer, publisher, nor proprietor of it, nor otherwise interested or concerned in it. He may also prove that he was a mere innocent agent in the publication; as, for instance, that he carried and delivered the letter containing the libel, without knowing its contents, or delivered one paper by mistake for another (*R.* v. *Topham*, 4 *T. R.* 126, 128), or the like. He may also, where a presumptive case of publication, by the act of any other person by his authority, has been established, prove that such publication was made without his authority, consent, or knowledge, and that it did not arise from want of due care or caution on his part; 6 & 7 *Vict. c.* 96, *s.* 7 (*ante*, p. 987); but the Act does not say expressly whether such evidence shall be a complete defence or go in mitigation of punishment only. On the trial of a criminal information against the defendants for a libel published in their newspaper, it appeared that the duty of editing the paper was left entirely by them to an editor whom they had appointed. The libel was inserted in the paper by the editor without the actual authority, consent, or knowledge of the defendants. The judge on these facts having directed a verdict of guilty against the defendants, it was held by *Cockburn*, C.J., and *Lush*, J. (*Mellor*, J., diss.), that there must be a new trial, for upon the true construction of the *Libel Act*, 1843 (6 & 7 *Vict. c.* 96), *s.* 7 (*ante*, p. 987), the libel was published without the defendants' authority, consent, or knowledge, and it

was a question for the jury whether the publication arose from any want of due care or caution on their part. *R.* v. *Holbrook*, 3 *Q. B. D.* 60; 47 *L. J.* (*Q. B.*) 85. Upon the second trial, the same facts having been proved as on the first trial, the judge summed up in terms which might have led the jury to suppose that the general authority given to the editor to manage the editorial department of the paper, was *per se* evidence that the defendants had authorized the publication of the libel within the meaning of 6 & 7 *Vict. c.* 96, *s.* 7, and the jury having returned a verdict of guilty, a new trial was granted on the ground of misdirection, *Cockburn*, C.J., and *Lush*, J. (*Mellor*, J., diss.), being of opinion that a general authority to an editor to conduct the business of a newspaper, in the absence of anything to give it a different character, must be taken to mean an authority to conduct it according to law, and therefore not to authorize the publication of a libel. *R.* v. *Holbrook*, 4 *Q. B. D.* 42; 48 *L. J.* (*Q. B.*) 113. It is not competent to the defendant to prove that a paper similar to that for the publication of which he is prosecuted was published on a former occasion by other persons who have never been prosecuted for it. *R.* v. *Holt*, 5 *T. R.* 436: *R.* v. *Newman*, 1 *E. & B.* 268.

2. He may prove that the words alleged to be seditious, whether spoken or written, are not seditious; and for that purpose a defendant has been allowed to give in evidence other passages in the same speech, newspaper or publication, plainly referring to the subject of the libel in question, or fairly connected with it, though disjoined from it by other matter, and in a different type, in order to prove that his intention was not such as was imputed to him by the prosecution, or that the passage in question would not fairly bear the construction attempted to be given to it. *R.* v. *Lambert & Perry*, 2 *Camp.* 398, 400; 31 *St. Tr.* 335; 11 *R. R.* 748.

3. He may show that he was privileged in publishing the matter alleged to be seditious. As, for instance, that it formed part of a speech delivered by him as a member of parliament (1 *W. & M. sess.* 2, *c.* 2); but this privilege extends only to his speaking in the house; for if he afterwards publish his speech, he is amenable for it in the same manner as any other person. *R.* v. *Creevey*, 1 *M. & Sel.* 273, 282; 14 *R. R.* 427: *R.* v. *Lord Abingdon*, 1 *Esp.* 226; 5 *R. R.* 733: *Stockdale* v. *Hansard*, 3 *St. Tr., N. S.* 723, 882, 896; 9 *A. & E.* 1; 2 *P. & D.* 1. The publication in a public newspaper of a faithful report of a debate in either house of parliament is privileged, so that the publisher is not responsible for statements made in the course of the debate so reported and published (*Wason* v. *Walter*, *L. R.* 4 *Q. B.* 73; 38 *L. J.* (*Q. B.*) 34); and the publication of articles fairly commenting upon debates so reported and published is equally privileged. *Id.* 3 & 4 *Vict. c.* 9, passed in consequence of *Stockdale* v. *Hansard*, *ubi supra*, provided for staying proceedings in respect of documents laid before either house and published by their authority. This enactment mainly affects defamatory libels, but appears to extend not only to defamatory, but to seditious, obscene, or blasphemous matter contained in such documents.

So, he may prove that the matter alleged to be seditious was contained in a petition to parliament, and published to its members only, or contained in articles of the peace, or in some other regular proceeding in a court of justice (1 *Hawk. c.* 73, *s.* 8), or the like. *See Fairman* v. *Ives*, 5 *B. & Ald.* 642; 24 *R. R.* 514: *M'Gregor* v. *Thwaites*, 3 *B. & C.* 24; 5 *Dowl. & Ry.* 447.

With regard to reports of judicial proceedings in newspapers, it is enacted by *s.* 3 (*post*, p. 1121) of the *Law of Libel Amendment Act*, 1888 (51 & 52 *Vict. c.* 64), that a fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority,

shall, if published *contemporaneously* with such proceedings, be privileged. As to what is a newspaper, *see* 44 & 45 *Vict.* c. 60, *s.* 1, *and* 51 & 52 *Vict.* c. 64, *s.* 1 (*post*, pp. 1120, 1121).

At common law, and irrespective of 51 & 52 *Vict.* c. 64, *s.* 3 (*post*, p. 1121), he may prove that it is a fair report of proceedings in a court of justice. *See R.* v. *Wright*, 8 *T. R.* 293; 4 *R. R.* 649: *Lewis* v. *Walter*, 4 *B. & Ald.* 605; 23 *R. R.* 415: *Chalmers* v. *Payne*, 2 *Cr. M. & R.* 156: *Lewis* v. *Levy*, *E. B. & E.* 537: *Ryalls* v. *Leader*, *L. R.* 1 *Ex.* 296; 35 *L. J.* (*Ex.*) 185: *Milissich* v. *Lloyds*, 13 *Cox*, 575; 46 *L. J.* (*C. P.*) 404. 51 & 52 *Vict.* c. 64, *s.* 3, excepts from protection blasphemous and obscene libel, but does not name seditious libel. The privilege at common law and by statute appears to attach whether the report published contains seditious or defamatory or even treasonable matter, if the publication is a fair and *bonâ fide* report. *R.* v. *Gray*, 10 *Cox*, 184 (*Ir.*). The publication of the history of a trial, consisting of the facts of the case, and of the law of the case as applied to those facts, is lawful. But the privilege is qualified only, and not absolute, and the fact that the publication incriminated is a fair report of proceedings in a court of justice must not be considered a justification or excuse in all cases. For instance, in the course of a trial it may become necessary for the purposes of justice to hear or read matter of a scandalous, blasphemous, or indecent nature; yet it is not lawful, under the pretence of publishing that trial, to circulate such matter. 51 & 52 *Vict.* c. 64, *s.* 3: *R.* v. *Mary Carlile*, 3 *B. & Ald.* 167: *R.* v. *Creevey*, 1 *M. & Sel.* 273, 281; 14 *R. R.* 427, *per Bayley*, J.: *Steele* v. *Brannan*, *L. R.* 7 *C. P.* 261; 41 *L. J.* (*M. C.*) 85: *Macdougall* v. *Knight*, 14 *App. Cas.* 194; 58 *L. J.* (*Q. B.*) 537; *Odgers on Libel* (3rd ed.), 283. And a true report of the proceedings in a court of justice sent to a newspaper by a person who is not a reporter on the staff of the newspaper, is not privileged absolutely; and if it be sent from a malicious motive, an action will lie against the sender. *Stevens* v. *Sampson*, 5 *Ex. D.* 53. Until the passing of the *Law of Libel Amendment Act*, 1888, the publication of reports of *ex parte* proceedings was discouraged if not held illegal, and the publication of proceedings before justices prior to committal was at least of doubtful legality. *See R.* v. *Parke* [1903] 2 *K. B.* 432, 438, *Wills*, J. But it is now settled that a fair and accurate report of an *ex parte* application made to a magistrate in open court is privileged (*Kimber* v. *Press Association* [1893] 1 *Q. B.* 65; 62 *L. J.* (*Q. B.*) 152: *R.* v. *Gray*, 10 *Cox*, 184), and this rule appears to apply in all cases where the magistrate has jurisdiction in point of law, although there is what may be called want of jurisdiction, because the facts do not make out the charge. *Usill* v. *Hales*, 3 *C. P. D.* 319; 47 *L. J.* (*C. P.*) 323; 14 *Cox*, 61: *Usill* v. *Brearley*, 3 *C. P. D.* 206; 47 *L. J.* (*C. P.*) 380: *Lewis* v. *Levy*, *E. B. & E.* 537; 27 *L. J.* (*Q. B.*) 282: *and Wason* v. *Walter*, *L. R.* 4 *Q. B.* 73, 94; 38 *L. J.* (*Q. B.*) 34, 44; where *Cockburn*, C.J., said, "even in quite recent days judges, in holding the publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this court, as, for instance, on application for criminal informations, are published every day; but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of, and if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected."

These decisions appear to overrule the opinions at one time expressed that the reports of proceedings (particularly *ex parte* proceedings) before magistrates were not privileged. *See R.* v. *Fisher*, 2 *Camp.* 563; 11 *R. R.* 799: *R.* v. *Lee*, 5 *Esp.* 123: *R.* v. *Fleet*, 1 *B. & Ald.* 379; 19 *R. R.* 344: *Duncan* v. *Thwaites*, 3 *B. & C.* 556, 583: *R.* v. *Parke* [1903] 2 *K. B.* 432, 438.

As to the publication of matters prejudicial to accused persons whose trial is pending, *see R.* v. *Tibbits* [1902] 1 *K. B.* 77; 20 *Cox*, 70, *and post*, p. 1095.

A fair and accurate report published in any newspaper of the proceedings of a public meeting and of certain bodies and persons specifically mentioned, and the publication of certain notices or reports issued by certain public officers, have a modified and limited protection afforded by 51 *&* 52 *Vict. c.* 64, *s.* 4 (*post*, p. 1121). It was formerly no defence to an action or indictment for publishing a libel in a newspaper, that it was a true report of proceedings at a public meeting held under a local improvement act, or the like. *Davison* v. *Duncan*, 7 *E. & B.* 229; 26 *L. J.* (*Q. B.*) 104: *Popham* v. *Pickburn*, 7 *H. & N.* 891; 31 *L. J.* (*Ex.*) 133.

The defendant is in no case allowed to prove the truth of a seditious libel, in justification of his having published it. 6 *&* 7 *Vict. c.* 96, *s.* 6 (*post*, p. 1119), permitting a plea that a libel is true, and its publication in the public interest, applies only to defamatory libels, and not to seditious or blasphemous libels. *R.* v. *Duffy*, 6 *St. Tr., N. S.* 303; 2 *Cox*, 45; 9 *Ir. L. R.* 329: *Ex parte O'Brien*, 12 *Ir. R. C. L.* 29; 15 *Cox.* 180: *R.* v. *McHugh* [1901] 2 *Ir. Rep.* 569. In *R.* v. *Burdett*, 1 *St. Tr., N. S.* 1; 4 *B. & Ald.* 95, it was held that on an indictment for a seditious libel containing statements involving criminal charges, the defendant could not at the trial or in mitigation prove their truth; but that he could after verdict in mitigation prove that he had read them in newspapers. But the publication in a newspaper of matter which is in itself a seditious libel will not be excused merely on the ground that it is copied from a foreign newspaper as an item of news, although this is a matter for the jury in considering the intention of the defendant; but they must also consider the circumstances under which the matter was copied, the state of the country at the time, the class of persons to whom the newspaper is addressed, and the general tone of the other writings in the newspaper. *R.* v. *Sullivan*, 11 *Cox*, 44 (*Ir.*). It was held in *R.* v. *McHugh*, *ubi supra*, that the defence of fair comment and absence of malice under 51 *&* 52 *Vict. c.* 64, *s.* 4 (*post*, p. 1121), is not open on a trial for seditious libel.

The jury may give a general verdict on the whole matter put in issue, and shall not be required by the court to find the defendant guilty merely on proof of the publication, and of the sense ascribed to it in the indictment or information. 32 *G.* 3, *c.* 60, *s.* 1 (*post*, p. 1118). This is without prejudice to their power to return a special verdict (*s.* 3), and does not affect the right of the judge to give his opinion and direction to the jury (*s.* 2), nor the right of the defendant on conviction to move in arrest of judgment (*s.* 4), as in other criminal cases.

Indictment for Seditious Words (Common Law).

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present that J. S., being a wicked, malicious, seditious, and evil-disposed person, and wickedly, maliciously, and seditiously contriving and intending the peace of our lord the King and of this realm

to disquiet and disturb, and the liege subjects of our said lord the King to incite and move to hatred and dislike of the person of our said lord the King, and of the government established by law within this realm, and to incite, move, and persuade great numbers of the liege subjects of our said lord the King to insurrections, riots, tumults, and breaches of the peace, and to prevent by force and arms the execution of the laws of this realm and the preservation of the public peace, on the —— day of ——, in the year of our Lord ——, in the parish of A., in the county of S., and within the jurisdiction of the said court, in the presence and hearing of divers, to wit, 200 of the liege subjects of our said lord the King then assembled together, in a certain speech and discourse by him the said J. S. then addressed to the said liege subjects so then assembled together, as aforesaid, unlawfully, wickedly, maliciously, and seditiously did publish, utter, pronounce, and declare with a loud voice, of and concerning the government established by law within this realm, and of and concerning our said lord the King and the crown of this realm, and of and concerning the liege subjects of our said lord the King, committing and being engaged in divers insurrections, riots, and breaches of the public peace, amongst other words, and matter, the false, wicked, seditious, and inflammatory words and matter following, that is to say:— "The late insurrection in Paris has shown how easily a crown can be crumbled. Now is the time to be brave, now is the time to be resolute, and the game's our own. I do not care for those persons who wear other person's clothes; I do not care if what I say is criminal; I shall do all in my power during the next week to put a stop to trade, and urge the Irishmen in London to a rebellion:"—in contempt of our said lord the King, in open violation of the laws of this realm, to the evil and pernicious example of all others in the like case offending, and against the peace of our said lord the King, his crown and dignity. *If there be any doubt of being able to prove this precise form of words, you may vary the statement in different counts. For other forms of indictment for seditious words, see R.* v. *Frost*, 22 *St. Tr.* 471: *R.* v. *Stephens*, 3 *St. Tr., N. S.* 1189: *R.* v. *O'Brien*: *R.* v. *Meagher*, 6 *St. Tr., N. S.* 571: *R.* v. *Jones*, 6 *St. Tr., N. S.* 783: *R.* v. *Burns*, 16 *Cox*, 355.

For precedents of indictments for seditious conspiracy, see R. v. *Hunt*, 1 *St. Tr., N. S.* 171, 175; 22 *R. R.* 485: *R.* v. *Feargus O'Connor*, 4 *St. Tr., N. S.* 935, 939: *R.* v. *Thomas Cooper*, *Id.* 1249, 1251, *and post, Book. II. Part III., tit.* "*Conspiracy.*"

Fine and imprisonment as a misdemeanant of the first division. 40 *&* 41 *Vict. c.* 21, *s.* 40; 61 *&* 62 *Vict. c.* 41, *s.* 6 (*ante*, p. 988).

Offences against the King's title, prerogative, person, or government, are not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant spoke the words set out in the indictment, or at least so much of them as may amount to an indictable offence. *R.* v. *Fussell*, 6 *St. Tr., N. S.* 723: *see Cro. Jac.* 407. Any variance in substance may be fatal: even where the words were set out in the indictment in the third person, "*He is*," *etc.*, and proved to have been spoken in the second person, "*You are*," *etc.*, the variance was held fatal; *R.* v. *Berry*, 4 *T. R.* 217; and where the words set out imported that they were spoken of a thing then present, and the words were proved to have been spoken of a thing not present at the time, the variance was held to be fatal. *Walters* v. *Mace*, 2 *B. & Ald.* 756. The powers of amendment under 14 *&* 15 *Vict. c.* 100 (*ante*, p. 52, *et seq.*), do not seem to apply where

words are the gist of the offence (*see ante*, pp. 75, 302). Prove the innuendoes, as in the last precedent, and see the evidence under the last precedent, generally.

Where seditious words are spoken at a meeting, those who do anything, as by expressions of approval, to help the speaker to produce upon the hearers the natural effect of the words spoken, are guilty of uttering seditious words just as if they spoke them themselves. *R.* v. *Burns*, 16 *Cox*, 355, 366, *Cave*, J., but the merely standing by and saying nothing when the seditious words are spoken does not make the stander-by guilty of uttering seditious words. *Id.*

Sect. 7.

UNLAWFUL OATHS.

Statutes.

37 *G.* 3, *c.* 123 (*Unlawful Oaths Act*, 1797, *s.* 1.]—Whereas divers wicked and evil-disposed persons have of late attempted to seduce persons serving in his Majesty's forces by sea and land, and others of his Majesty's subjects, from their duty and allegiance to his Majesty, and to incite them to acts of mutiny and sedition (*see* 37 *G.* 3, *c.* 70, *post*, p. 1004), and have endeavoured to give effect to their wicked and traitorous proceedings, by imposing upon the persons whom they have attempted to seduce the pretended obligation of oaths unlawfully administered; be it enacted, etc., that any person or persons who shall, in any manner or form whatsoever, administer or cause to be administered, or be aiding or assisting at, or present at and consenting to, the administering or taking of any oath or engagement purporting or intended to bind the person taking the same to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be of any association, society, or confederacy formed for any such purpose, or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander or other person not having authority by law for that purpose, or not to inform or give evidence against any associate, confederate, or other person, or not to reveal or discover any unlawful combination or confederacy, or not to reveal or discover any illegal act done or to be done, or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years; and every person who shall take any such oath or engagement, not being compelled (*see s.* 2, *infra*) thereto, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years. [*Penal servitude was substituted for transportation by* 20 *&* 21 *Vict. c.* 3, *ante*, p. 235.]

Sect. 2.]—*Persons compelled to take such oath not justified or excused unless within four days they declare the same.*

Sect. 3—*Aiders and abettors.*]—Persons aiding and assisting at, or present at, and consenting to, the administering or taking of any such

oath or engagement as aforesaid, and persons causing any such oath or engagement to be administered or taken, though not present at the administering or taking thereof, shall be deemed principal offenders, and shall be tried as such, although the persons or person who actually administered such oath or engagement, if any such there shall be, shall not have been tried or convicted. [*See ante*, pp. 12–21.]

Sect. 4—*Form of indictment.*]—It shall not be necessary in any indictment against any person or persons administering or causing to be administered or taken, or taking, any such oath or engagement as aforesaid, or aiding or assisting at, or present at and consenting to, the administering or taking thereof, to set forth the words of such oath or engagement; and that it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof.

Sect. 5—*Form of oath.*]—Provided always . . . that any engagement or obligation whatsoever, in the nature of an oath, shall be deemed an oath within the intent and meaning of this Act, in whatever form or manner the same shall be administered or taken; and whether the same shall be actually administered by any person or persons to any other person or persons, or taken by any person or persons without any administration thereof by any other person or persons.

Sect. 6—*Venue.*]—Provided also . . . that any offence committed against this Act on the high seas or out of this realm, or within that part of Great Britain called England, shall and may be prosecuted, tried, and determined, before any court of oyer and terminer or gaol delivery for any county in that part of Great Britain called England, in such manner and form as if such offence had been therein committed; and, if committed in that part of Great Britain called Scotland, shall and may be prosecuted, tried, and determined, either before the Justiciary Court at Edinburgh, or in any of the circuit courts in that part of the United Kingdom. [*This Act applies only to Great Britain.* 50 *G.* 3, *c.* 102, *makes similar provisions as to Ireland.*]

Sect. 7.]—*Persons tried under the Act not to be tried again for treason on the same facts.* [*Cf.* 52 *&* 53 *Vict.* c. 63, *s.* 33 (*ante*, p. 170.]

By the *Unlawful Societies Act*, 1799 (39 *G.* 3, *c.* 79), certain societies were prohibited as unlawful confederacies, and societies which require or use an oath or engagement unlawful within 37 *G.* 3, *c.* 123, are guilty of unlawful combination or confederacy. By the *Seditious Meetings Act*, 1817 (57 *G.* 3, *c.* 19, *s.* 25), partially repealed by 53 *&* 54 *Vict. c.* 33, all societies the members whereof are required to take any oath or engagement which is unlawful within 37 *G.* 3, *c.* 123 (*ante*, p. 999), or 52 *G.* 3, *c.* 104 (*post*, p. 1002), or to take any oath not required or authorized by law, etc., are to be deemed guilty of an unlawful combination within 39 *G.* 3, *c.* 79, *s.* 2. On these Acts *see R.* v. *Dixon*, 6 *C. & P.* 601; 3 *St. Tr., N. S.* 1281; *Steph. Dig. Cr. Law* (6th ed.), p. 66. Exceptions are made in favour of declarations in a form approved and registered at petty sessions, and confirmed at quarter sessions (39 *G.* 3, *c.* 79, *s.* 3); of regular lodges of Freemasons, subject to conditions (*ss.* 4, 5); and of registered friendly societies, subject to conditions. 59 *&* 60 *Vict. c.* 25, *s.* 32.

Proceedings under 39 *G.* 3, *c.* 79, and 57 *G.* 3, *c.* 19, can only be taken in the name of a law officer of the Crown. 9 *&* 10 *Vict. c.* 33, *s.* 1.

Indictment for administering an Unlawful Oath. (37 *G.* 3, *c.* 123, *s.* 1, (*ante*, p. 999.)

Sussex, to wit:—The jurors for our lord the King upon their oath present that J. S., on the first day of June, in the year of our lord ——, did feloniously and unlawfully administer and cause to be administered to one J. N., a certain oath and engagement, purporting, and then intended, to bind the said J. N. not to inform or give evidence against any associate, confederate, or other person of or belonging to a certain unlawful association and confederacy; and which said oath and engagement was then taken by the said J. N.; against the form [*as ante*, p. 465]. *If the offence has been committed on the high seas, or out of the realm, or in England, the venue may be laid in any county in England.* 37 *G.* 3, *c.* 123, *s.* 6.

Felony: penal servitude for not more than seven nor less than three years, or imprisonment not exceeding two years, with or without hard labour. 37 *G.* 3, *c.* 123, *s.* 1; 20 *&* 21 *Vict. c.* 3 (*ante*, p. 235); 54 *&* 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

The offence of administering or taking unlawful oaths is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

It is not necessary to set out the words of the oath; stating the purport, or some material part of it, is all that is required. 37 *G.* 3, *c.* 123, *s.* 4. The oath described by the statute must purport or be intended to bind the party taking it to one or other of the following things:—viz. 1. To engage in some mutinous or seditious purpose; 2. To disturb the public peace; 3. To be of some association, society or confederacy formed for any such purpose; 4. To obey the orders or commands of a committee or body of men not lawfully constituted, or of a leader or commander or other person not having authority by law for that purpose; 5. Not to inform or give evidence against any associate, confederate, or other person; 6. Not to reveal or discover any unlawful combination or confederacy; 7. Not to reveal or discover any illegal act done, or to be done; 8. Not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement. 37 *G.* 3, *c.* 123, *s.* 1. If the purport of the oath be doubtful, you should set it out in different ways in several counts, taking care to bring it within some of the descriptions above mentioned. *See R.* v. *Moors*, 6 *East*, 419, *n.* (*b*).

Evidence.

Prove that J. S. administered to J. N. an oath or engagement (it is no matter in what form, 37 *G.* 3, *c.* 123, *s.* 5: *see R.* v. *Lovelass*, 6 *C. & P.* 596; 1 *M. & Rob.* 349; 3 *St. Tr., N. S.* 1280) of the purport stated in some one count in the indictment. If read from a paper at the time it was administered, still it is not necessary to produce such paper, or give the defendant notice to produce it; but parol evidence of its purport, without such notice, will be sufficient. *R.* v. *Moors*, 6 *East*, 419, *n.* (*b*). So, parol evidence of any declarations made by the defendant at the time he administered the oath will be received in proof of the nature of the oath, if that do not sufficiently appear from the words of the oath itself. *Id.* And where it appeared that an oath was unlawfully administered by an associated body of men, purporting to bind the party not to reveal such unlawful combination or conspiracy, or any illegal act done by them, the judges seemed to have no doubt of its being a felony within this Act,

although it appeared that the object of the association was a conspiracy to raise wages and make regulations in a particular trade, and not to stir up mutiny or sedition. *R.* v. *Marks*, 3 *East*, 157; 6 *R. R.* 577: *see R.* v. *Ball*, 6 *C. & P.* 563: *R.* v. *Brodribb*, *Id.* 571.

An association, the members of which are bound by oath not to disclose its secrets, is an unlawful combination and confederacy (unless expressly declared by some statute to be legal), for whatever purpose or object it may be formed: and the administering an oath not to reveal anything done in such association is an offence within the statute 37 *G.* 3, c. 123, *s.* 1. *R.* v. *Lovelass*, 6 *C. & P.* 596; 1 *M. & Rob.* 349; 3 *St. Tr., N. S.* 1280. As to the common law with reference to unlawful oaths, *see R.* v. *Edgar*, 33 *St. Tr.* 145, 151, *n.*: *R.* v. *Eadon*, 31 *St. Tr.* 1064.

Indictment for taking such an Oath. (37 *G.* 3, *c.* 123, *s.* 1, *ante*, p. 999.)

Commencement as ante, p. 1001]—feloniously and unlawfully did take a certain oath and engagement, purporting [*etc., as in the last precedent*]: he the said J. S. not being then compelled to take the said oath and engagement; against the form [*as ante*, p. 465].

Felony: 37 *G.* 3, *c.* 123, *s.* 1. *See the last precedent.*

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

As to the evidence generally, *see ante*, p. 1001. It is not necessary to prove that any person administered the oath. 37 *G.* 3, *c.* 123, *s.* 5. Nor is it necessary for the prosecutor to prove that the defendant was not compelled to take the oath; compulsion is matter of excuse, and must come in evidence from the other side. And in order to make it a legal excuse, the defendant must prove that he disclosed the whole affair upon oath to a magistrate (or, if a soldier or seaman, to his commanding officer) within four days after, unless prevented by actual force or sickness, and then within four days after such force and sickness ceased. *Id. s.* 2.

OATHS TO COMMIT TREASON OR FELONY.

Statutes.

52 *G.* 3, *c.* 104 (*Unlawful Oaths Act*, 1812), *s.* 1.]—[*After reciting the passing of the Unlawful Oaths Act*, 1797 (37 *G.* 3, *c.* 123), *ante*, p. 999]: Whereas it is expedient that more effectual provisions should be made as to certain oaths; be it therefore enacted . . . that every person who shall, in any manner or form whatsoever, administer, or cause to be administered, or be aiding or assisting at the administering of any oath, or engagement, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall, on conviction thereof by due course of law, be adjudged guilty of felony; . . . (*see* 7 *W.* 4 & 1 *Vict. c.* 91, *s.* 1, *post*, p. 1003) and every person who shall take any such oath or engagement, not being compelled thereto shall, on conviction thereof by due course of law, be adjudged guilty of felony, and shall be *transported as a felon* for the term of his

natural life, or for such term of years as the court before which the said offender or offenders shall be tried shall adjudge.

Sect. 2.]—*Compulsion to take oath no justification or excuse unless declared within fourteen days.*

Sect. 4—*Aiders and abettors.*]—*In the same terms as* 37 *G.* 3, *c.* 123, *s.* 3, *ante*, p. 999.

Sect. 5—*Form of indictment.*]—*In the same terms as* 37 *G.* 3, *c.* 123, *s.* 4, *ante*, p. 1000.

Sect. 6—*Oaths within the Act.*]—Provided always . . . that any engagement or obligation whatsoever in the nature of an oath, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall be deemed an oath within the intent and meaning of this Act, in whatever form or manner the same shall be administered or taken, and whether the same shall be actually administered by any person to any other person or persons: or taken by any other person or persons without any administration thereof by any other person or persons.

Sect. 7—*Venue.*]—Provided also . . . that any offence committed against this Act on the high seas, or out of this realm, or within that part of Great Britain called England, shall and may be prosecuted, tried and determined before any court of oyer and terminer or gaol delivery for any county in that part of Great Britain called England, in such manner and form as if such offence had been therein committed; and if committed in that part of Great Britain called Scotland, shall and may be prosecuted, tried and determined, either before the Justiciary Court at Edinburgh, or in any of the circuit courts in that part of the United Kingdom. [*And see ante*, pp. 39–41, 51.]

Sect. 8.]—*Persons tried under the Act not to be tried again for the same offence as high treason or misprision. Provisions of Act alterative to law of treason, etc.* [*See* 52 *&* 53 *Vict. c.* 63, *s.* 33, *ante* p. 170.]

57 *G.* 3, *c.* 19, *s.* 25.]—*See ante*, p. 1000.

7 *W.* 4 *&* 1 *Vict. c.* 91, *s.* 1—*Commutation of punishment.*]—*Recites* (*inter alia*) 52 *G.* 3, *c.* 104, *s.* 1, *so far as it relates to administering the oaths therein mentioned*, and enacts that if any person shall, after the commencement of this Act, be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable . . . to be transported beyond the seas for the term of the natural life of such person. . . . [*Rest rep.* 55 *&* 56 *Vict. c.* 19, *S. L. R. Penal servitude was substituted for transportation by* 20 *&* 21 *Vict. c.* 3, *ante*, p. 235.]

Indictment for administering an Oath to commit Treason, etc. (52 *G.* 3, *c.* 104, *s.* 1, *ante*, p. 1002.)

Commencement as ante, p. 1001]—a certain oath and engagement purporting and then intended to bind the said J. N. to commit high treason

[*or*, to commit murder, that is to say, feloniously and of his malice aforethought to kill and murder one A. B., *or*, to commit a certain felony punishable by law with death, that is to say, feloniously to set fire to a certain dwelling-house of one A. B., the said A. B. being therein]; and which said oath and engagement was then taken by the said J. N.; against the form [*as ante*, p. 465].

Felony: 52 *G.* 3, *c.* 104, *s.* 1: *penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, not exceeding two years.* 7 *W.* 4 *& 1 Vict. c.* 91, *s.* 1; 20 *& 21 Vict. c.* 3 (*ante*, p. 235); 54 *&* 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235). *Taking such an oath felony: penal servitude for life or for not less than three years;* 52 *G.* 3, *c.* 104, *s.* 1; 54 *&* 55 *Vict. c.* 69, *s.* 1; *or imprisonment, with or without hard labour, not exceeding two years.* 54 *&* 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235). *As to the evidence, see the proofs under the precedent* (*ante*, p. 1001). *If the offence be committed on the high seas, or out of the realm, the venue may be laid in any county.* 52 *G.* 3, *c.* 104, *s.* 7, *supra.*

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

As to the evidence, *see ante*, pp. 1001, 1002. As to the effect of the Act, *see R. v. Edgar*, 33 *St. Tr.* 145.

Sect. 8.

INCITING TO MUTINY.

Statutes.

37 *G.* 3, *c.* 70 (*Incitement to Mutiny Act*, 1797), *s.* 1.]—Whereas divers wicked and evil-disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, have of late industriously endeavoured to seduce persons serving in his Majesty's forces by sea and land from their duty and allegiance to his Majesty, and to incite them to mutiny and disobedience; be it enacted, that any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in his Majesty's forces by sea or land from his or their duty and allegiance to his Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony. . . . [*As to punishment, see* 7 *W.* 4 *& 1 Vict. c.* 91, *s.* 1, *infra.*]

Sect. 2—*Venue.*]—Provided always . . . that any offence committed against this Act, whether committed on the high seas or within that part of Great Britain called England, shall and may be prosecuted and tried before any court of oyer and terminer or gaol delivery for any county in that part of Great Britain called England, in such manner and form as if the said offence had been therein committed. [*See ante*, pp. 39–41, 51.]

Sect. 3—*Persons tried for offences against the Act not to be tried again on the same facts for high treason or misprision of treason.*]—*See ante*, p. 170.

7 *W.* 4 & 1 *Vict. c.* 91, *s.* 1—*Punishment.*]— . . . *Recites* (*inter alia*) 37 *G.* 3, *c.* 70, *s.* 1; *and* enacts, that if any person shall, after the commencement of this Act, be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable . . . to be transported beyond the seas for the term of the natural life of such person. . . . [*Remainder rep.* 55 & 56 *Vict. c.* 19, *S. L. R. As to present punishment, vide infra.*]

Indictment for endeavouring to seduce a Soldier from his Allegiance.

Middlesex, to wit:—The jurors for our lord the King upon their oath present that J. S., [being a wicked and evil-disposed person,] on the first day of June, in the year of our Lord ——, feloniously, maliciously, and advisedly did endeavour to seduce one J. N. he the said J. N. then being a person serving in his Majesty's forces by land from his duty and allegiance to his said Majesty; he the said J. S., at the time he so endeavoured to seduce the said J. N. from his duty and allegiance as aforesaid, well knowing that the said J. N. was then a person serving in his Majesty's forces by land; against the form [*as ante*, p. 465]. *The venue may be laid in any county.* 37 *G.* 3, *c.* 70, *s.* 2. *The words in square brackets seem unnecessary.*

Felony: penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, for not more than two years. 7 *W.* 4 & 1 *Vict. c.* 91, *s.* 1, *supra*; 20 & 21 *Vict. c.* 3 (*ante*, p. 235); 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235). *The offence described in the statute is an endeavour to seduce any person serving in his Majesty's forces by sea or land, from his duty or allegiance to his Majesty: or to incite or stir him up to commit any act of mutiny, or to make or endeavour to make any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever. It is not necessary to allege the means by which the defendant endeavoured to seduce him. R.* v. *Fuller*, 2 *Leach*, 790; 1 *East, P. C.* 92; 1 *B. & P.* 180. *The allegation that J. S. "feloniously, maliciously, and* advisedly *did endeavour to seduce," etc., has been held sufficient without the averment contained in the above precedent that J. S. knew that J. N. was a person serving in his Majesty's forces. Id. As to the punishment of persons subject to military law who persuade or assist soldiers to desert, see Army Act* (44 & 45 *Vict. c.* 58), *ss.* 12, 14. *Civilians guilty of these acts may be punished by a court of summary jurisdiction under* 44 & 45 *Vict. c.* 58, *s.* 153.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Although in the indictment it is not necessary to state the means by which the defendant endeavoured to seduce J. N. from his duty and allegiance, they must be detailed in evidence. It must be proved, also, that J. N. was at the time serving in his Majesty's land forces; and that J. S. was aware of that fact. A sailor who has been in the sick hospital for thirty days, and therefore is not entitled to pay, nor liable to answer before a court-martial for what he does, is nevertheless a person serving in his Majesty's navy, within this Act. *R.* v. *Tierney, R. & R.* 74.

SECT. 9.

ILLEGAL TRAINING AND DRILLING.

Statutes.

60 *G.* 3 & 1 *G.* 4, c. 1 (*Unlawful Drilling Act*, 1819), *s.* 1.]—*Recites, that in some parts of the United Kingdom, men clandestinely and unlawfully assembled have practised military training and exercise, to the great terror and alarm of his Majesty's peaceable and loyal subjects, and the imminent danger of the public peace; and enacts, that* all meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled, to the use of arms, or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from his Majesty, or the lieutenant, or two justices of the peace of any county or riding, or of any stewartry, by commission or otherwise, for so doing, shall be and the same are, hereby prohibited, as dangerous to the peace and security of his Majesty's liege subjects and of his government; and every person who shall be present at or attend any such meeting or assembly, for the purpose of training and drilling any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall train or drill any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall aid or assist therein, being legally convicted thereof, shall be liable to be transported for any term not exceeding seven years, or to be punished by imprisonment not exceeding two years, at the discretion of the court in which such conviction shall be had; and every person who shall attend or be present at any such meeting or assembly as aforesaid, for the purpose of being, or who shall at any such meeting or assembly be trained or drilled to the use of arms, or the practice of military exercise, movements, or evolutions, being legally convicted thereof, shall be liable to be punished by fine and imprisonment not exceeding two years, at the discretion of the court in which such conviction shall be had. [*As to present punishment, see post*, p. 1007.]

Sect. 2—*Dispersion of meetings, etc.*]—It shall be lawful for any justice of the peace, or for any constable or peace officer, or for any other person acting in their aid or assistance, to disperse any such unlawful meeting or assembly as aforesaid, and to arrest and detain any person present at, or aiding, assisting, or abetting any such assembly or meeting as aforesaid; and it shall be lawful for the justice of the peace who shall arrest any such person, or before whom any person so arrested shall be brought, to commit such person for trial for such offence, under the provisions of this Act, unless such person can and shall give sufficient bail for his appearance at the next assizes or general or quarter sessions of the peace, to answer to any indictment which may be preferred against him for any such offence against this Act, in England and Ireland; and in Scotland every such person shall be arrested and dealt with according to the law and practice of that part of the United Kingdom in the case of a bailable offence.

Sect. 4—*Provisions of Act alternative to those of former law: provision against double prosecution.* [*Cf.* 52 & 53 *Vict. c.* 63, *s.* 33, *ante*, p. 170.]

Sect. 7—*Limitation of prosecutions.*]—Provided always that no person

shall be prosecuted by virtue of this Act for anything done or committed contrary to the provisions hereinbefore contained, unless such prosecution shall be commenced within six calendar months after the offence committed. [*See ante*, p. 95.]

Indictment for Unlawful Drilling. (60 *G.* 3 & 1 *G.* 4, *c.* 1, *s.* 1, *ante*, p. 1006.)

Yorkshire, to wit:—The jurors for our lord the King upon their oath present, that heretofore, to wit, on the first day of June, in the year of our Lord ——, divers, to wit, 500 persons, were unlawfully met and assembled together, for the purpose of being trained and drilled to the use of arms, and for the purpose of practising military exercise, movements, and evolutions, without any lawful authority from his Majesty, or the lieutenant or two justices of the peace of any county or riding or of any stewartry, by commission or otherwise, for so doing, contrary to the form of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present that J. S., on the day and year aforesaid, unlawfully was present at and attended the said meeting and assembly, for the purpose of training and drilling the said persons so then and there met and assembled together as aforesaid to the use of arms, and the practice of military exercise, movements, and evolutions; against the form [*as ante*, p. 465]. *Add counts stating the meeting in similar terms, and,* 1, *that the defendant did then and there train and drill the persons so assembled (or certain persons named or unknown)*; 2, *that he aided and assisted in so doing. You may also add a count charging generally that the defendant trained and drilled to the use of arms, etc., without stating any meeting or assembly. An indictment for being present at such meeting for the purpose of being trained or drilled, or for being there trained or drilled, may easily be framed from the above. The indictment must show that the meeting was held for the purpose of training or drilling, etc., as described in the statute: it is not sufficient to allege that it was a meeting dangerous to the public peace, and that the defendant attended it for the purpose of training and drilling, etc. Gogarty* v. *R.*, 3 *Cox*, 306 (*Ir.*); 1 *Ir. Jur.* (*O. S.*) 203.

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment not exceeding two years, with or without hard labour. 60 *G.* 3 & 1 *G.* 4, *c.* 1, *s.* 1; 20 & 21 *Vict. c.* 3 (*ante*, p. 235); 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the meeting was held as stated in the indictment, under circumstances tending to show that it was unauthorized and unlawful; that it was held for the purpose of training and drilling to the use of arms, etc.; and that the defendant attended it for the purpose of training and drilling others, or of being himself trained and drilled, as the case may be. The jury will, of course, have to infer the intent from the circumstances (*see ante*, p. 340).

Drilling for the purpose of going to a lawful meeting in good order is lawful: if for the purpose of securing attention to seditious speeches, and to give confidence to seditious persons, it is a misdemeanor: if for overawing the government, it is certainly unlawful, and seems to be treason. *R.* v. *Hunt*, 1 *St. Tr., N. S.* 171: *Redford* v. *Birley*, *Id.* 1071. *See post*, *chap. iii. s.* 1, "*Unlawful Assembly.*" As to unlawful making and selling of arms, *see R.* v. *Knowles*, 1 *St. Tr., N. S.* 497: *R.* v. *Morris*, *Id.* 521.

Sect. 10.

OFFENCES RELATING TO PUBLIC STORES.

Statutes.

12 *G.* 3, *c.* 24—*Setting fire to public stores.*]—*Ante*, p. 658; *and see R.* v. *Hill*, 20 *St. Tr.* 1318.

28 *& 29 Vict. c.* 89 (*Greenwich Hospital Act*, 1865), *s.* 45.]—The following mark may be applied in or on stores used or intended to be used for the purposes of Greenwich Hospital, to denote [his] Majesty's property in stores so marked, namely, an anchor surmounted with a naval crown, with two flags over the crown, and the letter G. on one side, and the letter H. on the other side: and stores intended to be used as aforesaid shall be deemed naval stores within the meaning of the *Public Stores Act*, 1875, and that Act shall apply thereto as if the mark in the present section were described in the schedule to that Act, and that Act shall apply to all stores so marked before the commencement of this Act (1st Sept. 1865) becoming by virtue of this Act the property of [his] Majesty. [*The words in italics were substituted by* 38 *& 39 Vict. c.* 25, *s.* 17 (*post*, p. 1009), *for the words "Naval and Victualling Stores Act*, 1864," *repealed by the later Act.*]

38 *& 39 Vict. c.* 25, *s.* 1—*Short title.*]—This Act may be cited as the *Public Stores Act*, 1875.

Sect. 2—*Interpretation of terms.*]—In this Act the term "secretary of state" means one of [his] Majesty's principal secretaries of state; the term "the admiralty" means the Lord High Admiral of the United Kingdom, or the commissioners for executing the office of Lord High Admiral: the term "stores" includes all goods and chattels, and any single store or article. . . .

Sect. 3—*Stores to which the Act applies.*]—This Act shall apply to all stores under the care, superintendence, or control of a secretary of state or the admiralty, or any public department or office, or of any person in the service of [his] Majesty, and such stores are in this Act referred to as [his] Majesty's stores. The secretary of state, admiralty, public department, office, or person having the care, superintendence, or control of such stores, are hereinafter in this Act included in the expression public department.

Sect. 4—*Marks in schedule appropriated for public stores—Misapplication of them a misdemeanor.*]—The marks described in the first schedule to this Act may be applied in or on stores therein described in order to denote [his] Majesty's property in stores so marked; and it shall be lawful for any public department, and the contractors, officers, and workmen of such department, to apply those marks, or any of them, in or on any such stores; and if any person without lawful authority (proof of which authority shall lie on the party accused) applies any of those marks in or on any such stores, he shall be guilty of a misdemeanor, and shall on conviction thereof be liable to be imprisoned for any term not exceeding two years, with or without hard labour.

Sect. 5—*Obliteration, etc., of marks with intent to conceal the* [*King's*]

property in stores.]—If any person, with intent to conceal [his] Majesty's property in any stores, takes out, destroys, or obliterates, wholly or in part, any such mark as aforesaid, or any mark whatsoever denoting the property of [his] Majesty in any stores, he shall be guilty of felony, and shall on conviction thereof be liable, in the discretion of the court before which he is convicted, to be kept in penal servitude for any term not exceeding seven years. . . .

Sect. 12—*Parts of* 24 *&* 25 *Vict. c.* 96, *incorporated.*]—The following sections of the *Larceny Act*, 1861, are hereby incorporated with this Act, and shall for the purposes of this Act be read as if they were here re-enacted, namely, sections 98 to 100, 103, 107 to 113, and 115 to 121, all inclusive, and for this purpose the expression "this Act," where used in those sections, shall be taken to include the present Act.

Sect. 13—*Provision for regimental necessaries, etc.*]—The provisions of this Act relative to the taking out, destroying, or obliterating of marks, or to the having in possession or keeping [his] Majesty's stores, shall not apply to stores issued as regimental necessaries or otherwise for any soldier, militiaman, or volunteer; but nothing herein shall relieve any person from any obligation or liability to which he may be subject under any other Act in respect of any such stores. [*See* 44 *&* 45 *Vict. c.* 58, *s.* 156 (7).]

Sect. 17.]—Section 45 of the *Greenwich Hospital Act*, 1865 (*ante*, p. 1008), shall be read and have effect as if this Act, instead of the *Naval and Victualling Stores Act*, 1864, were referred to in that section.

Sect. 18.]—*Act to apply to stores marked before its passing* (*June* 29, 1875).

FIRST SCHEDULE.

Marks appropriated for Use in or on [his] Majesty's Stores.

Stores.	Marks.
Hempen cordage and wire rope .	White, black or coloured worsted threads laid up with the yarns and the wire respectively.
Canvas, fearnought, hammocks, and seamen's bags.	A blue line in a serpentine form.
Bunting	A double tape in the warp.
Candles	Blue or red cotton threads in each wick or wicks of red cotton.
Timber or metal	The name of [his] Majesty, [his] predecessors, [his] heirs or successors, or of any public department, or any branch thereof, or the broad arrow, or a crown, or [his] Majesty's arms, whether such broad arrow, crown, or arms be alone or be in combination with any such name as aforesaid, or with any letters denoting any such name.
Any stores not before enumerated, whether similar to the above or not.	

Indictment for wrongfully applying Marks on Stores. (38 & 39 *Vict.* c. 25, s. 4, *ante*, p. 1008.)

County of Southampton, to wit:—The jurors for our lord the King upon their oath present that J. S., on the first day of June, in the year of our Lord ——, unlawfully and without lawful authority applied a certain mark, to wit, a double tape in the warp, in and on certain stores, to wit, 500 yards of bunting; against the form of the statute in such case made and provided.

Misdemeanor: imprisonment for any term not exceeding two years, with or without hard labour. 38 & 39 *Vict.* c. 25, s. 4.

Evidence.

Prove that the defendant applied the mark to the stores mentioned in the indictment. It is not necessary to show that he did so without lawful authority. If the defendant had such authority he must prove it. 38 & 39 *Vict.* c. 25, s. 4. See the following decisions on the former law as to offences relating to public stores:—*R.* v. *Banks*, 1 *Esp.* 144: *R.* v. *Wilmett*, 3 *Cox*, 281: *R.* v. *Cohen*, 8 *Cox*, 41: *R.* v. *Sleep*, *Id.* 472, *and see* 477, *n.*; *L. & C.* 44.

Indictment for obliterating Marks on Stores. (38 & 39 *Vict.* c. 25, s. 5, *ante*, p. 1009.)

County of Southampton, to wit:—The jurors for our lord the King upon their oath present that J. S., on the first day of June, in the year of our Lord ——, feloniously and with intent to conceal his Majesty's property in the stores hereinafter mentioned, took out ("*takes out, destroys, or obliterates, wholly or in part*") from 100 yards of canvas, which said canvas was then stores of and belonging to his Majesty, and under the care, superintendence and control of the Commissioners for executing the office of Lord High Admiral (*or as the case may be; see* 38 & 39 *Vict.* c. 25, *ss.* 2, 3), a certain mark, to wit, a blue line in a serpentine form, which said mark was then applied on the said canvas in order to denote his said Majesty's property therein; against the form of the statute in such case made and provided.

Add counts charging "destroying" and "obliterating."

Felony: penal servitude for any term not exceeding seven nor less than three years, or imprisonment for any term not exceeding two years, with or without hard labour. 38 & 39 *Vict.* c. 25, s. 5; 54 & 55 *Vict.* c. 69, s. 1, *sub-ss.* 1, 2 (*ante*, p. 235).

Evidence.

Prove that the defendant took out the mark from the stores, and circumstances from which it may be inferred that his intent in so doing was to conceal his Majesty's property therein. As, however, a man is presumed to intend the necessary and reasonable consequences of his own acts (*R.* v. *Dixon*, 3 *M. & Sel.* 11, 15; 4 *Camp.* 12; 15 *R. R.* 381: *R.* v. *Farrington*, *R. & R.* 207, *ante*, p. 343), the mere fact of the defendant's having taken out the mark will be sufficient evidence to go to the jury that in so doing he intended to conceal his Majesty's property in the stores.

Persons subject to naval discipline or military law are punishable by

court-martial for offences relating to public stores, etc. 29 & 30 *Vict.* c. 109, *ss.* 33, 34; 44 & 45 *Vict.* c. 58, *ss.* 17, 18.

Sect. 11.

Disclosure of Government Secrets.

Statute.

52 & 53 *Vict.* c. 52 (*Official Secrets Act*, 1889), *s.* 1—*Disclosure of information.*]—(1) (*a*) Where a person for the purpose of wrongfully obtaining information—

(i.) enters or is in any part of a place belonging to [his] Majesty the [King], being a fortress, arsenal, factory, dockyard, camp, ship, office, or other like place, in which part he is not entitled to be; or

(ii.) when lawfully or unlawfully in any such place as aforesaid, either obtains any document, sketch, plan, model, or knowledge of any thing which he is not entitled to obtain, or takes without lawful authority any sketch or plan; or

(iii.) when outside any fortress, arsenal, factory, dockyard, or camp belonging to [his] Majesty the [King], takes or attempts to take, without authority given by or on behalf of [his] Majesty, any sketch or plan of that fortress, arsenal, factory, dockyard, or camp; or

(*b*) Where a person knowingly having possession of or control over any such document, sketch, plan, model, or knowledge as has been obtained or taken by means of any act which would constitute an offence against this Act, at any time wilfully and without lawful authority communicates or attempts to communicate the same to any person to whom the same ought not, in the interest of the state, to be communicated at that time; or

(*c*) Where a person after having been entrusted in confidence by some officer under [his] Majesty the [King] with any document, sketch, plan, model, or information relating to any such place as aforesaid, or to the naval or military affairs of [his] Majesty, wilfully and in breach of such confidence communicates the same when, in the interest of the state, it ought not to be communicated;

he shall be guilty of a misdemeanor, and on conviction be liable to imprisonment, with or without hard labour, for a term not exceeding one year, or to a fine, or to both imprisonment and a fine.

(2) Where a person having possession of any document, sketch, plan, model, or information relating to any fortress, arsenal, factory, dockyard, camp, ship, office, or other like place, belonging to [his] Majesty, or to the naval and military affairs of [his] Majesty, in whatever manner the same has been obtained or taken, at any time wilfully communicates the same to any person to whom he knows the same ought not, in the interest of the state, to be communicated at that time, he shall be guilty of a misdemeanor, and be liable to the same punishment as if he committed an offence under the foregoing provisions of this section.

(3) Where a person commits any act declared by this section to be a misdemeanor, he shall, if he intended to communicate to a foreign state any information, document, sketch, plan, model, or knowledge obtained or taken by him, or entrusted to him as aforesaid, or if he communicates the same to any agent of a foreign state, be guilty of felony, and on

so, however, that no person be punished twice for the same offence. [*See* 52 & 53 *Vict.* c. 63, *s.* 33 (*ante*, p. 170).]

Sect. 10—*Short Title.*]—This Act may be cited as the *Official Secrets Act*, 1889.

54 & 55 *Vict.* c. 69, *s.* 1—*Minimum term of penal servitude.*]—*Ante*, p. 235).

The above Act was passed in consequence of the disclosure by a civil servant of the secret clause in the Anglo-Russian arrangement of 31st May, 1878, *which he committed to memory without touching the document or dealing with it in any way which would bring him within s.* 30 *of the Larceny Act*, 1861 (*ante*, p. 493). *See* 18 *L. J. Newsp.* 482; 337 *Hansard*, 321. *The first prosecution in England under the Act seems to have been R. v. Holden* (*Liverpool Assizes, April*, 1892; *see Report of Director of Public Prosecutions*, 1892, p. 19), *for divulging to a foreign government plans of the fortifications at Malta. In R. v. Stuart and Page, October*, 1899, *Cent. Crim. Court, the Recorder, Sir Charles Hall, quashed an indictment under s.* 3, *for inciting to the commission of an offence under s.* 2, *sub-s.* 3, *by a person who, by reason of a contract with the crown, was under an obligation of secrecy, because of the want of an averment that the person incited had obtained possession or control of the document the subject of the inquiry, within s.* 2, *sub-s.* 1.

Sect. 12.

Misconduct by Executive and Administrative Officials of the Crown.

It has already been stated (*ante*, pp. 145–147) that neglect by public officers of duties imposed on them at common law or by statute is indictable. Misconduct and extortion by, and bribery of, judicial officers and ministerial officers of justice are dealt with *post*, pp. 1080, 1083. Misconduct, fraud, and oppression by officers of the crown is indictable at common law, whether the officer is appointed under the common law or statute. *See* 1 *Russ. Cr.* (6th ed.) 417.

In *R. v. Bembridge*, 22 *St. Tr.* 1; 6 *East*, 136, *cit.*, it was held indictable to enable persons in the pay office to pass their accounts in such a way as to defraud the government. *Cf. R. v. Baxter*, 5 *Cox*, 302, and the charge of Lord *Russell*, L.C.J., to the grand jury of Middlesex in *R. v. Hodgkinson* (*Times Newsp.*, 26*th June*, 1900), where a British Vice-Consul (at Bremerhaven) was indicted for misconduct in failing to account for certain moneys received by him by virtue of his office. In *R. v. Davison*, 31 *St. Tr.* 99, the defendant was convicted on criminal information for defrauding the crown in the purchase of military stores by means of false vouchers. In *R. v. Hedges*, 28 *St. Tr.* 1315, clerks in the Woolwich Dockyard were convicted for fraud in their office; and in *R. v. Jones*, 31 *St. Tr.* 251; 8 *East*, 31, a commissary-general to the forces in the West Indies was convicted of frauds practised by him in his office.

For precedents of indictments see the cases cited. It is sufficient to state that the defendant holds the particular office, without stating his appointment. *R. v. Hollond*, 5 *T. R.* 607; 2 *R. R.* 678; *and see ante*, p. 344.

As to the trial and punishment of Indian officials in England for offences in India, *see Ilbert, Govt. of India*, pp. 52, 259: *R. v. Douglas*, 13 *Q. B.* 42: *R. v. Hollond*, *ubi supra.*

As to the trial and punishment of British officials for oppressions, crimes, and offences under the degree of felony committed outside Great Britain, *see* 11 *W.* 3, *c.* 12; 42 *G.* 3, *c.* 85 (*ante*, p. 38); 49 *G.* 3, *c.* 126, *s.* 14; *and cf. R.* v. *Hodgkinson*, *ubi supra.*

Prior to the passing of the last two of these Acts, in *R.* v. *Munton*, 1 *Esp.* 62, an information was laid against a principal storekeeper in the West Indies for misdemeanors in colluding with contractors to defraud the government. It was objected that the evidence showed that the alleged frauds were committed in the West Indies outside the jurisdiction of the court. Lord *Kenyon*, C.J., said that where the matter arose wholly abroad, the court could have no jurisdiction except by statute; but held that as some of the offences consisted in false returns sent from Antigua to England, there was an offence in London, where the returns were received and the offence made complete.

It is an indictable misdemeanor to buy or sell or pay any money or reward for any public office, within 5 & 6 *Edw.* 6, *c.* 16, or 49 *G.* 3, *c.* 126: *i.e.*, any office in the gift of the crown, and any military or naval commission or place under the control of any public department, whether it be in the United Kingdom or in a British possession abroad. 49 *G.* 3, *c.* 126, *ss.* 1, 3. The punishment is fine and imprisonment, forfeiture of the office, and absolute disqualification for holding it again. *See Earl of Macclesfield's case*, 16 *St. Tr.* 767; *Steph. Dig. Cr. Law* (6th ed.), 104; 1 *Russ. Cr.* (6th ed.) 433.

Purchase of the office of clerk of the peace or under-sheriff is punishable under 1 & 2 *W.* & *M.* *c.* 21, *s.* 8; 50 & 51 *Vict. c.* 55, *s.* 27.

Sect. 13.

CONCEALMENT OF TREASURE TROVE.

For the form of indictment for this rare offence, which is a misdemeanor at common law, punishable by fine and imprisonment, and for the evidence requisite to support it, *see* 3 *Co. Inst.* 133: *R.* v. *Thomas*, *L.* & *C.* 313; 33 *L. J.* (*M. C.*) 22: *R.* v. *Toole*, *Ir. Rep.* 2 *C. L.* 36; 11 *Cox*, 75; *Att.-Gen.* v. *British Museum* (*Trustees*) [1903] 2 *Ch.* 598. As to inquisitions *re* treasure trove, *see the Coroners Act*, 1887 (50 & 51 *Vict. c.* 71, *s.* 36); and *Att.-Gen.* v. *Moore* [1893] 1 *Ch.* 676; *Jervis on Coroners* (6th ed.), 107.

Sect. 14.—Smuggling.

MAKING SIGNALS TO SMUGGLING VESSELS.

Statute.

39 & 40 *Vict. c.* 36 (*Customs Consolidation Act*, 1876), *s.* 190—*Making signals.*]—No person shall, after sunset and before sunrise between the twenty-first day of September and the first day of April, or after the hour of eight in the evening and before the hour of six in the morning at any other time of the year, make, aid, or assist in making any signal in or on board or from any ship or boat, or from any part of the coast or shore of

the United Kingdom, or within six miles of any part of such coast or shore, for the purpose of giving notice to any person on board any smuggling ship or boat, whether any person so on board of such ship or boat be or be not within distance to notice any such signal; and if any person contrary to the *Customs Acts*, shall make or cause to be made, or aid or assist in making, any such signal, he shall be guilty of a misdemeanor, and may be stopped arrested detained and conveyed before any justice, who, if he sees cause, shall commit the offender to the next county gaol, there to remain until delivered by due course of law; and it shall not be necessary to prove on any indictment or information in such case that any ship or boat was actually on the coast; and the offender, being duly convicted, shall, by order of the court before whom he shall be convicted, either forfeit the penalty of one hundred pounds, or, at the discretion of such court, be committed to a gaol or house of correction, there to be kept to hard labour for any term not exceeding one year.

Sect. 191—*Onus of proof.*]—If any person be charged with having made or caused to be made, or for aiding or assisting in making, any such signal as aforesaid, the burden of proof that such signal so charged as having been made with intent and for the purpose of giving such notice as aforesaid was not made with such intent and for such purpose shall be upon the defendant against whom such charge is made.

Sect. 255—*In whose name indictments to be preferred.*]—*Ante*, p. 868.

Sect. 257—*Limitation of prosecution.*]—*Ante*, p. 868.

Sect. 258—*Venue.*]—*Ante*, p. 868.

Indictment. (39 & 40 *Vict. c.* 36, *s.* 190, *supra.*)

Kent, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of November, in the year of our Lord ——, after sunset of the same day and before sunrise on the day next following, to wit, at the hour of ten in the night of the same day, unlawfully did make, and did aid and assist in making a certain signal, to wit, a signal by the firing of a gun, on a certain part of the sea-shore, situate in the parish of F., in the county of K. ("*in or on board, or from any ship or boat, or on or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coast or shore*"), for the purpose of giving notice to some person or persons to the jurors aforesaid unknown, on board a certain smuggling ship [*or* boat] then being; against the form [*as ante*, p. 465]. *As to the venue, see ante*, p. 868.

Misdemeanor: 100*l. fine, or imprisonment with hard labour for any term not exceeding one year.* 39 & 40 *Vict. c.* 36, *s.* 190.

This offence is triable at quarter sessions. R. v. *Cock*, 4 *M. & Sel.* 71.

Evidence.

All the prosecutor has to prove is, that the defendant made a signal by firing a gun or otherwise, or was aiding and assisting in so doing on the sea-shore, etc., as stated in the indictment. It is not necessary for him to prove that any smuggling vessel was in fact within sight or actually on the coast at the time; 39 & 40 *Vict. c.* 36, *s.* 190; and it is for the

defendant to prove (if he can) that the fire, etc., was not lighted with the intent charged in the indictment. *Id. s.* 191. The offence must be committed after sunset and before sunrise between 21st September and 1st April, and after eight in the evening and before six in the morning in any other part of the year. *Id. s.* 190. *See R.* v. *Brown, M. & M.* 168.

The indictment for this and all other offences against this statute must be exhibited within three years next after the date of the offence committed. 39 & 40 *Vict. c.* 36, *s.* 257. *See R.* v. *Thompson*, 16 *Q. B.* 832; 20 *L. J.* (*M. C.*) 183 (*ante*, p. 95).

BEING ARMED AND ASSEMBLED FOR THE PURPOSE OF ASSISTING IN RUNNING UNCUSTOMED GOODS, ETC.

Statute.

42 & 43 *Vict. c.* 21 (*Customs and Inland Revenue Act*, 1879), *s.* 10—*Penalty for assembling to run goods.*]—All persons to the number of three or more who shall assemble for the purpose of unshipping landing running carrying concealing or having so assembled shall unship land run carry convey or conceal any spirits tobacco or any prohibited restricted or uncustomed goods shall each forfeit a penalty not exceeding five hundred pounds nor less than one hundred pounds. [*This section is to be read as part of* 39 & 40 *Vict. c.* 36, *and as if it occupied the place formerly occupied in that statute by s.* 188, *now repealed.* 42 & 43 *Vict. c.* 21, *s.* 14.]

39 & 40 *Vict. c.* 36 (*Customs Consolidation Act*, 1875), *s.* 189—*Procuring persons to assemble to run goods—Persons armed or disguised with goods within five miles of coast.*]—Every person who shall by any means procure or hire or shall depute or authorize any other person to procure or hire, any person or persons to assemble for the purpose of being concerned in the landing or unshipping or carrying, conveying, or concealing any goods which are prohibited to be imported, or the duties for which have not been paid or secured, shall be imprisoned for any term not exceeding twelve months; and if any person engaged in the commission of any of the above offences be armed with firearms or other offensive weapons, or whether so armed or not be disguised in any way, or being so armed or disguised shall be found with any goods liable to forfeiture under the *Customs Acts* within five miles of the sea-coast or of any tidal river, shall be imprisoned, with or without hard labour, for any term not exceeding three years. [*See note to indictment, post*, p. 1018.]

Sect. 257—*Limitation of time for prosecution.*]—*See ante*, p. 868.

Sect. 258—*Venue.*]—*See ante*, p. 868.

Indictment for being assembled armed to the Number of Three or more for the purpose of landing Uncustomed Goods. (42 & 43 *Vict. c.* 21, *s.* 10.)

Kent, to wit:—The jurors for our lord the King upon their oath present, that J. S., J. W., and E. W., together with divers other persons to the jurors aforesaid unknown, to the number of three and more, on the

first day of June, in the year of our Lord ——, at the parish of F., in the county of K., unlawfully did assemble for the purpose of unlawfully landing certain uncustomed goods, to wit, —— (*see* 42 & 43 *Vict.* c. 21, s. 10, *supra*), they the said J. S., J. W., and E. W., and the said other persons being then and there and whilst engaged in the commission of the said offence armed with firearms and other offensive weapons, to wit, with guns, pistols, swords and daggers (*see* 39 & 40 *Vict.* c. 36, s. 189, *supra*); against the form [*as ante*, p. 465].

Misdemeanor: imprisonment, with or without hard labour, for any term not exceeding three years. 39 & 40 *Vict.* c. 36, s. 189. *This term of imprisonment appears not to be altered by* 54 & 55 *Vict.* c. 69, s. 1 (*ante*, pp. 235, 236).

Evidence.

Prove that the defendants, or some of them, together with other persons unknown, to the number of three at least, were assembled and armed, as stated in the indictment. It is not necessary that all should be armed; if some be armed, and the others be present aiding and assisting, it will be sufficient. *R.* v. *Smith*, *R.* & *R.* 368. A variance between the indictment and evidence, as to the kind of arms with which they were armed, does not seem to be material; if it be proved that the defendants were armed either with "firearms," or such other "offensive weapons" as are within the meaning of the Act, it should seem to be sufficient. And in *R.* v. *Cosans*, 1 *Leach*, 342, 343, *n.* (*a*), the court held, that not only guns, pistols, daggers, and other instruments of war, but also bludgeons (properly so-called), clubs, and such other things as are not in common use for any other purpose but as weapons, are within the meaning of the Act. *See R.* v. *Hutchinson*, 1 *Leach*, 339. A common whip has been held not to be an offensive weapon (*R.* v. *Fletcher*, 1 *Leach*, 23, 342 *n.*), and bats, which are long poles used for smugglers to carry tubs, were also held not to be offensive weapons within 6 *G.* 4, c. 108, s. 56 (*rep.*). *R.* v. *Noakes*, 5 *C.* & *P.* 326. If, in the heat of an affray, a man catch up a hatchet accidentally, this is not within the meaning of the statute. *R.* v. *Rose*, 1 *Leach*, 342, *n.* Also, to bring the case within the statute, it must appear that the parties had deliberately assembled for the purpose charged in the indictment.

The purpose for which the defendants assembled is proved, either expressly, by the evidence of an accomplice, or the like; or impliedly, by evidence of circumstances from which the jury may fairly presume it.

SHOOTING AT VESSELS BELONGING TO THE NAVY, ETC.

Statute.

39 & 40 *Vict.* c. 36, s. 193.]—*Ante*, p. 867.

CHAPTER II.

OFFENCES AGAINST RELIGION AND PUBLIC WORSHIP.

SECT. 1. *Blasphemy and Blasphemous Libel*, p. 1019.
2. *Disturbing Public Worship, etc.*, p. 1023.

SECT. 1.

BLASPHEMY AND BLASPHEMOUS LIBEL.

Common Law.

Blasphemy against God or the Christian religion is indictable at common law. 1 *Hawk. c.* 5; 1 *East. P. C.* 3; 2 *Chit. Cr. L.* 13; and the authorities there cited. As to the true definition of this offence, *see Steph. Dig. Cr. L.* (6th ed.) 125.

Statutes.

1 *Edw.* 6, *c.* 1.]—*An Act against such as shall irreverently speak against the sacrament of the body and blood of Christ, commonly called the sacrament of the altar.* [*See* 1 *Hawk. c.* 6, *s.* 31.]

Sect. 1.]—*Punishment by fine and imprisonment.*

Sect. 2—*Trial at quarter sessions: but see* 5 & 6 *Vict. c.* 38, *s.* 1.]—*Ante*, p. 126.

Sect. 3.]—*Writ to bishop to attend himself or by chancellor or lawful deputy at trial.*

Sect. 4.]—*Limitation of prosecution three months.*

1 *Mar. Sess.* 2, *c.* 3.]—*Punishment for abuse of the said sacrament.*

1 *Eliz. c.* 1, *s.* 1.]—*Revives* 1 *Edw.* 6, *c.* 1, *supra.*

1 *Eliz. c.* 2, *s.* 3.]—*Punishment of persons declaring or speaking anything in the derogation, depraving or despising of the book of common prayer, or anything contained therein.* [1 *Hawk. c.* 7.]

14 *C.* 2, *c.* 4, *s.* 20.]—*Applies* 1 *Edw.* 6, *c.* 1. *s.* 1, *to the present book of common prayer.*

9 *W.* 3, *c.* 35 (9 & 10 *W.* 3, *c.* 32, *in Ruffhead's edition*), *s.* 1—*Penalties.*]—Whereas many persons have of late years openly avowed and published many blasphemous and impious opinions contrary to the doctrines and principles of the Christian religion greatly tending to the dishonour of Almighty God and may prove destructive to the peace and welfare of this kingdom. Wherefore for the more effectual suppressing of

the said detestable crimes be it enacted [*etc.*] that if any person or persons having been educated in or at any time having made profession of the Christian religion within this realm shall by writing printing teaching or advised speaking [*deny any one of the persons in the Holy Trinity to be God* (*rep.* 53 *G.* 3, *c.* 160, *s.* 2: *see Shore* v. *Wilson*, 9 *Cl. & F.* 355; 4 *St. Tr., N. S.* 1370), *or shall*] assert or maintain there are more gods than one or shall deny the Christian religion to be true or the Holy Scriptures of the Old and New Testament to be of divine authority and shall upon indictment or information in any of his Majesty's courts at Westminster or at the assizes be thereof lawfully convicted by the oath of two or more credible witnesses such person or persons for the first offence shall be adjudged incapable and disabled in law to all intents and purposes whatsoever to have or enjoy any office or offices employment or employments ecclesiastical civil or military or any part in them or any profit or advantage appertaining to them or any of them. And if any person or persons so convicted as aforesaid shall at the time of his or their conviction enjoy or possess any office place or employment such office place or employment shall be void and is hereby declared void. And if such person or persons shall be a second time lawfully convicted as aforesaid of all or any of the aforesaid crime or crimes that then he or they shall from henceforth be disabled to sue prosecute plead or use any action or information in any court of law or equity or to be guardian of any child or executor or administrator of any person or capable of any legacy or deed of gift or to bear any office civil or military or benefice ecclesiastical for ever within this realm and shall also suffer imprisonment for the space of three years without bail or mainprize from the time of such conviction. [*This term of imprisonment appears not to be affected by* 54 *&* 55 *Vict. c.* 69, *s.* 1 (*ante*, pp. 235, 236). *There seems to be no instance of a prosecution under this enactment. Neither this Act nor* 53 *G.* 3, *c.* 160, *altered the common law offence of blasphemy. R.* v. *Richard Carlile*, 1 *St. Tr., N. S.* 1387, *Abbott*, C.J.: *R.* v. *Waddington*, 1 *St. Tr., N. S.* 1339; 1 *B. & C.* 26; 25 *R. R.* 288: *R.* v. *Mary Carlile*, 1 *St. Tr., N. S.* 1033: *R.* v. *Richard Carlile*, 3 *B. & Ald.* 161; 1 *Chit.* (*K. B.*) 451.]

Sect. 2—*Limitation of prosecutions.*]—Provided always . . . that no person shall be prosecuted by virtue of this Act for any words spoken unless the information of such words shall be given upon oath before one or more justice or justices of the peace within four days after such words spoken and the prosecution of such offence be within three months after such information. (*See ante*, p. 95.)

Sect. 3—*Relief from penalties.*]—Provided also . . . that any person or persons convicted of all or any of the aforesaid crime or crimes in manner aforesaid shall for the first offence (upon his her or their acknowledgment and renunciation of such offence or erroneous opinions in the same court where such person or persons was or were convicted as aforesaid within the space of four months after his her or their conviction) be discharged from all penalties and disabilities incurred by such conviction; anything in this Act contained to the contrary thereof in anywise notwithstanding.

60 *G.* 3 *&* 1 *G.* 4, *c.* 8, *ss.* 1, 2—*Seizure of blasphemous libels after verdict, and disposal, if judgment not arrested.*]—*Ante*, pp. 986, 987.

Sect. 4—*Punishment on a second conviction for blasphemous libel.*]—*Ante*, p. 987.

Sect. 7—Evidence of previous conviction.]—*Ante*, p. 987.

43 & 44 *Vict. c.* 41 (*Burial Laws Amendment Act*, 1880), *s.* 7.]—All burials under this Act, whether with or without a religious service, shall be conducted in a decent and orderly manner; and every person . . . who shall in any such churchyard or graveyard as aforesaid, (*i.e., in which parishioners have rights of burial* (*s.* 1)) deliver any address, not being part of or incidental to a religious service permitted by this Act, and not otherwise permitted by any lawful authority, or who shall, under colour of any religious service or otherwise, in any such churchyard or graveyard, wilfully endeavour to bring into contempt or obloquy the Christian religion, or the belief or worship of any church or denomination of Christians, or the members or any minister of any such church or denomination, or any other person, shall be guilty of a misdemeanor. [*For other offences under this section, see post*, p. 1025.]

Indictment for a Blasphemous Libel. (*Common Law.*)

Kent, to wit:—The jurors for our lord the King upon their oath present, that J. S., being a wicked and evil-disposed person, and disregarding the laws and religion of the realm, and wickedly and profanely devising and intending to bring the Holy Scriptures and the Christian religion into disbelief and contempt among the people of this kingdom, on the first day of June, in the year of our Lord ——, unlawfully and wickedly did compose, print and publish, and cause and procure to be composed, printed and published, a certain scandalous, impious, blasphemous, and profane libel of and concerning the Holy Scriptures and the Christian religion, in one part of which said libel there were and are contained, amongst other things, certain scandalous, impious, blasphemous and profane matter and things, of and concerning the Holy Scriptures and the Christian religion, according to the tenour and effect following, that is to say [*here set out the blasphemous passage; and if there be another such passage in another part of the libel, introduce it thus:* and in another part thereof there were and are contained, amongst other things, certain other scandalous, impious, blasphemous, and profane matters and things, of and concerning the said Holy Scriptures and the Christian religion, according to the tenour and effect following, that is to say, *etc., etc., and to conclude the count thus*]: to the high displeasure of Almighty God, to the great scandal and reproach of the Christian religion, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. [*For other precedents, see R.* v. *Mary Carlile*, 1 *St. Tr., N. S.* 1033: *R.* v. *Hetherington*, 4 *St. Tr., N. S.* 563: *R.* v. *Petcherine*, 8 *St. Tr., N. S.* 1086; 7 *Cox*, 79. *For observations as to the form of indictment for seditious libels, see ante*, p. 988; *for other libels, see post*, p. 1118, *et seq.*]

Misdemeanor: fine and imprisonment. See 60 *G.* 3 & 1 *G.* 4, *c.* 4, *ss.* 4, 7, *as to second convictions.*

Blasphemy and offences against religion, and composing, printing or publishing blasphemous libels, are not triable at any quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

No indictment can be preferred for libel unless one or other of the preliminary steps required by 22 & 23 *Vict. c.* 17, *s.* 1 (*as extended by* 30 & 31 *Vict. c.* 35, *s.* 1) (*ante*, p. 7, *et seq.*), *has been taken.* 44 & 45 *Vict. c.* 60, *s.* 6 (*post*, p. 1121). *Nor can any criminal prosecution be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a*

any former Act or Acts of Parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled, such person or persons so offending, upon proof thereof before any justice of the peace by two or more credible witnesses, shall find two sureties, to be bound by recognizances in the penal sum of fifty pounds, to answer for such offence, and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions, and upon conviction of the said offence at the said general or quarter sessions, shall suffer the pain and penalty of forty pounds. [*This Act did not extend to Quakers' meeting-houses* (s. 14), *nor does it extend to the meetings for religious worship mentioned in* 18 & 19 *Vict. c* 86, *s.* 1; *but see* 9 & 10 *Vict. c.* 59, *s.* 4, *infra.*]

2 & 3 *W.* 4, *c.* 115 (*Roman Catholic Churches Act*, 1832), *s.* 1.]—His Majesty's subjects professing the Roman Catholic religion, in respect to their schools, places for religious worship, education, and charitable purposes, in Great Britain, and the property held therewith, and the persons employed in or about the same, shall in respect thereof be subject to the same laws as the Protestant dissenters are subject to in England in respect to their schools and places for religious worship, education, and charitable purposes, and not further nor otherwise.

9 & 10 *Vict. c.* 59 (*Religious Disabilities Act*, 1846), *s.* 2.]—*Persons professing the Jewish religion to be subject to the same laws as Protestant dissenters as to their schools, places for religious worship, education, and charitable purposes.*

Sect. 4.]—All laws now (18*th Aug.*, 1846) in force against the wilfully and maliciously or contemptuously disquieting or disturbing any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorized by any former Act or Acts of Parliament, or the disturbing, molesting, or misusing any preacher, teacher, or person officiating at such meeting, assembly, or congregation, shall apply respectively to all meetings, assemblies, or congregations whatsoever of persons lawfully assembled for religious worship, and the preachers, teachers, or persons officiating at such last-mentioned meetings, assemblies, or congregations, and the persons there assembled.

18 & 19 *Vict. c.* 81 (*Places of Public Worship Registration Act*, 1855), *s.* 2.]—*Places of public worship of Protestant dissenters and of persons professing the Roman Catholic religion to be certified to the Registrar-General.*

Sect. 3.]—*Place of meeting to be recorded by Registrar-General.*

Sect. 4.]—*Certification to Registrar-General of places certified before the passing of the Act* (30*th July*, 1855).

Sect. 10.]—*Places of worship of Church of England or Ireland not within the Act.*

Sect. 11—*Proof of certification.*]—The Registrar-General, on payment to him of a fee of two shillings and sixpence, shall, with respect to any place certified to him as a place of meeting for religious worship, the record whereof remains uncancelled, give to any person demanding the same a certificate, sealed or stamped with the seal of the general register office, that at the time or respective times in such certificate in that behalf

stated the place therein described was duly certified and duly recorded as required by this Act, and that at the date of such sealed or stamped certificate the record of such certification remained uncancelled; and every such sealed or stamped certificate, if tendered in evidence upon any trial or other judicial proceeding in any civil or criminal court, shall be received as evidence of the said several facts therein mentioned without any further or other proof of the same.

18 & 19 *Vict. c.* 86 (*Liberty of Religious Worship Act*, 1855), *s.* 2.]—*Applies to Roman Catholic and Jewish places of worship the laws for the time being in force as to Protestant dissenters.*

23 & 24 *Vict. c.* 32 (*Ecclesiastical Courts Jurisdiction Act*, 1860), *s.* 1.]—*Abolishes ecclesiastical jurisdiction as to persons guilty of brawling who are not in holy orders.* [*See* 5 & 6 *Edw.* 6, *c.* 4.]

Sect. 2.]—*Summary punishment of persons guilty of riotous, violent, or indecent behaviour in places of worship of the Established Church or places of worship certified under* 18 & 19 *Vict. c.* 81, *during celebration of divine service, or at any other time, or in a churchyard or burial ground. This section applies to clergy as well as laity. Vallancey* v. *Fletcher* [1897] 1 *Q. B.* 265.

Sect. 4.]—*Appeal to quarter sessions from any conviction.*

Sect. 6.]—Nothing hereinbefore contained shall be taken to repeal or alter 1 *Mar. sess.* 2, *c.* 3; *or* 1 *Eliz. c.* 2; *or* 1 *W. & M. c.* 18, *s.* 15 (*s.* 18 *in Ruffhead*) (*ante*, p. 1023).

24 & 25 *Vict. c.* 96, *s.* 50—*Sacrilege.*]—*Ante*, p. 621.

24 & 25 *Vict. c.* 97, *ss.* 1, 8, 11, 12, 37—*Malicious injury to churches.*]—*Ante*, pp. 647, 648, 670.

24 & 25 *Vict. c.* 100, *s.* 36.]—*Arresting, etc., ministers of religion when in discharge of their functions* (*ante*, p. 856).

43 & 44 *Vict. c.* 41 (*Burial Laws Amendment Act*, 1880), *s.* 7.]— . . . And every person guilty of any riotous, violent, or indecent behaviour at any burial under this Act, or wilfully obstructing such burial, or any such service as aforesaid, . . . shall be guilty of a misdemeanor. [*For other offences created by the section, see ante*, p. 1021.]

Indictment for disturbing a Congregation of Baptists during Divine Service. (52 *G.* 3, *c.* 155, *s.* 12, *ante*, p. 1023.)

Westmoreland, to wit:—The jurors for our lord the King upon their oath present, that heretofore, to wit, at the general quarter sessions of the peace holden at Appleby, in and for the county of Westmoreland, on the —— day of ——, in the year of our Lord ——, before A. B. and C. D., esquires, and others their associates, justices of our lord the King, assigned to keep the peace of our said lord the King in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, J. N., clerk, teacher, and

preacher to a congregation of Protestants dissenting from the Church of England, scrupling infant baptism, did then, pursuant to the statute in such case made and provided, certify to his Majesty's justices of the peace assembled in quarter sessions aforesaid, that he had appointed a certain house situate at ——, in the parish of B., in the county aforesaid, therein to assemble and meet for religious worship, and which was then duly registered and recorded, according to the directions of the statute in such case made and provided. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the first day of June, in the year of our Lord ——, a congregation of Protestants, dissenting from the Church of England, of which the said J. N. was then the teacher and preacher, were assembled for the public worship and service of Almighty God in the house aforesaid, so certified, registered, and recorded as aforesaid; and that J. S., J. W., and E. W. afterwards, to wit, on the day and year last aforesaid, whilst the said congregation were so assembled as aforesaid, and during divine service, unlawfully, wilfully, maliciously, and contemptuously did come into the said congregation, during divine service as aforesaid, and did then wilfully, maliciously, and contemptuously disquiet and disturb the congregation [by then talking, cursing, and swearing, with a loud voice, and also by talking with a loud voice to the said J. N., he the said J. N. then being in the pulpit], the doors of the said meeting-house and place where the said congregation were so assembled as aforesaid not being then locked, barred, or bolted; against the form [*as ante*, p. 465]. (*2nd Count*)—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., J. W., and E. W. afterwards, to wit, on the day and year last aforesaid, unlawfully, wilfully, maliciously, and contemptuously did come into a certain congregation of Protestants dissenting from the Church of England, then assembled for the worship and service of Almighty God, in a certain meeting-house, and the said congregation did then unlawfully, wilfully, maliciously, and contemptuously disquiet and disturb [by talking, laughing, swearing, and cursing with a loud voice], (the said meeting-house where the said congregation were so assembled as aforesaid being then and long before certified, registered, and recorded according to the direction of the statute in such case made and provided, and the doors of the said meeting-house and place where the said congregation were so assembled not being then locked, barred, or bolted); against the form [*as ante*, p. 465]. [*See R.* v. *Cheere*, 4 *B. & C.* 902; 7 *D. & Ry.* 461.]

Fine: 40l. for each defendant (52 *G.* 3, *c.* 155, *s.* 12). *R.* v. *Hube*, 5 *T. R.* 542; 2 *R. R.* 669; *Peake* (3rd ed.), 180. 23 *& 24 Vict. c.* 32 (*ante*, p. 1025). *See also Williams* v. *Glenister*, 2 *B. & C.* 699.

This offence may be tried at quarter sessions; 52 *G.* 3, *c.* 155, *s.* 12; *or in the High Court of Justice* (*K. B. D.*); *R.* v. *Wroughton*, 3 *Burr.* 1683; *or at the assizes, if removed from the sessions by certiorari; R.* v. *Hube, ubi supra.*

Evidence.

1. Prove that the chapel or meeting-house was certified and registered as alleged in the indictment; which may be done by the clerk of the peace producing the book, etc., in which the same was registered, or by an examined or certified copy of the entry, under 14 *&* 15 *Vict. c.* 99, *s.* 14 (*ante*, p. 879). Where the chapel or meeting-house has been registered under the *Places of Worship Registration Act*, 1855 (18 *&* 19 *Vict. c.* 81), the registration may be proved by the certificate mentioned in *s.* 11 of that Act (*ante*, p. 1024). 1 *W. & M. c.* 18, has been held to extend

to a registered congregation of foreign Lutherans. *R.* v. *Hube, ubi supra.* It is immaterial whether the officiating clergyman has qualified according to the statute or not. *Id.*

2. Prove the disturbance as stated in the indictment. Where, in a contest for the situation of a clerk to a meeting-house, one clerk pulled the other from the desk, it was held to be a disturbance within the statute, *R.* v. *Hube, ubi supra,* although the statute was certainly intended principally to apply to persons who with violence oppose a form of worship inconsistent with their own ideas and tenets.

CHAPTER III.

OFFENCES AGAINST PUBLIC JUSTICE.

SECT. 1. *Escape*, p. 1028.
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3. *Rescue*, p. 1038.
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6. *Administering, etc., Voluntary Oaths, etc.*, p. 1076.
7. *Embracery*, p. 1077.
8. *Interference with Witnesses*, p. 1078.
9. *Barratry, Champerty, and Maintenance*, p. 1079.
10. *Bribery of Public Officials*, p. 1080.
11. *Extortion by Public Officials*, p. 1083.
12. *Misconduct of Officers of Justice*, p. 1085.
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14. *Compounding Offences*, p. 1088.
15. *Libels reflecting on the Administration of Justice, and Contempt of Court*, p. 1094.

SECT. 1.

ESCAPE.

Common Law.

"Escape" proper is where a person having a prisoner lawfully in his custody voluntarily or negligently suffers him to go at large. 1 *Hale*, 570; *Steph. Dig. Cr. Law* (6th ed.), 115. The custodian is said to be guilty of treason who voluntarily suffers the escape of a man in custody for treason; 1 *Hale*, 234; *Steph. Dig. Cr. Law* (6th ed.), 115; and to be liable as an accessory after the fact to the prisoner's crime if it be felony; 1 *Hale*, 235; and to be guilty of a misdemeanor if the prisoner was in custody for misdemeanor: *Steph. Dig. Cr. Law* (6th ed.), 115. A custodian who "negligently" allows his prisoner to escape from lawful custody is guilty of a misdemeanor. 1 *Hale*, 600; *Steph. Dig. Cr. Law* (6th ed.), 115; *and see* indictment, *post*, p. 1032.

It is also an indictable misdemeanor at common law, punishable by fine and imprisonment (with or without hard labour: 14 *&* 15 *Vict.* c. 100, *s.* 29), for a prisoner whether innocent or guilty to escape from lawful custody on a criminal charge, whether the escape is effected by force or artifice, or in consequence of neglect in the custodian, and whether it is made from gaol or in transit thereto. 2 *Hawk.* c. 19; 1 *Hale* 590; 2 *Chit. Cr. L.* 159: *R.* v. *Allan, C. & Mar.* 295.

Persons who aid a prisoner to escape are at common law guilty as

principals, or may be indicted for rescue (*post*, p. 1038); *and see R. v. Allan, ubi supra.*

Statutes.

31 *Edw.* 3, *st.* 1, *c.* 14.]—*Item*, it is accorded that the escape of thieves and felons and the chattels of felons and of fugitives, and also escapes of clerks convict out of their ordinaries' prison, from henceforth to be judged before any of the King's justices shall be levied from time to time as they shall fall, as well of the time past as of the time to come.

16 *G.* 2, *c.* 31 (*Prison Escape Act*, 1742), *s.* 1—*Aiding escapes.*]—For the further punishment of persons who shall aid or assist prisoners to attempt to escape out of lawful custody (*be it enacted, etc., that*), if any person shall, from and after the 24th day of June, 1743, by any means whatsoever, be aiding or assisting to (*sic*) any prisoner to attempt to make his or her escape from any gaol, although no escape be actually made, in case such prisoner then was attainted or convicted of treason, or any felony, except petty larceny, or lawfully committed to or detained in any gaol for treason, or any felony, except petty larceny (*see ante*, p. 427), expressed in the warrant of commitment or detainer, every person so offending, and being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America, for the term of seven years [*now penal servitude or imprisonment; see* 20 *&* 21 *Vict. c.* 3; 54 *&* 55 *Vict. c.* 69, *s.* 1, *ante*, p. 235]; and in case such prisoner then was convicted of, committed to, or detained in any gaol for petty larceny, or any other crime not being treason or felony, expressed in the warrant of his or her commitment or detainer as aforesaid, or then was in gaol upon any process whatsoever for any debt, damages, costs, sum or sums of money amounting in the whole to the sum of one hundred pounds, every person so offending as aforesaid, and being thereof lawfully convicted, shall be deemed and adjudged to be guilty of a misdemeanor, for which he or she shall be liable to a fine and imprisonment. [*As to common law liability in such cases, see* 1 *Russ. Cr.* (6th ed.) 911.]

It is difficult to say how far 16 *G.* 2, *c.* 31, *ss.* 1, 2, *are still in force. See Mr. Greaves' note*, 1 *Russ. Cr.* (6th ed.) 900. *They were repealed by* 4 *G.* 4, *c.* 64, *s.* 1, *so far "as relates to the escape of any prisoner from any gaol or prison to which"* 4 *G.* 4, *c.* 64, *extended. The prisons to which* 4 *G.* 4, *c.* 64, *extended are stated in* 2 *Statutes Revised* (2nd ed.), p. 160. *That Act specially excepted Bethlehem, Bridewell, the King's Bench, and Fleet Prisons, the prison of the Marshalsea and Palace Courts, the Millbank Penitentiary and Gloucester Penitentiary, and vessels provided for the reception and employment of convicts sentenced to transportation; and this exception was not affected by the subsequent repeal of* 4 *G.* 4, *c.* 64, *by* 28 *&* 29 *Vict. c.* 126, *s.* 78. *The Millbank and Gloucester Penitentiaries and the hulks have been abolished, and convict prisons have been substituted for the hulks. As to escapes from such prisons, see post*, p. 1040. *The Fleet Prison and the prison of the Marshalsea and Palace Courts were abolished, and "the Queen's Prison" was substituted by* 5 *&* 6 *Vict. c.* 22. *That prison was discontinued and Whitecross Street Prison substituted* (25 *&* 26 *Vict. c.* 104). *The latter prison was discontinued in* 1870 *under s.* 12 *of the Act last mentioned, and the City Prison at Holloway was substituted as "the Queen's Prison." It had been made a valid prison by* 15 *&* 16 *Vict. c.* 70, *and is a local prison within* 28 *&* 29 *Vict. c.* 126 (*see Home Office Orders, 19th May*, 1886; *Statutory Rules and Orders Revised* (ed. 1904), *vol.* 10, "*tit. Prison E.*," p. 72).

Brixton Prison, appointed by order of 16th October, 1901, is now used for male prisoners committed by the High Court, and Holloway only for female prisoners. The result seems to be that 16 *G.* 2, *c.* 31, *ss.* 1, 2, *can apply now only to the City Bridewell (used only for recalcitrant apprentices), and to Bethlehem Hospital which is not an asylum for criminal lunatics within* 23 *&* 24 *Vict. c.* 75, *s.* 12.]

Sect. 2—*Conveying into prison the means of escape.*]—And . . . if any person shall, from and after the said 24th day of June, 1743, convey or cause to be conveyed into any gaol or prison any vizor, or other disguise, or any instrument or arms proper to facilitate the escape of the prisoners, and the same shall deliver or cause to be delivered to any prisoner in any such gaol, or to any other person there for the use of any such prisoner, without the consent or privity of the keeper or under-keeper of any such gaol or prison, every such person, although no escape or attempt to escape be actually made, shall be deemed to have delivered such vizor, or other disguise, or instrument, or arms, with an intent to aid and assist such prisoner to escape or attempt to escape; and in case such prisoner then was attainted or convicted of treason, or any felony, except petty larceny (*see ante*, p. 427), or lawfully committed to or detained in any such gaol for treason, or any felony, except petty larceny, expressed in the warrant of commitment or detainer (*i.e., clearly and expressly stated*; *R.* v. *Walker*, 1 *Leach*, 97: *R.* v. *Greenif*, *Id.* 98, *n.*, 363); every person so offending, and being thereof lawfully convicted, shall in like manner be deemed and adjudged guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America for the term of seven years [*now penal servitude for not more than seven nor less than three years, or imprisonment, with or without hard labour, for not more than two years* (54 *&* 55 *Vict. c.* 69, *s.* 1, *ante*, p. 235)]; but in case the prisoner to whom, or for whose use, such vizor or disguise, instrument, or arms shall be so delivered, then was convicted, committed, or detained for *petty larceny*, or any other crime not being treason or felony, expressed in the warrant of commitment or detainer, or upon any process whatsoever for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds, every such person so offending, and being thereof lawfully convicted, shall be deemed and adjudged to be guilty of a misdemeanor, for which he or she shall be in like manner liable to a fine and imprisonment. [*As to how far s.* 2 *is in force, see note to s.* 1, *supra. The fact that the prisoner had already been pardoned, or that the accused did not know of what specific offence the prisoner had been convicted, is no defence to an indictment under this section. R.* v. *Shaw, R. & R.* 256. *The statute does not apply where an actual escape has been effected. R.* v. *Tilley*, 2 *Leach*, 662.]

Sect. 3—*Aiding escape from constable.*]—And . . . if any person shall, from and after the 24th day of June, 1743, aid or assist any prisoner to attempt to make his or her escape from the custody of any constable, headborough, tithingman, or other officer or person who shall then have the lawful charge of such prisoner, in order to carry him or her to gaol, by virtue of a warrant of commitment for treason or any felony except petty larceny (*vide ante*, p. 427) expressed in such warrant; or if any person shall be aiding or assisting to (*sic*) any felon to attempt to make his escape from on board any boat, ship, or vessel carrying felons for transportation, or from the contractor for the transportation of such felons, his assigns or agents, or any other person to whom such felon shall have been lawfully delivered in order for transportation, then every person so

offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be transported to one of his Majesty's colonies or plantations in America, for the term of seven years [*now penal servitude or imprisonment.* 20 & 21 *Vict. c.* 3; 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235)].

Sect. 4—*Limitation.*]—Provided always . . . that there shall be no prosecution for any of the said offences, unless such prosecution be commenced within one year after such offence committed. [*See ante*, p. 94.]

52 *G.* 3, *c.* 156 (*Prisoners of War Escape Act*, 1812), *s.* 1.]—Every person who shall, from and after the passing of this Act (29th July, 1812), knowingly or wilfully aid or assist any alien enemy of his Majesty, being a prisoner of war in his Majesty's dominions, whether such prisoner shall be confined as a prisoner of war in any prison or other place of confinement, or shall be suffered to be at large in his Majesty's dominions or any part thereof on his parole, to escape from such prison or other place of confinement, or from his Majesty's dominions, if at large on parole, shall, upon being convicted thereof, be adjudged guilty of felony, and be liable to be transported as a felon for life, or for such term of fourteen or seven years (*see now* 54 & 55 *Vict. c.* 69, *s.* 1, *ante*, p. 235), as the court before whom such person shall be convicted shall adjudge. [*Prior to this Act the offence was a misdemeanor only. R.* v. *Martin*, *R. & R.* 196.]

Sect. 2.]—Provided always . . . that every person who shall knowingly and wilfully aid or assist any such prisoner at large on parole in quitting any part of his Majesty's dominions where he may be on his parole, although he shall not aid or assist such person in quitting the coast of any part of his Majesty's dominions, shall be deemed guilty of aiding the escape of such person under the provisions of this Act.

Sect. 3.]—*Same punishment for British subjects assisting on the high seas in the escape of prisoners of war who have escaped from his Majesty's dominions. Venue: see ante*, pp. 39–43.

Sect. 4.]—*Act not to prevent other modes of trial; but accused not to be tried both ways.* [*Cf.* 52 & 53 *Vict. c.* 63, *s.* 33, *ante*, p. 170.]

1 & 2 *Vict. c.* 82, *ss.* 11, 12, 13.]—*Escapes from Parkhurst Prison.*

5 & 6 *Vict. c.* 29, *ss.* 24, 25, 28.]—*Escapes from Pentonville Prison.*

23 & 24 *Vict. c.* 75 (*Criminal Lunatic Asylums Act*, 1860), *s.* 12.]—Any person who rescues any person ordered to be conveyed to an asylum for criminal lunatics during the time of his conveyance thereto, or of his confinement therein, and any officer or servant in any asylum for criminal lunatics, who through wilful neglect or connivance permits any person confined therein to escape therefrom, or secretes or abets or connives at the escape of any such person, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for any term not exceeding four years (*now, semble, not more than five and not less than three years*, 54 & 55 *Vict. c.* 69, *s.* 1, *ante*, p. 235), or to be imprisoned for any term not exceeding two years, with or without hard labour, at the discretion of the court; and any such officer or servant who carelessly allows any such person to escape shall, on summary conviction, forfeit any sum not exceeding 20*l.* nor less than 2*l.* [*For summary punishment for*

wilfully permitting escape of non-criminal lunatic, see 53 & 54 *Vict. c.* 5, *s.* 323. *The only asylum for criminal lunatics is Broadmoor Prison. See Statutory Rules and Orders Revised* (ed. 1904), *vol.* 8, *tit.* "*Lunatic E.*," p. 78.]

28 & 29 *Vict. c.* 126 (*Prison Act*, 1865), *s.* 37—*Assisting prisoners to escape.*]—Every person who aids any prisoner in escaping or attempting to escape from any prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison any mask, dress or other disguise, or any letter, or any other article or thing, shall be guilty of felony, and on conviction be sentenced to imprisonment with hard labour for a term not exceeding two years. [*For indictment, see post*, p. 1035.]

Sect. 3—*Application of Act.*]—This Act shall not extend to Scotland or Ireland, and shall not apply to the prisons for convicts under the superintendence of the directors of convict prisons, or to any military or naval prison.

Sect. 4—*Meaning of word "prison."*]— . . . "*Prison*" shall mean gaol, house of correction, bridewell or penitentiary; it shall include the airing grounds, or other grounds or buildings occupied by prison officers for the use of the prison and contiguous thereto. . . .

29 & 30 *Vict. c.* 109, *s.* 82.]—*Escapes from naval prisons.*

44 & 45 *Vict. c.* 58, *ss.* 20, 22.]—*Escapes from military prisons.*

61 & 62 *Vict. c.* 41 (*Prison Act*, 1898), *s.* 1.]—*Prison commissioners under* 28 & 29 *Vict. c.* 126, *to be directors of convict prisons.*

Sect. 10.]—Every prison officer while acting as such shall, by virtue of his appointment, have all the powers, authorities, protections and privileges of a constable.

Indictment against a Constable for Negligently Permitting an Escape.
(*Common Law.*)

Middlesex, to wit:—The jurors for our lord the King, upon their oath present, that on the first day of June, in the year of our Lord ——, J. S., then being an officer of the police force of the county of M. [or *administrative county of*, or *borough of* ——, or *of the metropolis*], brought one J. N. before A. C., esquire, then and yet being one of the justices of our said lord the King assigned to keep the peace for our said lord the King in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, and the said J. N. was then charged before the said A. C., by one Catherine Hope, spinster, upon the oath of the said Catherine Hope, that he the said J. N. had then lately before violently, and against her will, feloniously ravished and carnally known her the said Catherine Hope; and the said J. N. was then brought before the said A. C., the justice aforesaid, and the said justice held an inquiry according to law, in the presence of the said J. N., touching the said offence so to him charged as aforesaid; upon which the said A. C., the justice aforesaid, did then make a certain warrant, under his hand and seal, in due form of law,

bearing date the said first day of June in the year aforesaid, directed to the keeper of his Majesty's prison at —— or his deputy, commanding him the said keeper or his deputy, that he should receive into his custody the said J. N., brought before him and charged upon the oath of the said Catherine Hope, with the premises above specified; and the said justice, by the said warrant, did command the said keeper of his Majesty's said prison or his deputy, to safely keep him the said J. N. there until he by due course of law should be discharged; which said warrant afterwards, to wit, on the day and year aforesaid, was delivered to the said J. S., then being an officer of the police force of the county [or *administrative county, or as the case may be*] aforesaid, and then having the said J. N. in his custody for the cause aforesaid; and the said J. S. was then commanded by the said A. C., the justice aforesaid, to convey the said J. N., without delay, to the said prison, and to deliver him the said J. N. to the keeper of the said prison or his deputy, together with the warrant aforesaid.* And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year last aforesaid, then being one of the constables of the said parish as aforesaid, and then having the said J. N. in his custody for the cause aforesaid, the said J. N. out of the custody of him the said J. S. unlawfully and negligently did permit to escape, and go at large whithersoever he would, whereby the said J. N. did then escape and go at large whithersoever he would, to the great hindrance of justice, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Where the escape is negligently permitted by an officer, the punishment is said to be fine only. 2 *Hawk. c.* 19; 1 *Hale*, 600; 1 *Russ. Cr.* (6th ed.) 982. *This appears to be erroneous, and to arise from a misconception of the nature of a fine. See* 2 *Pollock & Maitland, Hist. Eng. Law*, 512. *Officers of county, borough, or metropolitan, police are in the same position as a parish constable at common law. See* 10 *G.* 4, *c.* 44, *s.* 4; 2 *&* 3 *Vict. c.* 93, *s.* 8; 45 *&* 46 *Vict. c.* 50, *s.* 191.

Where a private person is guilty of a negligent escape, the punishment is fine or imprisonment, or both. 2 *Hawk. c.* 20, *s.* 6. *The imprisonment must be for some criminal matter, otherwise the escape is not an indictable offence at common law; but it is punishable under* 16 *G.* 2, *c.* 31, *s.* 1 (*ante*, p. 1029), *and is actionable under* 5 *&* 6 *Vict. c.* 98, *s.* 31; *or where the escape is due to negligence of sheriffs or other officers, by proceedings under* 50 *&* 51 *Vict. c.* 55, *s.* 29, *or by attachment. In case of negligent escape, the custodian may, it seems, retake his prisoner by force.* 2 *Hawk. c.* 19, *s.* 13: *R.* v. *Forster*, 1 *Lewin*, 187: *R.* v. *Dadson*, 2 *Den.* 85.

Evidence.

Prove that J. N. was charged with rape, as alleged in the indictment. Prove the warrant of commitment in substance as set out in the indictment, either by producing the warrant itself, or, after proving the service of a notice upon the defendant to produce it, by parol or other secondary evidence of its contents. Prove a delivery of the warrant to the defendant, and that he is a member of the police force specified. Prove that he had J. N. in actual custody under the warrant. *See* 2 *Hawk. c.* 19, *ss.* 1, 4. And, lastly, prove the escape. It is not necessary to prove negligence in the defendant; the law implies it; *see* 1 *Hale*, 600; but if the escape were not in fact negligent, if the defendant by force rescued himself, or were rescued by others, and the defendant made fresh pursuit after him, but without effect; all this must be shown upon the part of the defendant.

Also, it is immaterial whether J. N. were guilty of the rape or not, provided that the warrant were such as would justify J. S. in detaining him. (*See ante*, p. 805, *et seq.*)

Indictment for escaping out of the Custody of a Constable. (*Common Law.*)

*State the charge before the magistrate, the warrant of commitment, and the defendant's being in the custody of J. S. as in the last precedent to the * ; and then proceed thus*]: and the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. N. so being in the custody of the said J. S., under and by virtue of the warrant aforesaid, afterwards, and whilst he continued in such custody, and before he was delivered by the said J. S. to the said keeper of his Majesty's said prison or his deputy, to wit, on the day and year last aforesaid, out of the custody of the said J. S. unlawfully did escape, and go at large whithersoever he would: to the great hindrance of justice, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Misdemeanor: fine and imprisonment (*with or without hard labour*, 14 & 15 *Vict. c.* 100, *s.* 29, *ante*, p. 238). *See* 2 *Hawk. c.* 17, *s.* 5. *See the evidence under the last precedent.*

Indictment against a Gaoler for a Voluntary Escape. (*Common Law.*)

Berkshire, to wit:—The jurors for our lord the King upon their oath present, that heretofore, to wit [at the general quarter sessions of the peace, holden at ——, *so continuing the record of the conviction of the party who escaped, stating it, however, in the past and not in the present tense: then proceed thus*]: which said judgment still remains in full force and effect, and not in the least reversed or made void. And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, at the said general quarter sessions of the peace above mentioned, he the said J. N. was committed to the care and custody of J. S., he the said J. S. then and still being keeper of his Majesty's prison at *Reading*, being the common gaol in and for the county of Berks, there to be kept and imprisoned in the prison aforesaid, according to and in pursuance of the judgment and sentence aforesaid: and the said J. S. him the said J. N. then had in the custody of him the said J. S. for the cause aforesaid in the gaol aforesaid. And the jurors first aforesaid, upon their oath aforesaid, do further present that the said J. S. afterwards, and before the expiration of the six calendar months for which the said J. N. was so ordered to be imprisoned as aforesaid, and whilst the said J. N. was so in the custody of the said J. S. as such keeper of the said prison as aforesaid, to wit, on the first day of August, in the year last aforesaid, feloniously [*if the offence for which J. N. was convicted were felony*], unlawfully, voluntarily and contemptuously, did permit and suffer the said J. N. to escape and go at large whithersoever he would; whereby the said J. N. did then escape out of the said prison, and go at large whithersoever he would; in contempt of our said lord the King and his laws, contrary to the duty of the said J. S., so being keeper of the prison aforesaid, in manifest hindrance of justice, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

A voluntary escape amounts to the same offence, and is punishable in the same degree as the offence of which the prisoner was guilty, and for which he was in custody, whether treason, felony, or misdemeanor (trespass). The officer, however, cannot be thus punished until after the original delinquent has been convicted; but before such conviction he may be fined and imprisoned as for a misdemeanor. 4 *Bl. Com.* 130; 1 *Hale*, 235; 2 *Hawk. c.* 19, *s.* 22; *Steph. Dig. Cr. Law* (6th. ed.), 115.

Evidence.

Prove the conviction of J. N., and that, upon his conviction, he was remanded or committed to the custody of the defendant, as keeper of the common gaol of the county of Berks. The conviction may be proved in the manner pointed out by 14 & 15 *Vict. c.* 99, *s.* 19 (*ante*, p. 360), or 34 & 35 *Vict. c.* 112, *s.* 18 (*ante*, p. 361). Prove him afterwards to have been in the custody of the defendant, in pursuance of his sentence. And, lastly, prove the escape. An escape is voluntary where the keeper gives the prisoner his liberty with the object of saving him from trial and punishment. *See* 2 *Hawk. c.* 19, *s.* 10; 1 *Russ. Cr.* (6th ed.) 891. It does not seem to be necessary to prove that the escape was voluntary; the law, it would seem, will presume that, until the contrary appear.

On the transfer of local prisons to the Crown, orders were made constituting particular prisons, whether within or without a county, as the common gaol for such county. For these orders, *see St. R. & O. Revised* (ed. 1904), *vol.* 10, *tit.* "*Prison E.*;" *and see* 28 & 29 *Vict. c.* 126, *ss.* 57, 58; 40 & 41 *Vict. c.* 21, *s.* 30. Removal of prisoners from one prison to another under lawful authority is not an escape. 28 & 29 *Vict. c.* 126, *ss.* 63–65; 40 & 41 *Vict. c.* 21, *s.* 28.

Indictment for aiding Escape. (16 *G.* 2, *c.* 31, *s.* 1, *ante*, p. 1029.)

For precedent, see R. v. Shaw, R. & R. 526.

Indictment for conveying Files into a Local Prison, with intent to facilitate Escape of Prisoner. (28 & 29 *Vict. c.* 126, *s.* 37, *ante*, p. 1032.)

Berkshire, to wit:—The jurors for our lord the King upon their oath present, that before and at the time of the committing of the felony hereinafter charged and stated, to wit, on the first day of June, in the year of our Lord ——, one J. N. was a prisoner, in his Majesty's prison at ——, being the common gaol in and for the county of Berks; and that J. S. afterwards, and whilst the said J. N. was such prisoner as aforesaid, to wit, on the day and year aforesaid, with intent to facilitate the escape of the said J. N., so then being such prisoner as aforesaid, from and out of the said prison, feloniously did convey and cause to be conveyed into the prison as aforesaid two steel files; against the form [*as ante*, p. 465]. *In former editions reference was made to indictments under* 16 *G.* 2, *c.* 31, *s.* 2 (*ante*, p. 1030), *which are now omitted, as that section is for all practical purposes obsolete. See note, ante*, p. 1029. *An indictment under that section* (*ante*, p. 1030), *for aiding a prisoner to escape or in attempting to escape, need not set forth the means employed by the defendant for that purpose. Holloway* v. *R.*, 2 *Den.* 287; 17 *Q. B.* 317.

Felony: 28 & 29 *Vict. c.* 126, *s.* 37 (*ante*, p. 1032), *imprisonment with hard*

labour for a term not exceeding two years. 28 & 29 *Vict. c.* 126, *applies to all local prisons in England and Wales, but not to "convict" prisons (which include Parkhurst, Aylesbury, Borstal, Dartmoor, and Portland Prisons);* *Statutory Rules and Orders Revised* (ed. 1904), *vol.* 10, *tit.* "*Prison E.,*" pp. 118–121), *nor to any military or naval prison* (28 & 29 *Vict. c.* 126, *ss.* 3, 4). (*See ante*, p. 1032.)

Evidence.

Prove that J. N. was in custody, and a prisoner in the gaol mentioned in the indictment. The words of the statute are, "any prisoner." Prove that whilst J. N. was so in custody, the defendant conveyed to him one or more files; and prove that such files were calculated to facilitate his escape, by filing his irons, or the window bars, or the like. The mere delivery of such instruments to the prisoner is a fact from which the jury may well infer the intent, and it is immaterial, upon this statute, whether an escape be actually made or not. A crowbar is an "article or thing" within the meaning of this section. *R.* v. *Payne*, *L. R.* 1 *C. C. R.* 27; 35 *L. J.* (*M. C.*) 170.

Sect. 2.

BREACH OF PRISON.

Common Law.

Breaking prison, or conspiring so to do, seems to have been felony at common law. 2 *Chit. Cr. L.* 150 (*n.*); 1 *Hale*, 607; 2 *Hawk. c.* 18.

Statute.

23 *Edw.* 1, *Stat. de frang. pris.* (1 *Edw.* 2, *st.* 2, *c.* 1, *Ruffhead*)—*Punishment.*]—Concerning prisoners which break prison, our lord the King willeth and commandeth, that none from henceforth that breaketh prison shall have judgment of life or member for breaking of prison only; except the cause for which he was taken and imprisoned did require such judgment, if he had been convict thereupon according to the law and custom of the realm, albeit in times past it hath been used otherwise.

Indictment for breaking Prison. (*Common Law*).

Proceed as in the precedent, ante, p. 1032, *to the words* "until he by due course of law should be discharged," *in the description of the warrant of commitment, and then proceed thus*]: by virtue of which said warrant afterwards, to wit, on the day and year aforesaid, the said J. N. was taken and conveyed to the said prison, and then delivered to one W. S., the keeper of the said prison, and the said W. S., keeper of the said prison then and there received him the said J. N. in his custody in the said prison.* And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. N. afterwards, and whilst he so remained in custody of the said W. S., keeper of the said prison, under and by virtue of the warrant aforesaid, to wit, on the 3rd day of September, in the year

last aforesaid, feloniously [*if he was committed for treason or felony*], unlawfully, wilfully, and wilfully and injuriously did break the said prison, by then cutting and sawing two iron bars of the said prison, and also by then breaking, cutting and removing a great quantity of stone, parcel of the prison aforesaid; by means whereof, he the said J. N. did then escape and go at large whithersoever he would, to the great hindrance and obstruction of justice, in contempt of our lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Felony, if the defendant were in custody for treason or felony (23 *Edw.* 1, *supra*; 2 *Chit. Cr. L.* 158; 1 *Hale*, 612); *penal servitude for not more than seven nor less than three years, or imprisonment not exceeding two years, with or without hard labour.* 7 & 8 *G.* 4, *c.* 28, *s.* 8 (*ante*, p. 234); 20 & 21 *Vict. c.* 3 (*ante*, p. 235); 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

Misdemeanor, if the defendant were in custody for any other offence: fine and imprisonment. 2 *Hawk. c.* 18, *s.* 1; *Steph. Dig. Cr. Law* (6th ed.), 119.

Evidence.

Prove the charge before the magistrate, and the warrant as directed, *ante*, p. 1033. Prove that the defendant was afterwards lodged in the prison mentioned in the indictment, in the custody of the keeper; and prove that, while in custody there under the warrant, he broke the prison and escaped.

The escape must be proved, if the breaking be charged as a felony; 2 *Hawk. c.* 18, *s.* 12; but otherwise, it would seem, if it be a misdemeanor only. And the breaking proved must be an actual breaking; merely getting over the walls, or passing out through a door, or the like, is an escape only, and not a breach of prison; 1 *Hale*, 611; 2 *Chit. Cr. L.* 150 (*n.*); *and see R.* v. *Burridge*, 3 *P. Wms.* 439; and on this account, it would seem that the manner of the breaking should be stated in the indictment, as in the above precedent, in order that the court may see that it was such as is necessary in law to constitute a breach of prison. But the breaking need not be intentional; and therefore where a prisoner, in effecting his escape, by accident threw down some loose bricks at the top of the prison wall, placed there to impede escape and give alarm, it was held to be a prison breach. *R.* v. *Haswell*, *R. & R.* 458.

Every place where a man's person is lawfully imprisoned, whether upon accusation or after conviction, such as the common gaol, the constable's house, the stocks, etc., is a prison within the meaning of the statute; 2 *Hawk. c.* 18, *s.* 4; and as described in the indictment, so it must be proved.

Although it is not material, in this case, whether the defendant was guilty of the offence for which he was imprisoned or not, 2 *Hawk. c.* 18, *s.* 16, yet if he can prove that no such offence was ever actually committed, or that he was arrested and detained without any reasonable cause of suspicion against him, 1 *Hale*, 610, 611, or if he has been subsequently indicted for the offence and acquitted, this will be a sufficient defence to the indictment for breach of prison. The mere dismissal, however, by a justice, on the preliminary examination before him, of the charge on which the defendant was imprisoned, is no defence to an indictment for the breach of prison by the defendant while in custody on the charge which was so afterwards dismissed. *R.* v. *Waters*, 12 *Cox*, 390, *Martin*, B.

SECT. 3.

RESCUE.

Common Law.

Rescue at common law is forcibly freeing a prisoner from his lawful custodian. 1 *Co. Inst.* 160; 1 *Hale*, 606, 611; 2 *Hawk.* c. 21; 2 *Chit. Cr. L.* 182; 1 *Russ. Cr.* (6th ed.) 904; *Steph. Dig. Cr. Law* (6th ed.), 116. If the prisoner is in private custody, the rescuer is not liable criminally unless he knew that the prisoner was in custody on a criminal charge. *Id.* The offence is treason, felony, or misdemeanor, according to the quality of the offence of the person rescued; but if the latter is not convicted of the offence for which he was in custody, the rescue is only a misdemeanor. *Id.* (*See post*, p. 1039.)

Statutes.

25 *G.* 2, c. 37 (*Murder Act*, 1751), *s.* 9—*Rescuing murderers while proceeding to execution.*]— . . . If any person or persons whatsoever shall by force set at liberty, or rescue, or attempt to rescue or set at liberty, any person out of prison, who shall be committed for or found guilty of murder, or rescue, or attempt to rescue any person convicted of murder, going to execution, or during execution, every person so offending shall be deemed, taken, and adjudged to be guilty of felony. . . .

1 & 2 *G.* 4, c. 88 (*Rescue Act*, 1821), *s.* 1.]—"*Whereas divers daring attempts have of late been made to effect the rescue or prevent the detention of persons charged with or committed for or on suspicion of felony; and whereas it might tend more effectually to prevent the commission of such offences, if such further provisions were made for the punishment of persons who may hereafter be convicted thereof, as are hereinafter enacted;*" *be it therefore enacted, that from and after the passing of this Act*, if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, headborough, or other person whomsoever, any person charged with or suspected of or committed for any felony or on suspicion thereof, then, if the person or persons so offending shall be convicted of felony and be entitled to benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the court, by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported beyond the seas for seven years, or be imprisoned only, or be imprisoned and kept to hard labour, in the common gaol, house of correction, or penitentiary house, for any term not less than one and not exceeding three years. [*Preamble rep.*, 53 & 54 *Vict.* c. 51, *Stat. Law Rev. As to present punishment, see note to precedent, post*, p. 1039.]

5 *G.* 4, c. 84, *ss.* 22, 23]—*Rescue of prisoners during conveyance for transportation.*]—*See post*, p. 1040.

7 *W.* 4 & 1 *Vict.* c. 91 (*Punishment of Offences Act*, 1837), *s.* 1—*Punishment for rescuing murderers.*]—*Recites* 25 *G.* 2, c. 37, *s.* 9, *and* enacts, that, "if any person shall after the commencement of this Act (1st Oct. 1837),

be convicted of the offence thereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable to be transported beyond the seas for the term of the natural life of such person. . . ." [*Now penal servitude for life, or such less punishment as is provided by* 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235). *Rest rep.*, 55 & 56 *Vict. c.* 19, *S. L. R.*]

14 & 15 *Vict. c.* 100, *s.* 29—*Imprisonment with hard labour.*]—*Ante*, p. 238.

Indictment for the rescue of a Felon from a Constable. (*Common Law.*)

State the charge before the magistrate, the warrant, the delivery of it to the constable, and J. N.'s being in his custody under it, as in the precedent, ante, p. 1032, *to the words* "together with the warrant aforesaid," *inclusive. Then proceed thus*]—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. N. and J. T. afterwards, and whilst the said J. N. was in the custody of the said J. S., under the said warrant as aforesaid, and whilst the said J. S. was conveying the said J. N., under and by virtue of the said warrant, to the said prison, to wit, on the day and year last aforesaid, in and upon the said J. S., then being a constable as aforesaid, and then lawfully having the said J. N. in his custody, by virtue of the said warrant, for the cause aforesaid, in the due execution of his said office then being, did make an assault, and him the said J. S. did then beat, wound, and ill-treat; and that the said J. T., the said J. N. out of the custody of the said J. S., and against the will of him the said J. S., then unlawfully and forcibly did rescue and put at large, to go whithersoever he would: and that the said J. N. himself out of the custody of the said J. S., and against the will of him the said J. S., then unlawfully and forcibly did rescue and put at large, to go whithersoever he would: to the great hindrance of justice, etc. [*as in last precedent*].

Fine and imprisonment (*with or without hard labour*, 14 & 15 *Vict. c.* 100, *s.* 29, *ante*, p. 238), *as for a misdemeanor, if the party rescued has not been convicted of the offence for which he was in custody*; 2 *Hawk. c.* 21, *s.* 8; *but if he has been convicted, then, if for high treason, the rescue is high treason; if for felony, felony; if for a misdemeanor, a misdemeanor.* 1 *Hale*, 607; 1 *Steph. Dig. Cr. Law* (6th ed.), 117. *If the rescuers be convicted of felony, the court, at its discretion, may adjudge them to be kept to penal servitude for not exceeding seven or less than three years, or to be imprisoned for not exceeding two years, with or without hard labour.* 1 & 2 *G.* 4, *c.* 88, *s.* 1; 20 & 21 *Vict. c.* 3 (*ante*, p. 235); 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235). *See* 7 & 8 *G.* 4, *c.* 28 *s.* 10 (*ante*, pp. 231, 232).

Evidence.

Prove the charge before the magistrate, the warrant, and that J. N. was in the custody of J. S. under the warrant. If the party was convicted, the conviction may be proved by a certificate of the proper officer. 14 & 15 *Vict. c.* 99, *s.* 13 (*ante*, p. 360); 34 & 35 *Vict. c.* 112, *s.* 18 (*ante*, p. 361). And prove that whilst so in custody the defendant forcibly rescued him, as stated in the indictment. A warrant of a justice of the peace to apprehend any person, founded on a certificate of the clerk of the peace, that an indictment for a misdemeanor had been found against such person, is good (*see* 11 & 12 *Vict. c.* 42, *s.* 3), and therefore, if upon

such warrant the person be arrested and afterwards rescued, those who are guilty of the rescue may be convicted of a misdemeanor. *R.* v. *Stokes*, 5 *C. & P.* 148.

As to evidence for the defendant, it may be observed, that any circumstances that will excuse a breach of prison will excuse a rescue. *See ante*, p. 1037. 2 *Hawk. c.* 21, *ss.* 1, 2.

Sect. 4.

Being at Large during a Sentence of Penal Servitude.

Statutes.

5 *G.* 4, *c.* 84 (*Transportation Act*, 1824), *s.* 22—*Punishment—Venue.*]—If any offender who shall have been or shall be so sentenced or ordered to be transported or banished, or who shall have agreed or shall agree to transport or banish himself or herself, on certain conditions, either for life or any number of years, under the provisions of this or any former Act (*e.g.*, 2 *G.* 2, *c.* 25, *s.* 2, *post*, p. 1051), shall be afterwards at large, within any part of his Majesty's dominions without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself [*every such offender so being at large, being thereof lawfully convicted, shall suffer death as in cases of felony, without the benefit of clergy, rep.* 4 & 5 *W.* 4, *c.* 67, *post*, p. 1041], and such offender may be tried either in the county or place where he or she shall be apprehended, or in that from whence he or she was ordered to be transported or banished;

And if any person shall rescue or attempt to rescue, or assist in rescuing or attempting to rescue, any such offender from the custody of such superintendent or overseer, or of any sheriff or gaoler or other person conveying, removing, transporting, or reconveying him or her, or shall convey or cause to be conveyed any disguise, instrument for effecting escape, or arms, to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted;

And whoever shall discover and prosecute to conviction any such offender so being at large within this kingdom, shall be entitled to a reward of twenty pounds for every such offender so convicted. [*See post*, p. 1043. *This enactment is applied to penal servitude by* 20 & 21 *Vict. c.* 3, *s.* 3, *ante*, p. 235.]

Sect. 23—*Indictment.*]—In any indictment against any offender for being found at large contrary to the provisions of this or of any other Act now made or hereafter to be made, and also in any indictment against any person who shall rescue or attempt to rescue, or assist in rescuing any such offender from such custody, or who shall convey or cause to be conveyed any disguise, instrument for effecting escape, or arms, to any such offender, contrary to the provisions of this or any other Act now made or hereafter to be made, whether such offender shall have been tried before any court or judge within or without the United Kingdom, or before any naval or military court-martial, it shall be sufficient to charge and allege the order made for the transportation or banishment of such offender,

without charging or alleging any indictment, trial, conviction, judgment, or sentence, or any pardon or intention of mercy, or signification thereof, of or against, or in any manner relating to such offender.

Sect. 24—*Evidence of conviction.*]—The clerk of the court or other officer having the custody of the records of the court where such sentence or order of transportation or banishment shall have been passed or made, shall, at the request of any person on his Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his or her transportation or banishment (not taking for the same more than six shillings and eightpence), which certificate shall be sufficient evidence of the conviction, or sentence or order for the transportation or banishment of such offender; and every such certificate, if made by the clerk or officer of any court in Great Britain, shall be received in evidence, upon proof of the signature and official character of the person signing the same; and every such certificate, if made by the clerk or officer of any court out of Great Britain, shall be received in evidence, if verified by the seal of the court, or by the signature of the judge, or one of the judges of the court, without further proof. *See* 8 & 9 *Vict. c.* 113, *s.* 1 (*ante*, p. 378); 14 & 15 *Vict. c.* 99, *s.* 13 (*ante*, p. 360); 34 & 35 *Vict. c.* 112, *s.* 18 (*ante*, p. 361).

4 & 5 *W.* 4, *c.* 67 (*Transportation Act*, 1834).]—*Recites* 5 *G.* 4, *c.* 84, *s.* 22, *supra, and* enacts, that any person convicted of any offence above specified in the said *Transportation Act*, 1824, or of aiding or abetting, counselling or procuring the commission thereof, shall be liable to be transported beyond the seas for his or her natural life. [*Now penal servitude for life, or such less punishment as is provided by* 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).]

20 & 21 *Vict. c.* 3 (*Penal Servitude Act*, 1857), *s.* 3—*Provisions of former enactments as to persons unlawfully at large while under sentence of transportation to apply to penal servitude.*]—*Ante*, p. 235.

22 *Vict. c.* 25 (*Convict Prisons Abroad Act*, 1859), *ss.* 2, 14—*Rescue or attempted rescue of persons sent to penal servitude in British possessions abroad.*]—*Not triable in England, see s.* 19.

Indictment. (5 *G.* 4, *c.* 84, *s.* 22, *ante*, p. 1040.)

Middlesex, to wit:—The jurors for our lord the King, upon their oath present, that heretofore, to wit [at the general quarter sessions of the peace, holden at ——, *so continuing the caption of the indictment to the words* "county committed" (*see ante*, p. 93); *then proceed thus*]: it was ordered that J. S. should be kept in penal servitude for the term of seven years (*or as the case may be*), which said order still remains in full force and effect, and not in the least reversed or made void. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, that is to say, after he the said J. S. was so ordered to be kept in penal servitude as aforesaid, and before the expiration of the term of seven years for which he the said J. S. was so ordered to be kept in penal servitude as aforesaid, to wit, on the first day of June, in the year of our Lord ——, feloniously and unlawfully and without any lawful cause or excuse whatsoever was at large within the United Kingdom of

Great Britain and Ireland, to wit, at the parish of B., in the county of M.; against the form [*as ante*, p. 465].

The word "feloniously" is essential (*R.* v. *Horne*, 4 *Cox*, 263). *It is sufficient in the indictment to charge and allege the order made for the sentence of the offender, without charging or alleging any indictment, trial, conviction, judgment, or sentence, or any pardon, or intention of mercy, or signification thereof, of, or against, or in any manner relating to such offender.* 5 *G.* 4, *c.* 84, *s.* 23 (*ante*, p. 1040). *See R.* v. *Fitzpatrick, R. & R.* 512. *The venue may be laid either in the county where the defendant was apprehended, or in the county whence he was ordered to be transported or kept in penal servitude.* 5 *G.* 4, *c.* 84, *s.* 22.

Felony: 5 *G.* 4, *c.* 84, *s.* 22: *penal servitude for life or for not less than three years, or imprisonment, with or without hard labour, not exceeding two years.* 4 *&* 5 *W.* 4, *c.* 67, *supra*; 20 *&* 21 *Vict. c.* 3 (*ante*, p. 235); 54 *&* 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

The *Penal Servitude Act*, 1857 (20 *&* 21 *Vict. c.* 3, *ante*, p. 235), abolished sentences of transportation and substituted penal servitude. Convicts can be sent abroad to serve the sentence (22 *Vict. c.* 25), but there are not at present any regulations for exercising this power. The Act of 1857 (20 *&* 21 *Vict. c.* 3), *s.* 3, provides that all Acts and provisions then (26th June, 1857) applicable to the punishment of offenders under sentence or orders of transportation, if at large without lawful cause before the expiration of their sentence, and all provisions then applicable to and in the case of persons under sentence or order of transportation, are to apply to and in the case of persons under sentence or order of penal servitude, as if they were persons under sentence or order of transportation. It is therefore necessary to retain in this place the provisions of 5 *G.* 4, *c.* 84, *s.* 22, and 4 *&* 5 *W.* 4, *c.* 67. It will also be seen (*ante*, pp. 1031, 1032) that there is no express provision as to escape of penal servitude prisoners from a convict prison in England.

Prove the sentence of transportation or penal servitude by a certificate in writing, which the clerk of the court, or other officer having the custody of the records of the court where such order was made (*see R.* v. *Jones*, 2 *C. & K.* 524: *R.* v. *Parsons*, *L. R.* 1 *C. C. R.* 24; 35 *L. J.* (*M. C.*) 167; 5 *G.* 4, *c.* 22, *s.* 24), must give upon application, and which is made evidence if it purport to be signed by the person having the custody of the records of the courts, without any proof of the signature or official character of such person (8 *&* 9 *Vict. c.* 113, *s.* 1, *ante*, p. 378); or if it be a court out of Great Britain, if verified by the seal of the court, or by the signature of the judge or one of the judges of the court, without further proof. 5 *G.* 4, *c.* 84, *s.* 24; *see also* 14 *&* 15 *Vict. c.* 99, *s.* 13 (*ante*, p. 360); 34 *&* 35 *Vict. c.* 112, *s.* 18 (*ante*, p. 361). The certificate must contain the effect and substance of the indictment and conviction of such offender, and of the sentence of penal servitude. Merely stating that the prisoner was convicted of felony, without stating the nature of the felony, is insufficient. *See R.* v. *Watson*, *R. & R.* 468, decided on 56 *G.* 3, *c.* 27, *s.* 8 (*rep.*), which is in substance the same as 5 *G.* 4, *c.* 84, *s.* 22. Prove also the prisoner's identity.

Prove also that the defendant was at large before the expiration of the term for which he was ordered to be kept in penal servitude. The fact of the sentence being in force when the defendant was found at large is sufficiently proved by the certificate of the conviction and sentence—the

judgment remaining unreversed; although it appear on the face of the certificate that the sentence was one which could not legally have been inflicted on the defendant for the offence of which, according to the certificate, he had been convicted. *R.* v. *Finney*, 2 *C. & K.* 774. For the defence, it may be proved that the prisoner is at large conditionally under a licence of ticket-of-leave or otherwise, and that the conditions have been observed. *See* 27 *&* 28 *Vict. c.* 47, *ss.* 4, 58; 34 *&* 35 *Vict. c.* 112, *ss.* 4, 5; 54 *&* 55 *Vict. c.* 69, *ss.* 2–5; or that he has been pardoned. *R.* v. *Miller*, 2 *W. Bl.* 797; 1 *Leach*, 74. Where the terms of a conditional pardon are not observed the sentence revives. *R.* v. *Madan*, 1 *Leach*, 223: *Aickles' case*, *Id.* 390.

The judge at the trial has power to order the county treasurer to pay the prosecutor the reward under 5 *G.* 4, *c.* 84, *s.* 22. *R.* v. *Emmons*, 2 *M. & Rob.* 279: *R.* v. *Ambury*, 6 *Cox*, 79.

Sect. 5.

PERJURY, SUBORNATION AND ATTEMPTED SUBORNATION OF PERJURY, FABRICATION OF EVIDENCE, AND FALSE OATHS AND DECLARATIONS.

Common Law.

Perjury by a witness has long been treated as an offence at common law (2 *Hale*, 192); but, prior to the Reformation, it seems to have been usually dealt with as an ecclesiastical offence (*see* 13 *Edw.* 1 (*circumspecté agatis*), 2 *Pollock & Maitland, Hist. Eng. Law*, 539, 541). 32 *H.* 8, *c.* 9, *s.* 3, provides for the punishment of persons suborning witnesses to procure perjury by false verdict (3 *Co. Inst.* 184). 5 *Eliz. c.* 9, deals with perjury by suborned or other witnesses in the courts of common law and chancery, and other courts named, and gives jurisdiction to the judges of assize and quarter sessions (*s.* 3). It saves the jurisdiction of spiritual courts and of judges who at its passing had absolute power to punish perjury (*s.* 7). In 1612 it was held that perjury by a witness for the crown was punishable at common law; *re Rowland ap Eliza*, 3 *Co. Inst.* 164; and this view has been since treated as applying to perjury in civil proceedings or trials for misdemeanor before courts of justice. It is extended by 1 *Anne*, *st.* 2, *c.* 9, *s.* 3, to witnesses for the defence in treason and felony.

The legal offence of perjury can only be committed in certain cases of oaths taken under the common law, or on oaths taken under particular statutes in which the offence is provided for. It by no means necessarily follows that perjury must be committed in a false oath taken under a particular statute. Though a high misdemeanor, it would not be perjury unless so made by the statute requiring the oath, and there are many cases of statutes requiring oaths and not creating the offence. *R.* v. *Mudie*, 1 *M. & Rob.* 128, 131, *Tenterden*, L.C.J. It has, therefore, been usual in creating new courts or authorizing new kinds of proceedings, judicial or quasi-judicial, to enact that wilful false evidence on oath shall be punished as perjury. Most of these statutes are collected in the *Official Index to the Statutes* (ed. 1904), *tit.* "*Perjury*," 1, 2, 3, 4, 5, to which reference should be made for special provisions. Those of more general concern are printed *post*, p. 1051, *et seq.* The following pages, subject to the particular terms of these statutes, state the law generally as to perjury.

Formerly when a defendant in a criminal case was not a competent

witness, he could not be indicted for perjury if sworn by mistake. *R.* v. *Clegg*, 19 *L. T.* (*N. S.*) 47, *Hannen*, J. But he can be indicted for perjury when he is a competent witness (*R.* v. *Baker* [1895] 1 *Q. B.* 797), under 61 & 62 *Vict. c.* 36 (*ante*, pp. 392–397), or any other Act. *See R.* v. *Bartley, Staffordshire Assizes, July*, 1899, *Day*, J.: *R.* v. *Wookey*, 63 *J. P.* 409: *R.* v. *Dean*, 17 *N. S. W. Rep.* (*Law*) 357; *and see* 33 *L. J. Newsp.* 392, 603; 34 *L. J. Newsp.* 100.

An oath, or affirmation, to amount to perjury, must be taken (1) in a judicial proceeding, and (2) before a competent jurisdiction; it must also be (3) material to the question depending, and (4) false, and (5) the witness must know it to be false (*R.* v. *Aylett*, 1 *T. R.* 63, 69; 1 *R. R.* 152: *R.* v. *Dunn*, 1 *D. & Ry.* 10; *and see Steph. Dig. Cr. Law* (6th ed.), 106), or not know it to be true. *See post*, p. 1050.

1. *Judicial proceeding.*]—It must be taken *in a judicial proceeding*. As if the defendant swear falsely, when examined as a witness at a trial; 3 *Co. Inst.* 166; or in an affidavit in the courts of King's Bench, Common Pleas, Chancery, etc.; 5 *Mod.* 348; 1 *Show.* 335, 397; 1 *Rolle Rep.* 79, *Coke*, C.J.; or upon a commission for the examination of witnesses; *Cro. Car.* 99; *see* 1 *B. & P.* 210; 42 *G.* 3, *c.* 85, *s.* 5; 1 *W.* 4, *c.* 22, *s.* 7; 22 *Vict. c.* 20, *s.* 2; or in justifying bail in any of the courts; or upon an examination before a magistrate; or in a judicial proceeding in a court baron; 5 *Mod.* 348; 1 *Mod.* 55, *Twisden*, J.; or ecclesiastical court; 5 *Mod.* 348: *R.* v. *Worley*, 3 *Cox*, 535; or before a local marine board; *R.* v. *Tomlinson*, *L. R.* 1 *C. C. R.* 49; 36 *L. J.* (*M. C.*) 41; or before a judge trying an election petition; 31 & 32 *Vict. c.* 125, *s.* 21; or a grand jury; *R.* v. *Hughes*, 1 *C. & K.* 519; 19 & 20 *Vict. c.* 54, *s.* 1; or any other court, whether of record or not, *e.g.*, a naval-court martial; *R.* v. *Heane*, 4 *B. & S.* 947; 33 *L. J.* (*M. C.*) 115; 29 & 30 *Vict. c.* 109, *s.* 67; or before a commissioner for oaths where the false oaths if taken in a judicial proceeding before a competent court would have been perjury. 52 & 53 *Vict. c.* 10 (*Commissioners for Oaths Act*, 1889), *s.* 7 (*post*, p. 1054). *See* 1 *Hawk. c.* 69, *s.* 3. Perjury may be assigned on an oath taken before the commencement of a legal proceeding, but for the purposes of such proceeding; *King* v. *R.*, 14 *Q. B.* 31; 18 *L. J.* (*M. C.*) 253 (*Ex. Ch.*); or an affidavit made for the purposes of a motion in chancery, though the motion is never made. *R.* v. *White*, *M. & M.* 271. In *R.* v. *Foster*, *R. & R.* 459, a false oath taken before a surrogate to procure a marriage licence was held not sufficient to support a prosecution for perjury at common law: *see* 1 *Russ. Cr.* (6th ed.) 295. A surrogate has, under 4 *G.* 4, *c.* 76, *s.* 14, the power and duty to administer an oath before granting a licence. *R.* v. *Fairlie*, 9 *Cox*, 209. In such cases it has been usual to indict as for a mere misdemeanor at common law, and such an indictment is certainly sustainable; *see R.* v. *Chapman*, 1 *Den.* 432; 2 *C. & K.* 846; 18 *L. J.* (*M. C.*) 152; 3 *Cox*, 467: *R.* v. *Hodgkiss*, *L. R.* 1 *C. C. R.* 212; 39 *L. J.* (*M. C.*) 14, *and post*, p. 1071. And if an indictment for such a common law misdemeanor contains the words "and so the defendant did commit wilful and corrupt perjury," this allegation may be rejected as surplusage, and the defendant may nevertheless be convicted of the common law misdemeanor; *R.* v. *Hodgkiss*, *ubi supra*; in which case it was held that making a false affidavit before a commissioner for taking oaths in the Queen's Bench for the purpose of getting a bill of sale filed under the *Bills of Sale Act*, 1854, was a misdemeanor, though not perjury. But now to make such an affidavit is perjury by *s.* 17 of the *Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31). If on a prosecution for taking a false oath before a surrogate to procure a marriage licence, the indictment

only charges the taking the false oath, without stating that it was for the purpose of procuring a licence, or that a licence was thereby procured, the party cannot (at common law) be punished thereon as for a misdemeanor; but if the purpose is to obtain a licence, and the licence is obtained, and the marriage had, the party may be indicted as for a misdemeanor. *R.* v. *Foster, R. & R.* 459, which case was distinguished by *Martin*, B., from *R.* v. *Hodgkiss* (*ubi supra*), in his judgment in the last-named case, on the ground that in *R.* v. *Foster* the indictment did not state facts sufficient to constitute the offence of taking a false oath. *See now* 3 *&* 4 *Vict. c.* 72, *s.* 4, *and* 19 *&* 20 *Vict. c.* 119, *ss.* 2, 18; *and R.* v. *Smith*, 4 *F. & F.* 1099, which subject a false declaration made for the purpose of procuring a marriage to the penalties of perjury. *Cf. s.* 41 of the *Marriage Act*, 1836 (6 *&* 7 *W.* 4, *c.* 86). There is a like provision as to marriages before British officials abroad. 55 *&* 56 *Vict. c.* 23, *s.* 15. Perjury might, it seems, be assigned on the oath against simony taken by clergymen at the time of their institution. *R.* v. *Lewis*, 1 *Str.* 70. By the *Clerical Subscription Act*, 1865 (28 *&* 29 *Vict. c.* 122, *ss.* 2, 5), a declaration is substituted for this oath. By the *Benefices Act*, 1898 (61 *&* 62 *Vict. c.* 48), *s.* 1 (4), the form of declaration is altered, and *knowingly* to make a false statement therein is punishable as perjury.

The judge of the Sheriffs' Court in London (now the City of London Court) had no power to amend a summons issued upon a judgment recovered in a plaint by a single woman, by adding the name of a man whom she had married subsequently to obtaining the judgment, and therefore (before the power of amendment given by *ss.* 87, 185 of the *County Courts Act*, 1888) the person against whom such judgment had been recovered could be convicted of perjury committed by him upon the hearing of such an amended judgment summons, he having been sworn in a cause which had in fact no existence. *R.* v. *Pearce*, 8 *B. & S.* 531; 32 *L. J.* (*M. C.*) 75.

2. *Competent jurisdiction.*]—It must be taken *before a competent jurisdiction.* For, if it appear to have been taken before a person who had no lawful authority to administer it, 3 *Co. Inst.* 165, 166; or who had no jurisdiction of the cause, 3 *Co. Inst.* 166; *Paine's case, Yelv.* 111, the defendant must be acquitted. *See* 1 *Hawk. c.* 69, *ss.* 3, 4; *Bac. Abr. Perjury* (A.): *R.* v. *Crossley*, 7 *T. R.* 315; 4 *R. R.* 445; *Dunn* v. *R.*, 12 *Q. B.* 1026; 18 *L. J.* (*M. C.*) 41: *R.* v. *Dunn*, 1 *D. & R.* 10: *R.* v. *Hanks*, 3 *C. & P.* 419: *R.* v. *Stone, Dears.* 251; 23 *L. J.* (*M. C.*) 14: *R.* v. *Townsend*, 10 *Cox*, 356; 4 *F. & F.* 1089. But it is not necessary in the indictment to show the *nature* of the authority of the party administering the oath. *R.* v. *Callanan*, 6 *B. & C.* 102. Nor is it necessary that the indictment should expressly aver, or show by necessary inference, that the court before which the oath was taken had jurisdiction to try the cause or indictment in the course of the trial of which the oath was taken. *R.* v. *Dunning, L. R.* 1 *C. C. R.* 290; 40 *L. J.* (*M. C.*) 58. Perjury cannot be assigned on a foreign affidavit taken before a person not authorized to administer an oath by English law; *Musgrave* v. *Medex*, 19 *Ves.* 652: *cf. O'Mealy* v. *Newell*, 8 *East*, 364; nor on an affidavit sworn in England before a commissioner of oaths for a foreign proceeding unless it is made under the *Foreign Tribunals Evidence Act* (19 *&* 20 *Vict. c.* 113), or the *Extradition Act*, 1873 (36 *&* 37 *Vict. c.* 60, *s.* 5): *R.* v. *Christian*, 33 *L. J. Newsp.* 587 (*Cent. Crim. Ct.*). As to affidavits sworn abroad, *see* 52 *&* 53 *Vict. c.* 10 (*Commissioners for Oaths Act*, 1889), *ss.* 3, 6 (*post*, p. 1054). As to persons competent to take affidavits under the *Bank Notes Act*, 1823 (9 *G.* 4, *c.* 23, *s.* 7), *see R.* v. *Greenland*,

L. R. 1 *C. C. R.* 65; 10 *Cox*, 377 (*C. C. R.*); 52 & 53 *Vict. c.* 10, *s.* 7 (*post*, p. 1054); 54 & 55 *Vict. c.* 38, *s.* 24. In *R.* v. *Cohen*, 1 *Stark.* (*N. P.*) 511, perjury was assigned on evidence given on a trial after a co-plaintiff had died after issue joined, when no suggestion of the death had been entered on the record. This omission was held to abate the suit and make the trial extra-judicial, and to defeat the charge of perjury.

An affidavit of debt filed in the Court of Bankruptcy, under 1 & 2 *Vict. c.* 100, *s.* 8 (*rep.*), for the purpose of causing a person to be adjudged bankrupt, was held to be properly sworn before a registrar of that court, by virtue of 5 & 6 *Vict. c.* 122, *s.* 67 (*rep.*). *R.* v. *Dunn*, 12 *Q. B.* 1026; 18 *L. J.* (*M. C.*) 41. The prisoner was convicted of perjury alleged to have been committed in an examination by "the court" under *s.* 27 of the *Bankruptcy Act*, 1883. It appeared that he was summoned under *s.* 27 before a county court having jurisdiction in bankruptcy. The oath was administered to the prisoner in court by the registrar, who had power to take the examination and before whom it was intended that it should be taken. The registrar remained in court, but the examination of the prisoner took place in a room used for examinations in the absence of the registrar. It was held that there had been no valid examination by "the court" within *s.* 27, and that the conviction must be quashed. *R.* v. *Lloyd*, 19 *Q. B. D.* 213; 56 *L. J.* (*M. C.*) 119.

An arbitrator under the *County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), has power under 14 & 15 *Vict. c.* 99, *s.* 16 (*post*, p. 1052), to administer an oath. And by 52 & 53 *Vict. c.* 49 (*Arbitration Act*, 1889), *s.* 22 (*post*, p. 1054), any person who wilfully and corruptly gives false evidence before any referee, arbitrator, or umpire, is guilty of perjury as if the evidence had been given in open court, and may be dealt with, prosecuted, and punished accordingly. These statutes overrule the decision in *R.* v. *Hallett*, 2 *Den.* 237; 3 *C. & K.* 30; 20 *L. J.* (*M. C.*) 197, given under 9 & 10 *Vict. c.* 95, *s.* 77 (*rep.*).

In affiliation proceedings.]—Under *s.* 2 of the *Poor Law Act*, 1844 (7 & 8 *Vict. c.* 101), justices of the peace had power to entertain a second application for an order in bastardy, after the first application had been dismissed on the merits: therefore, perjury could be assigned on a false oath taken before them on the hearing of such second application. *R.* v. *Cooke*, 2 *Den.* 462; 21 *L. J.* (*M. C.*) 136. To sustain an indictment for perjury committed on the hearing of an affiliation summons, it must appear that the woman was resident within the petty sessional division in which the summons was heard. *R.* v. *Hughes*, *Dears. & B.* 188; 26 *L. J.* (*M. C.*) 133; 7 *Cox*, 286 (*C. C. R.*). Assuming that such summons, where the application for it is made more than twelve months after the birth, ought to issue only upon evidence given *on oath* of the payment of money by the putative father within twelve months next after the birth, the objection is waived by his appearing on the summons, and submitting to the jurisdiction of the petty sessions; for this is not a proceeding *in pœnam*, but is in the nature of a civil suit. *R.* v. *Berry*, *Bell*, 46; 28 *L. J.* (*M. C.*) 86; 8 *Cox*, 121 (*C. C. R.*); *see R.* v. *Lightfoot*, 6 *E. & B.* 822; 25 *L. J.* (*M. C.*). 115: *R.* v. *Simmons*, *Bell*, 168; 28 *L. J.* (*M. C.*) 183; 8 *Cox*, 190. And although 7 & 8 *Vict. c.* 101, *s.* 2, enacted that where application for an affiliation summons is made before the birth of the child, the woman shall make a deposition (which means evidence taken down in writing) upon oath, yet where such summons is issued without any such deposition having been made by the woman, but upon a mere verbal statement upon oath by her, this irregularity is waived, and the petty sessions have jurisdiction

to hear the complaint if the defendant appears to the summons and makes no objection to its validity or to the jurisdiction of the court, and he may therefore be indicted for perjury committed on the hearing. *R.* v. *Fletcher, L. R.* 1 *C. C R.* 320; 40 *L. J.* (*M. C.*) 123. Upon an indictment for perjury committed at the hearing of an information in bastardy, which indictment alleged the application for a summons, the issuing thereof, and the hearing upon it, proof of the information, of the appearance of the defendant at the hearing, of evidence being given on both sides, and of no objection being made of the want of a summons, is sufficient to show jurisdiction in the justices, without proof of the summons. *R.* v. *Smith, L. R.* 1 *C. C. R.* 110; 37 *L. J.* (*M. C.*) 6. Where the application for an affiliation summons is made within twelve months from the birth, the justices have jurisdiction, although the summons is not actually issued until after the twelve months. *R.* v. *Chugg,* 11 *Cox,* 558 (*C. C. R.*): *Potts* v. *Cumbridge,* 8 *E. & B.* 847; 27 *L. J.* (*M. C.*) 62. Nor will the fact that a summons has been actually issued within the twelve months, but not served, prevent the jurisdiction of the justices attaching on a second summons issued and served after the twelve months, and founded upon the application made within the twelve months. *R.* v. *Chugg, ubi supra.* 7 *&* 8 *Vict. c.* 101, *s.* 2, was repealed by *s.* 2 of the *Bastardy Act,* 1872 (35 *&* 36 *Vict. c.* 65), and re-enacted almost *iisdem verbis* as *s.* 3 of that Act, to which the above decisions seem to apply.

Jurisdiction of justices.]—An indictment for perjury upon the hearing of an information for penalties under 11 *G.* 4 *&* 1 *W.* 4, *c.* 64, *s.* 15 (*rep.*), did not allege that the magistrates were acting for the division in which the house was situated, and upon that ground was held to be bad. *R.* v. *Rawlins,* 8 *C. & P.* 439. The decision in that case was on the ground that such justices alone had jurisdiction under the statute to hear the information, but where the statute creating the offence gave the jurisdiction to justices of the county, it was held sufficient to state that the hearing out of which the charge of perjury arose, took place before justices of the county. *R.* v. *Shaw, L. & C.* 579; 34 *L. J.* (*M. C.*) 169: *see* 35 *&* 36 *Vict. c.* 94, *s.* 18.

Under 7 *&* 8 *G.* 4, *c.* 30, *s.* 24 (*rep.*), which gave a magistrate jurisdiction to convict summarily in cases of malicious injury to property (*see now* 24 *&* 25 *Vict. c.* 97, *s.* 52), it was held that he might adjudicate and convict, although there was not an information *on oath,* notwithstanding *s.* 30. *R.* v. *Millard, Dears.* 166; 22 *L. J.* (*M. C.*) 108 (*C. C. R.*).

If a party is before a magistrate, and he is then charged with the commission of an offence within the jurisdiction of that magistrate, the latter has jurisdiction to proceed to hear the charge without any information or summons having been previously issued (unless the statute creating the offence imposes the necessity of taking some such step, as was the case in *R.* v. *Scotton,* 5 *Q. B.* 493; 13 *L. J.* (*M. C.*) 58), and the witnesses, if they swear falsely, will be liable to an indictment for perjury. *R.* v. *Shaw, L. & C.* 579; 34 *L. J.* (*M. C.*) 169. Therefore, where H., a police constable, procured a warrant to be illegally issued, without any written information or oath, for the arrest of S., on a charge of "assaulting and obstructing him, H., in the discharge of his duty," upon which warrant S. was arrested and brought before justices and charged with assaulting H., and obstructing him, being a police constable in the discharge of his duty, which charge against S. was, without objection by him, tried by the justices, and H. was afterwards indicted for perjury committed on that trial, it was held that H. was rightly convicted, although there was no written information nor oath to justify the issue

of the warrant, and that the justices had jurisdiction to hear the charge, though the warrant upon which S. was brought before them was illegal. *R.* v. *Hughes*, 4 *Q. B. D.* 614; 48 *L. J.* (*M. C.*) 151.

On an indictment for perjury on the hearing of a complaint for trespass in pursuit of game, it appeared that the complaint alleged that the defendant was in the close for the purpose of destroying game, but it did not allege that it was for the purpose of destroying game *there*; the complaint was held to be sufficient in form to give the justices jurisdiction so as to make false evidence on the hearing perjury. *R.* v. *Western*, *L. R.* 1 *C. C. R.* 122; 37 *L. J.* (*M. C.*) 81; 11 *Cox*, 93.

As to perjury before a deputy coroner, *see post*, p. 1068. As to perjury on trial before deputy or under-sheriff, *see R.* v. *Dunn*, 2 *Mood. C. C.* 297; 1 *C. & K.* 730, 732, *n.*

3. *Materiality.*]—That part of the oath upon which the perjury is assigned must be *material* to the matter then under the consideration of the court. 3 *Co. Inst.* 167: *R.* v. *Griepe*, 1 *Ld. Raym.* 256; 2 *Salk.* 513: *R.* v. *Nicholl*, 1 *B. & Ald.* 21; 8 *L. J.* (*O. S.*) *M. C.* 112: *R.* v. *Townsend*, 10 *Cox*, 356; 4 *F. & F.* 1089: *R.* v. *Hadfield*, 16 *Cox*, 148 (*C. C. R.*). For instance, if a witness be asked whether goods were paid for on a particular day, and he answer in the affirmative—if the goods were really paid for, though not on that particular day, it will not be perjury, 2 *Rolle Rep.* 41, 42, unless the day be material. So, if a man swear that J. S. beat another with a sword, and it turn out that he beat him with a stick, this is not perjury; for all that was material was the battery. *Allen* v. *Westley*, *Hetley*, 97. *See* 1 *Hawk. c.* 69, *s.* 8. It has been held that denial of an agreement void under the Statute of Frauds is not material, and that perjury cannot be assigned on it. *R.* v. *Dunston*, *Ry. & M.* 109: *R.* v. *Benesech*, *Peake*, *Add. Cas.* 98; 4 *R. R.* 894: *sed quære.* On an indictment for perjury committed on the hearing of a charge of assault by a husband on his wife, an assignment of perjury on a statement by the defendant, as a witness for the husband, that he had seen the wife committing adultery, of which he had told the husband just before the assault, was held bad for immateriality, as the supposed statement could not be legally relevant to the charge of assault as affording no ground of legal justification, although it might afford some ground for mitigation of punishment. *R.* v. *Tate*, 12 *Cox*, 7, *Cockburn*, C.J. But perjury may be assigned upon a man's testimony as to the credit of a witness. *R.* v. *Griepe*, *ubi supra.* And every question in cross-examination which goes to the witness's credit (as, whether he has before been convicted of felony) is material for this purpose. *R.* v. *Lavey*, 3 *C. & K.* 26: *R.* v. *Overton*, 2 *Mood. C. C.* 263; *C. & Mar.* 655, *Patteson*, J., and *Parke*, B.: *R.* v. *Baker* [1895] 1 *Q. B.* 797; 64 *L. J.* (*M. C.*) 177 (*C. C. R.*). The last of these cases must be treated as disposing of the doubts expressed on this point by *Kelly*, C.B., and *Byles* and *Lush*, JJ., in *R.* v. *Tyson*, *L. R.* 1 *C. C. R.* 107; 37 *L. J.* (*M. C.*) 7; 11 *Cox*, 1; and by *Martin*, B., and *Crompton*, J., in *R.* v. *Gibbon*, *L. & C.* 109; 31 *L. J.* (*M. C.*) 98. In *R.* v. *Baker* (*ubi supra*), the accused had been prosecuted before a magistrate under 35 & 36 *Vict. c.* 94, *s.* 3, for selling beer without a licence. On that charge he was a competent witness under 35 & 36 *Vict. c.* 94, *s.* 51 (4), and gave evidence, in which he denied that he had authorized his solicitor to put in a plea of guilty for him to a previous charge for the same offence. This evidence was held to be material to the question under trial before the magistrate, although the accused had admitted the existence of the previous conviction. In *R.* v. *Overton* (*ubi supra*), the date of a receipt given for the price of a greyhound was held material. *Cf. R.* v. *Altass*, 1 *Cox*, 17. On the hearing of an application

for an affiliation order against H., in respect of a full-grown bastard child born in March, the mother, in answer to questions put to her in cross-examination, denied having had connection with G. in the September previous to the birth. G. was called to contradict her, and he wilfully and falsely swore that he had had connection with her at the time specified. It was held, that although the evidence of G. ought not to have been admitted to contradict the mother on a matter which went only to her credit, still, as it was admitted, it was evidence material to her credit; and, consequently, so far material in the inquiry before the justices as to be capable of being made the subject of an indictment against G. for perjury. *R.* v. *Gibbon, ubi supra.* Upon an indictment for robbery committed on the night of the 13th April, a witness swore, not only (1) that the prisoner was at home on that night, but (2) that the prisoner had lived in the same house for two years previous, and (3) that during the whole of that time he had not been absent from home for more than three nights. The last two statements were proved to be false, and it was held that they were material, and the proper subjects of assignments of perjury, inasmuch as they tended to render more probable the statement that the prisoner was at home on the night of the 13th April. *R.* v. *Tyson, ubi supra.* Evidence of the payment of money by the putative father of a bastard child, within twelve months before the issuing of an affiliation summons against him, is material on the hearing of such summons. *R.* v. *Berry, Bell,* 46; 28 *L. J.* (*M. C.*) 86; 8 *Cox,* 121. Where a prisoner charged with robbery before a magistrate, having cross-examined the prosecutor whether he had not, the day before that of the alleged robbery, met him (the prisoner) in company with M., and proposed to him to commit a burglary, and the prosecutor having denied this, the prisoner called M. to prove it, it was held that M.'s evidence was not material to the issue, so that it could be made the subject of an indictment for perjury. *R.* v. *Murray,* 1 *F. & F.* 80; *cf. R.* v. *Holden,* 12 *Cox,* 166. On the trial of A. for perjury, in an affidavit made by him, and used on the taxation of costs, the signature to the affidavit was proved to be in A.'s handwriting, but the commissioner who had administered the oath was unable to identify A. as the person who made the affidavit. B. was thereupon called as a witness, and swore that the affidavit was used before the taxing-master, when A. was present, and that it was then publicly said that it was A.'s affidavit. B. was afterwards indicted for perjury on A.'s trial, and it was held that the above evidence given by him on that trial was material as corroborative evidence of the affidavit having been made by A. *R.* v. *Alsop,* 11 *Cox,* 264; 17 *W. R.* 621 (*C. C. R.*). On the trial of an action of trover, the plaintiff's case was that the defendant had tricked him out of the goods, the subject of the action, while the plaintiff was drunk. The defendant's case was that he had fairly bought the goods from the plaintiff, who had sent for the goods from a railway station where they were lying, had signed a delivery note for them, and had then sold them to the defendant. The defendant, who was called as a witness in support of his own case, swore that the plaintiff's name on the delivery note was plaintiff's writing, and that he saw him write it. It was held that this was evidence material to the issue, upon which perjury might be assigned, the question in the action being whether the plaintiff had been imposed on by a fraud while drunk, and that it therefore became essential to ascertain whether the handwriting on the delivery note was his, as a step in ascertaining whether or not he was drunk at the time of the transaction. *R.* v. *Naylor,* 11 *Cox,* 13 (*C. C. R.*); 16 *W. R.* 374.

On the trial of a plaint in the county court, the judge having decided that a debt was due from the defendant, while considering how it was

to be paid, asked defendant what was his christian name. Defendant wilfully and falsely swore that his name was "Edward," and not "Bernard," he being called in the summons "Bernard Edward Mullany," and the judge thereupon struck out the cause. It was held that the answer was relevant to the inquiry, and that defendant was liable to be indicted for perjury. *R.* v. *Mullany*, *L. & C.* 593; 34 *L. J.* (*M. C.*) 111.

Where an action and all matters in difference are referred to arbitration, and perjury is assigned on evidence given before the arbitrator, the indictment ought to state, and the evidence must show, whether the evidence alleged to be false was material in respect to the matters in issue in the action, or to the other matters in difference. *R.* v. *Ball*, 6 *Cox*, 360: *cf. R.* v. *Newman*, 2 *Den.* 390; 21 *L. J.* (*M. C.*) 75.

It is perjury to give false evidence, whereby the judge is induced to admit other material evidence—even though the latter evidence is afterwards withdrawn by counsel, or was not legally receivable. *R.* v. *Phillpotts*, 2 *Den.* 302; 3 *C. & K.* 135; 21 *L. J.* (*M. C.*) 18. *See R.* v. *Pepys*, *Peake* (3rd ed.), 187: *R.* v. *Benesech*, *Peake*, *Add. Cas.* 93; 4 *R. R.* 894: *R.* v. *Dunston*, *Ry. & M.* 109: *R.* v. *Meek*, 9 *C. & P.* 513: *R.* v. *Yates*, *C. & Mar.* 132: *Ryalls* v. *R.*, 11 *Q. B.* 781; 17 *L. J.* (*M. C.*) 92.

It is still a moot point whether, on an indictment for perjury, the materiality of the matter in which the false swearing is proved is a question of fact for the jury, or a question of law for the judge; but according to the better opinion it ought to be regarded in the latter light. 1 *Tayl. Ev.* (9th ed.) 45; 1 *Russ. Cr.* (6th ed.) 319: *R.* v. *Courtney*, 5 *Ir. C. L. Rep.* 434; 7 *Cox*, 111: *R.* v. *Dunston*, *Ry. & M.* 109: *R.* v. *Worley*, 3 *Cox*, 535: *R.* v. *Southwood*, 1 *F. & F.* 356: *contra*, *R.* v. *Lavey*, 3 *C. & K.* 26 (doubted on this point in *R.* v. *Gibbon*, *L. & C.* 109, *Channell*, B.): and *R.* v. *Goddard*, 2 *F. & F.* 361.

Although it has long been regarded as law that that part of the oath upon which the perjury is assigned must be *material* to the matter then under the consideration of the court, *Erle*, C.J., in pronouncing judgment in *R.* v. *Mullany*, *L. & C.* 593; 34 *L. J.* (*M. C.*) 111, said:—"Whenever the question arises whether a person may not be guilty of perjury, who, with intent to mislead the court, wilfully swears falsely on a matter which, in the opinion of the judges, is of doubtful admissibility, *or immaterial to the inquiry*, it will be one well worthy the careful consideration of all the judges." *See R.* v. *Baker* [1895] 1 *Q. B.* 797; 64 *L. J.* (*M. C.*) 177 (*C. C. R.*).

4. *Falsity.*]—The matter sworn must be either false in fact, or if true, the defendant must not have known it to be so. 1 *Hawk. c.* 69, *s.* 6; 3 *Co. Inst.* 166: *R.* v. *Ockley*, *Palmer*, 294. Where a man swears to a particular fact, without knowing at the time whether the fact be true or false, it is as much perjury as if he knew the fact to be false, and equally indictable. *R.* v. *Mawbey*, 6 *T. R.* 619, *per Lawrence*, J., at p. 637. If a man swear that J. N. revoked his will in his presence—if he really had revoked it, but it were unknown to the witness that he had done so, it is perjury. *Allen* v. *Westley*, *Hetley*, 97. And a man may be indicted for perjury in swearing that he *believes* a fact to be true which he must know to be false. *R.* v. *Pedley*, 1 *Leach*, 325, *per Lord Mansfield*: *R.* v. *Schlesinger*, 10 *Q. B.* 670; 17 *L. J.* (*M. C.*) 29. *Sed contra*, *see* 1 *Hawk*, *c.* 69, *s.* 7; 3 *Co. Inst.* 166; 1 *Russ. Cr.* (6th ed.) 294, and authorities and precedents there mentioned. But it would seem that perjury cannot be assigned on evidence stating the opinion of the witness as to the construction of a deed. *R.* v. *Crespigny*, 1 *Esp.* 280, *Kenyon*, L.C.J.

5. *Knowledge of falsity.*]—The false oath must be taken deliberately and

intentionally; for if taken from inadvertence or mistake, it cannot amount to wilful and corrupt perjury. 1 *Hawk. c.* 69, *s.* 2; *and see R.* v. *Mawbey, ubi supra and post*, p. 1071. Therefore where perjury is assigned on an answer in equity, or an affidavit, etc., the part on which the perjury is assigned may be explained by another part, or even by a subsequent answer, etc. 1 *Sid.* 419; *Com. Dig., Just. of Peace* (B.), 102. On the trial of a cause a witness was asked three or four times by the advocate and judge whether at any time he had any coals on credit from P., to which the witness always answered "I did not." It was held that the witness's attention had been sufficiently called to the subject to found a charge of perjury against him upon the answer, although no distinct transactions on credit were suggested to him during his examination. *R.* v. *London*, 12 *Cox*, 50 (*C. C. R.*): *cf. R.* v. *Stolady*, 1 *F. & F.* 518.

Statutes.

32 *H.* 8, *c.* 9, *s.* 3; 5 *Eliz. c.* 9—*Punishment of perjury and subornation: unrepealed, but never used.*]—*See ante*, p. 1043.

1 *Anne, st.* 2, *c.* 9, *s.* 3.]—*Liability for perjury of witnesses for defence in treason and felony.*

12 *G.* 1, *c.* 29, *s.* 4.]—*Summary punishment of solicitors practising after conviction for perjury or subornation of perjury.*

2 *G.* 2, *c.* 25, *s.* 2—*Punishment.*]—And the more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, be it further enacted by the authority aforesaid, that besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to *some house of correction within the same county*, for a time not exceeding seven years, there to be kept to hard labour during all the said time, or otherwise to be *transported to some of his Majesty's plantations beyond the seas* for a term not exceeding seven years (*now penal servitude*, 20 *&* 21 *Vict. c.* 3 (*ante*, p. 235); 54 *&* 55 *Vict. c.* 69, *s.* 1, *ante*, p. 235), as the court shall think most proper, and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly, over and besides such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being; and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person, so committed or *transported* shall voluntarily escape or break prison, *or return from transportation*, before the expiration of the *time for which he shall be ordered to be transported* as aforesaid, such person, being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy (*see now* 4 *&* 5 *W. & M.* 4, *c.* 67, *ante*, p. 1041), and shall be tried for such felony in the county where he so escaped, or where he shall be apprehended. [*This Act applies to false oaths taken in a manner authorized by subsequent statutes. R.* v. *Castro*, 5 *Q. B. D.* 490; 49 *L. J.* (*Q. B.*) 747: *Castro* v. *R.*, 6 *App. Cas.* 229; 50 *L. J.* (*Q. B.*) 497 (*post*, p. 1059). *As to punishment for escape, etc., see ante*, p. 1028, *et seq.*]

8 *G.* 4, *c.* 114, *s.* 1—*Imprisonment with hard labour for wilful and corrupt perjury or subornation of perjury.*]—*Ante*, p. 237.

1 & 2 *Vict. c.* 105 (*Oaths Act*, 1838)—*Form of oath.*]—In all cases in which an oath may lawfully be and shall have been administered to any person, either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person in case of wilful false swearing may be convicted of the crime of perjury in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted. [*See ante*, p. 406. *"Oath" in this Act does not include affirmation or declaration in lieu of an oath.*]

5 & 6 *Vict. c.* 38—*Quarter sessions no jurisdiction over perjury.*]—*Ante*, p. 126.

11 & 12 *Vict. c.* 46, *s.* 4; 12 & 13 *Vict. c.* 45, *s.* 10; 14 & 15 *Vict. c.* 100, *s.* 1—*Amendment of variances not to affect liability of witnesses for perjury.*]—*Ante*, pp. 51–53.

14 & 15 *Vict. c.* 99 (*Evidence Act*, 1851), *s.* 16—*Power to administer oaths.*]—Every court, judge, justice, officer, commissioner, arbitrator (*see post*, p. 1054), or other person, nor or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively. [*It appears not to be determined whether all the above proceedings would be regarded as judicial, but even when they are not, it is submitted that false swearing would be a misdemeanor* (*post*, p. 1071). *The section does not apply to commissioners of oaths, and the like.*]

14 & 15 *Vict. c.* 100 (*Criminal Procedure Act*, 1851), *s.* 19—*Prosecution by direction of judge.*]—[*Recital of* 23 *G.* 2, *c.* 11 (*rep.*), *and Irish Act*, 31 *G.* 3, *c.* 18.] It shall and may be lawful for the judges or judge of any of the superior courts of common law or equity, or for any of her Majesty's justices or commissioners of assize, *Nisi Prius*, oyer and terminer, or gaol delivery, or for any justices of the peace, recorder or deputy recorder, chairman, or other judge, holding any general or quarter sessions of the peace, or for any commissioner of bankruptcy or insolvency, or for any judge or deputy judge of any county court or any court of record, or for any justices of the peace in special or petty sessions, or for any sheriff or his lawful deputy before whom any writ of inquiry or writ of trial from any of the superior courts shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other proceeding made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted until the next session of oyer and terminer or gaol delivery for the county or other district within which such perjury was committed, unless such person shall enter into a recognizance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next session of oyer and terminer or gaol delivery, and that he will then surrender and take his trial, and not depart the court without leave, and

to require any person he or they may think fit to enter into a recognizance, conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid, and to give to the party so bound to prosecute a certificate of the same being directed, which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production thereof the costs of such prosecution shall and are hereby required to be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last-mentioned court shall specially otherwise direct (*ante*, p. 246, *et seq.*); and when allowed by any such court in Ireland, such sum as shall be so allowed shall be ordered by the said court to be paid to the prosecutor by the treasurer of the county in which such offence shall be alleged to have been committed, and the same shall be presented for, raised, and levied in the same manner as the expenses of prosecutions for felonies are now presented for, raised, and levied in Ireland; provided always that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid.

Sect. 20—*Form of indictment for perjury.*]—In every indictment for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing was taken, made, signed, or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding either in law or in equity, and without setting forth the commission or authority of the court or person before whom such offence was committed.

Sect. 21—*Form of indictment for subornation of perjury.*]—*Post*, p. 1068.

Sect. 22—*Certificate of trial of indictment on which perjury was committed.*]—A certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer (for which certificate a fee of six shillings and eightpence and no more shall be demanded or taken), shall, upon the trial of any indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same. [*See also* 14 & 15 *Vict. c.* 99, *s.* 13 (*ante*, p. 360). *This section seems to dispense with need of a formal record, which used to be required. See Porter* v. *Cooper*, 6 *C. & P.* 354. *As a general rule it is now necessary to have either a certificate under this section or the record*; *R.* v. *Coles*, 16 *Cox*, 165; *but production of caption and indictment, with indorsement of plea, verdict and sentence, and minutes of the trial by the proper officer, have been held sufficient. R.* v. *Newman*, 2 *Den.* 390; 3 *C. & K.* 240; 21 *L. J.* (*M. C.*) 75.]

51 & 52 *Vict. c.* 46 (*Oaths Act*, 1888), *s.* 1—*Substitution of affirmation for oath in certain cases* (*ante*, p. 407, *et seq.*)]—Every person upon objecting to be sworn, and stating, as the ground of such objection, either

that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath; and if any person making such affirmation shall wilfully, falsely, and corruptly affirm any matter or thing which, if deposed on oath, would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury. [*As to perjury on affirmation by persons who are or have been Quakers or Moravians, see* 3 & 4 *W.* 4, *c.* 49, *s.* 1; 1 & 2 *Vict. c.* 77, *s.* 1, *ante*, p. 407.]

52 & 53 *Vict. c.* 10 (*Commissioners for Oaths Act*, 1889), *s.* 7—*Perjury on affidavits.*]—Whoever wilfully and corruptly swears falsely in any oath or affidavit (*see infra*, *s.* 11) taken or made in accordance with the provisions of this Act, shall be guilty of perjury in every case where if he had so sworn in a judicial proceeding before a court of competent jurisdiction, he would have been guilty of perjury. [*For indictment, see post*, p. 1063.]

Sect. 9—*Venue.*]—Any offence under this Act, whether committed within or without her Majesty's dominions, may be inquired of, dealt with, tried, and punished in any county or place in the United Kingdom in which the person charged with the offence was apprehended or is in custody, and for all purposes incidental to or consequential on the trial or punishment the offence shall be deemed to have been committed in that county or place (*see ante*, p. 47).

Sect. 11—*Definitions.*]—In this Act, unless the context otherwise requires, "*oath*" includes affirmation and declaration; "*affidavit*" includes affirmation, statutory or other declaration, acknowledgment, examination, and attestation or protestation of honour; "*swear*" includes affirm, declare, and protest.

The above Act applies to commissioners for oaths, etc., for courts and matters in England (*s.* 1), *including affidavits for use in county courts* (51 & 52 *Vict. c.* 43, *s.* 83; 53 & 54 *Vict. c.* 7, *s.* 1), *and in case of oaths or affidavits abroad for the purpose of any cause or matter in England, or the registration of an instrument in England, to such oaths, etc., if taken before any person having authority to administer an oath in the place where it is taken* (52 & 53 *Vict. c.* 10, *s.* 3), *including British diplomatic and consular officers exercising functions there* (*s.* 6).

52 & 53 *Vict. c.* 49 (*Arbitration Act*, 1889), *s.* 22.]—Any person who wilfully and corruptly gives false evidence before any referee, arbitrator, or umpire shall be guilty of perjury, as if the evidence had been given in open court, and may be dealt with, prosecuted, and punished accordingly.

48 & 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 4—*Punishment of false evidence by child of tender years.*]—*Ante*, p. 913.

4 *Edw.* 7, *c.* 15 (*Prevention of Cruelty to Children Act*, 1904), *s.* 15—*Summary punishment of children of tender years giving false evidence.*]—*Ante*, p. 884.

General Observations as to Indictments for Perjury.

The indictment must charge that the oath or affirmation was taken (1) *in a judicial proceeding* (*ante*, p. 1044); (2) *before a competent jurisdiction* (*ante*, pp. 1045–1048); (3) *as to some thing material to the questions at issue before the tribunal* (*ante*, p. 1048); and was (4) *false* (*ante*, p. 1050); (5) *to the knowledge of the defendant* (*ante*, p. 1050).

It is usual and generally prudent to state in the introductory part of the indictment circumstances which show that the oath was taken in a judicial proceeding, before a competent jurisdiction, and was material to the matter then before the court. The oath is then set out; and the perjury is then assigned upon it—that is, some one or more of the affirmative assertions in it are negatived, or the negative assertions contradicted by the opposite affirmative. Where an indictment stated that certain persons were commissioners acting in the execution of certain Acts of Parliament relating to the duties of assessed taxes; and that at a meeting held by them for the purpose of hearing and determining appeals against the certificate of supplementary charges made by J. L., crown surveyor, in pursuance of the said Acts, a certain appeal of one W. H. came on in due form of law to be heard; and that the defendant appeared before the said commissioners as a witness for W. H. on the hearing of the said appeal, and took his corporal oath, etc., it was held bad, as not sufficiently showing that the oath was taken in a judicial proceeding. *R.* v. *Overton*, 4 *Q. B.* 83; 3 *G. & D.* 133; 12 *L. J.* (*M. C.*) 61. *See also R.* v. *Bartlett*, 1 *Dowl. & L.* 95; 12 *L. J.* (*M. C.*) 127.

The precision formerly required in describing the offence of perjury is now unnecessary, since 14 *&* 15 *Vict. c.* 100, *s.* 20 (*ante*, p. 1053). It is not necessary that the indictment should expressly aver, or even show by necessary inference, that the court before which the false oath was taken had competent authority to administer the same, or that it had jurisdiction to try the cause or indictment in the course of the trial of which the oath was taken. *R.* v. *Dunning*, *L. R.* 1 *C. C. R.* 290, 293, 294; 40 *L. J.* (*M. C.*) 58, 60, 61. In that case an indictment was held to be good which stated the perjury to have been committed on the trial of "a certain indictment for misdemeanor" at quarter sessions, although it did not aver that the sessions had competent authority to administer the oath, nor state what the misdemeanor was, nor that the sessions had jurisdiction to try it. *Id.* In an indictment for perjury on the trial of a cause under a writ of trial directed to the sheriffs of London, the oath is properly alleged to have been taken before the sheriffs, though in fact the trial was had before the secondary. *R.* v. *Schlesinger*, 10 *Q. B.* 670; 17 *L. J.* (*M. C.*) 29.

It is essential to state that the defendant was sworn as a witness, but it is not necessary to set out the mode in which he was sworn. *R.* v. *McCarther*, *Peake* (3rd ed.), 211.

It is not necessary to aver expressly the materiality of the evidence if it sufficiently appears from the oath itself, or is clearly disclosed by the facts averred. *R.* v. *Souter*, 2 *Stark.* (*N. P.*) 424, *n.* If it does not so appear, the materiality of that part of the oath in which perjury is assigned should be averred. *R.* v. *McKeron*, 5 *T. R.* 316, *cit.*: *R.* v. *Nicholl*, 1 *B. & Ad.* 21; 8 *L. J.* (*O. S.*) *K. B.* 112: *R.* v. *Dunn*, 1 *D. & R.* 8. For instance, if the perjury were committed upon the trial of a cause, it should be averred that it then and there became a material question whether J. N. was at B. on such a day, and then it may be stated that J. S. swore at the trial that J. N. was not at B. on that day, and, lastly, proceed to assign the perjury. This mode of pleading will at once show

the materiality of the evidence; and it is deemed sufficient, without setting out so much of the proceedings of the former trial as might otherwise be necessary to show that it was material. *R.* v. *Dowlin*, 5 *T. R.* 311, 318; 3 *R. R.* 679. As to what is a sufficient averment, *see Ryalls* v. *R.*, 11 *Q. B.* 781; 18 *L. J.* (*M. C.*) 69; 3 *Cox*, 254: *R.* v. *Scott*, 2 *Q. B. D.* 415; 46 *L. J.* (*M. C.*) 259: *R.* v. *Gardiner*, 8 *C. & P.* 737; 2 *Mood. C. C.* 95. If the averment is insufficient, the indictment cannot, it would seem, be amended under 14 & 15 *Vict. c.* 100, *s.* 25 (*ante*, pp. 55, 165): *R.* v. *Harvey*, 8 *Cox*, 99: *and cf. R.* v. *Cutts*, 4 *Cox*, 435. If there is more than one material question, it is better to aver each separately, and assign perjury separately. *R.* v. *Burraston*, 4 *Jur.* 697: *and see R.* v. *Hadfield*, 16 *Cox*, 148 (*C. C. R.*).

An averment that "it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to by the said J. S. on his oath," is not a good averment of materiality. *R.* v. *Goodfellow*, *C. & Mar.* 569. Where the indictment stated, that A. B. stood charged before a justice with having committed a trespass by entering in the daytime on certain land in pursuit of game, on the 12th of August, 1843, that the justice proceeded to the hearing of the charge, and that upon the hearing of the charge the defendant swore falsely that he did not see A. B. during the whole of the said 12th day of August; and that, *at the time he the defendant swore as aforesaid*, it was material and necessary for the justice to inquire of and be informed by the defendant, whether he did see the said A. B. at all during the 12th day of August, this averment was held insufficient, because, consistently with it, it might have been material for the justice to have put this question, and received the answer to it in some other matter, and not in the matter then in issue before him. *R.* v. *Bartholomew*, 1 *C. & K.* 366, *Alderson*, B.

The oath is next set out, together with such innuendoes as may be necessary to render the matter of it intelligible, and to connect it clearly with the assignments of perjury contained in the subsequent part of the indictment. As to the use and necessity of an innuendo generally, *see ante*, p. 991; *and see R.* v. *Aylett*, 1 *T. R.* 63, 70: *R.* v. *Virrier*, 4 *P. & D.* 161; 12 *A. & E.*, 317; 9 *L. J.* (*M. C.*) 120: *R.* v. *Nicholl*, 1 *B. & Ad.* 21; 8 *L. J.* (*O. S.*) *M. C.* 112. The time and place where the oath is made should be averred, and also any dates to which the oath relates. *R.* v. *Aylett*, 1 *T. R.* 63; 1 *R. R.* 152: *R.* v. *Whitehouse*, 3 *Cox*, 86: *R.* v. *Burraston*, 4 *Jur.* 697: *R.* v. *Webster*, *Bell*, 154; 28 *L. J.* (*M. C.*) 200; 8 *Cox*, 187: *R.* v. *Stolady*, 1 *F. & F.* 518. Where the indictment charged that the defendant swore "that he had never received any coals on credit from P. either on account of himself or A.," it was objected that this allegation was not sufficiently precise, and that the whole of the defendant's evidence ought to have been set out in the indictment; but the court held the indictment sufficient. *R.* v. *London*, 12 *Cox*, 50 (*C. C. R.*).

Next, as to the assignments of perjury. They must be by special averment, negativing the oath, or some part or parts of it. Merely saying that the defendant falsely swore so and so, would be bad, and even perhaps ground of error. *See R.* v. *Perrott*, 2 *M. & Sel.* 379; 15 *R. R.* 380. Where a man swore to a fact before a committee of the House of Commons, and afterwards swore directly the contrary before a committee of the House of Lords: an information setting out the substance of his evidence upon both occasions, and concluding "and so, etc., the said —— did commit wilful and corrupt perjury"—was held bad; because it did not appear from it which oath was false, which true. *R.* v. *Harris*, 1 *D. & R.* 578; 5 *B. & Ald.* 926; *see R.* v. *Wheatland*, 8 *C. & P.* 238. To justify

punishment under 2 *G. c.* 25, *s.* 2 (*ante*, p. 1051), or 5 *Eliz. c.* 9 (*ante*, p. 1043), the indictment must allege that the defendant swore wilfully *and* corruptly; *R.* v. *Cox*, 1 *Leach*, 71: *R.* v. *Stevens*, 5 *B. & C.* 246, *S. C. sub nom. R.* v. *Richards*, 7 *D. & R.* 665; 4 *L. J.* (*O. S.*) *K. B.* 346; and also that he swore falsely. On an indictment at common law "wilfully" is not essential; *R.* v. *Cox*, *supra*; and where the word "feloniously" was inserted instead of "falsely," the indictment (though it alleged that the defendant swore wilfully, corruptly, and maliciously) was held bad in substance, and not amendable. *R.* v. *Oxley* [1852] 3 *C. & K.* 317. In *R.* v. *Tremearne, or Tremaine*, 5 *B. & C.* 761; 7 *D. & R.* 684, a true bill for perjury was found, and the judge at the assizes having refused to try it on account of manifest imperfections in the record, a new bill was preferred, upon which the defendant was found guilty. A new trial being subsequently granted, the prosecutor, instead of taking down the old record again, preferred a new indictment (for the same offence), and removed it into the Court of King's Bench by *certiorari*: and the court refused to stay proceedings upon that indictment until the prosecutor paid the costs of the former proceedings.

It is the practice of the Central Criminal Court not to try an indictment for perjury arising out of a civil action until that action is determined, unless the civil action be postponed by the court, that the indictment may be tried first. *R.* v. *Ashburn*, 8 *C. & P.* 50: *Peddell* v. *Rutter*, 8 *C. & P.* 337, 340. And where justices refused to hear a charge of perjury, alleged to have been committed in a suit pending at the time when the charge was made, on the ground that the suit was still pending, the Court of Queen's Bench refused to grant a mandamus to them to hear the charge, and expressed an opinion that the course taken by the justices was the most likely one to answer the ends of justice. *R.* v. *Ingham*, 14 *Q. B.* 396; 19 *L. J.* (*M. C.*) 69.

Indictment for Perjury in an Action in the High Court. (*Common Law.*)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that heretofore and before the commission of the offence by A. B. hereinafter (*if more than one count for perjury on different dates*, "in this count") charged and stated, the said A. B. commenced a certain action in the [Chancery Division] of the High Court of Justice against one C. D. (*for specific performance of an alleged agreement for the sale by C. D. to him, the said A. B., of certain freehold hereditaments situate at* ——), and the jurors aforesaid upon their oath aforesaid do further present, that afterwards, to wit, at the sittings of the said Chancery Division of the said High Court of Justice, at the Royal Courts of Justice, in the county of London, on the —— day of ——, A.D. ——, the said action came on to be tried, and was tried in due form of law by and before the Honourable Sir A. K., knight, one of the justices of the said High Court of Justice, sitting for the trial of actions in the said (Chancery Division) without a jury (*if with a jury*, "and a jury of the county in that behalf duly sworn and taken between the parties aforesaid"). And the jurors aforesaid upon their oath aforesaid do further present, that at and upon the trial of the said action the said A. B. appeared as a witness for and on behalf of himself, the plaintiff in the said action, and was sworn in due course of law [and did then take his corporal oath upon the Holy Gospel of God] before the said the Honourable Sir A. K., knight, so sitting as aforesaid, and then having competent

power and authority to administer the said oath to the said A. B. in that behalf, that the evidence he should give to the court there (and to the jury) touching the matters in dispute between the parties should be the truth, the whole truth, and nothing but the truth. And the jurors (*insert here the word "first" if the action is tried with a jury*) aforesaid upon their oath aforesaid do further present, that at and upon the trial of the said action, and at the time when the said A. B. deposed, swore, and gave evidence as hereinafter mentioned, it became and was a material question whether [*the said C. D. had ever signed an agreement for the sale to the said C. D. of a certain farm known as* ——], and whether, etc. And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., being so sworn as aforesaid, contriving and intending to prevent the due course of law and justice upon the trial of the said action by and before the said Honourable Sir A. K., knight, so sitting as aforesaid (and the said jury, *if any*), upon the —— day of ——, A.D. ——, in the parish of St. Clement Danes, in the said county of London, and within the jurisdiction of the said Central Criminal Court, unlawfully, falsely, knowingly, wilfully, corruptly, and maliciously did say, depose, swear, and give evidence, amongst other things, in substance and to the effect following, that is to say, that [*the said C. D. had theretofore signed an agreement for the sale to him, the said A. B., of a certain farm known as* ——], and that ——. Whereas in truth and in fact [*the said C. D. had not theretofore signed an agreement for the sale to him, the said A. B., of a certain farm known as* ——: *here state the truth as alleged to have been known to the defendant, as in the precedents of indictments for false pretences* (*ante*, p. 595),] as he, the said A. B., well knew at the time when he so deposed, swore, and gave evidence as aforesaid. *And so the jurors aforesaid upon their oath aforesaid do say, that the said A. B., upon the trial of the said action so had as aforesaid, of his own act and consent, and of his own most wicked and corrupt mind, in manner and form as aforesaid, unlawfully [falsely, wickedly, wilfully, and corruptly] did commit wilful and corrupt perjury*; against the peace of our said lord the King, his crown and dignity.

Indictments for perjury on trials in other divisions of the High Court can be framed from the above precedent, with the necessary alterations in the case of common law, admiralty or probate actions, and in the case of matrimonial causes, or proceedings in bankruptcy or the winding-up of companies, by substituting the appropriate description of the particular proceeding. As to bankruptcy proceedings under former statutes, see R. v. Westley, Bell, 193; 29 *L. J.* (*M. C.*) 35. *For old precedent of indictment for perjury before arbitrators, see* 4 *Went.* 256; *before a deputy sheriff, see R. v. Dunn*, 1 *C. & K.* 732, *n.*; 2 *Mood. C. C.* 297; *Cro. Circ. Comp.* 361. *Two or more persons cannot be jointly indicted for perjury. R. v. Philips*, 2 *Str.* 921. *As to the use of the words* "wilfully, corruptly," *etc., see ante*, p. 1057. *The allegation* between the * *, "and so the jurors aforesaid," *etc., has generally been used as a mode of directly alleging the offence, instead of leaving it to be inferred from the previous part of the indictment. Stiles v. Nokes*, 7 *East*, 493, 505, *Le Blanc*, J. *But it is surplusage* (*ante*, pp. 72, 304), *and may be rejected. Ryalls v. R.*, 11 *Q. B.* 781; 17 *L. J.* (*M. C.*) 92. *As to perjury in affidavits and declarations, see post*, pp. 1063, 1072.

The words "corporal oath," *etc., are in old precedents, and referred to the actual touching of the Gospels by the witness.*

Punishment.]—*Perjury at common law is punishable with fine and imprisonment with hard labour*, 3 *G.* 4, *c.* 114 (*ante*, p. 237), *at the discretion of the court; and by* 2 *G.* 2, *c.* 25, *s.* 2 (*ante*, p. 1051), *the judge might order*

the party to be transported, or to be imprisoned and kept to hard labour in the house of correction, for any term not exceeding seven years. And by 20 & 21 *Vict. c.* 3 (*ante*, p. 235), *and* 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235), *a sentence of penal servitude for any term not exceeding seven years nor less than three is substituted for the sentence of transportation, with the alternative of imprisonment for not exceeding two years, with or without hard labour. Where an offender is sentenced under* 2 *G.* 2, *c.* 25, *s.* 2, *to penal servitude, it is not necessary that he should also be sentenced to fine or imprisonment. R. v. Castro,* 5 *Q. B. D.* 490; 49 *L. J.* (*Q. B.*) 747: *Castro* v. *R.*, 6 *App. Cas.* 229; 50 *L. J.* (*Q. B.*) 497. *Under that statute a defendant convicted of perjury upon an indictment containing two counts for distinct offences may be sentenced to consecutive terms of penal servitude, although the aggregate of the punishments may exceed the punishment allowed by law for one offence. Id. Upon an indictment for perjury charging perjuries committed in different suits, the defendant upon conviction may be sentenced to distinct punishments, although the suits were instituted with a common object. Id. Therefore where C. was convicted upon an indictment for perjury containing two counts: in one count perjury was alleged to have been committed in an action in the Court of Common Pleas, in the other count another perjury was alleged to have been committed in a suit in the Court of Chancery, but the proceedings in both courts had one object, and C. was sentenced to two consecutive terms of penal servitude, one in respect of each count, it was held that the sentences were lawfully passed. Id. Sentence of penal servitude may be passed although the false oath was taken in a manner which, although now authorized by law, was not so authorized at the time of the passing of* 2 *G.* 2, *c.* 25. *R. v. Castro, L. R.* 9 *Q. B.* 350; 43 *L. J.* (*Q. B.*) 105, 108. *The judge may also require the offender to find sureties to keep the peace and be of good behaviour for a further period. R. v. Hart,* 30 *St. Tr. at* 1344: *R. v. Dunn,* 12 *Q. B.* 1026; 18 *L. J.* (*M. C.*) 41. *A solicitor who practises after a conviction of perjury or subornation is liable on summary conviction before the High Court to seven years' penal servitude.* 12 *G.* 1, *c.* 29, *s.* 4; *and see Steph. Dig. Cr. L.* (6th ed.) 112.

No indictment can be preferred for perjury unless one or other of the preliminary steps required by 22 & 23 *Vict. c.* 17, *s.* 1, *has been taken* (*ante*, p. 7).

The offences of perjury and subornation of perjury, etc., are not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126). *R. v. Haynes, Ry. & M.* 298. *Justices of the peace had not cognizance of the offence of perjury at common law, so as to apprehend or commit a person charged with it, until* 11 & 12 *Vict. c.* 42, *s.* 1, *gave them power to grant a warrant for any indictable offence. See* 2 *Hawk. c.* 8, *s.* 64: *R. v. Bartlett,* 1 *Dowl. & L.* 95; 12 *L. J.* (*M. C.*) 127.

Evidence.

Let an officer from the Central Office of the Royal Courts of Justice (*see R. S. C.* 1883, *Order* 61) produce the record (*i.e.*, the writ, pleadings, etc.) of the trial at which the perjury is alleged to have taken place; or produce a copy thereof and prove it to be an examined copy, or produce a copy thereof purporting to be signed and certified as a true copy by the officer to whose custody the original record is entrusted. 14 & 15 *Vict. c.* 99, *s.* 14 (*ante*, p. 379); *and see ante*, pp. 345, 358, *et seq.* Production of the originals cannot be obtained by *subpœnâ*, but only by order of a judge or master, *R. S. C.* 1883, *O.* 61, *ss.* 28, 29. As to production of impounded documents, *see R. S. C.*, 1883, *O.* 42, *r.* 33 A. Upon an indictment for perjury, charged as having been committed on the trial of an action in the High Court of Justice, in order to prove that the action mentioned in the indictment was pending and was tried as alleged, the

following documents were tendered in evidence:—1. The copy (filed under *Order V. Rule* 7, of the *Rules of the Supreme Court*, 1875) of the original writ of summons. 2. The copy of the pleadings in the action filed under *Order XLI. Rule* 1. 3. The original order to dismiss the action. Nos. 1 and 2 were produced by an officer from the Record and Writ Clerks' Office, and No. 3 was produced by the solicitor for the defendant in the action. It was held that these documents were properly received in evidence, and that they sufficiently proved the existence and trial of the action. *R.* v. *Scott*, 2 *Q. B. D.* 415; 46 *L. J.* (*M. C.*) 259.

Then prove the evidence the defendant gave upon the trial by the testimony of some person who was present at the trial. It is sufficient for this purpose if the witness state from recollection the evidence the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence given by the defendant, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it. *R.* v. *Rowley*, 1 *Mood. C. C.* 111: *R.* v. *Munton*, 3 *C. & P.* 498: *R.* v. *Browne*, 3 *C. & P.* 572; *M. & M.* 315. It is said that all evidence admissible on the trial of the indictment in which the perjury is alleged to have been committed is admissible on the trial for the perjury. *R.* v. *Harrison*, 9 *Cox*, 503, *Bramwell*, B.

Statements made by the judge, etc., before whom the perjury is alleged to have been committed are not admissible on the trial for the offence. *R.* v. *Britton*, 17 *Cox*, 627, *Hall*, Recorder. It is not necessary to produce the judge's notes, which are not the best evidence of what took place at the trial, and are not admissible except to refresh the memory of the judge if called as a witness. *R.* v. *Child*, 5 *Cox*, 197: *R.* v. *Morgan*, 6 *Cox*, 107: and the judge should not be called. *R.* v. *Gazard*, 8 *C. & P.* 595, *Patteson*, J. The notes or minutes of the clerk of the court are in the same position as those of the judge; *R.* v. *Newall*, 6 *Cox*, 21; and of no greater authority than those of a shorthand writer or other person who took a note of the evidence. *Id.* Grand jurors cannot be called to prove perjury before them. *R.* v. *Hughes*, 1 *C. & K.* 519, *Tindal*, C.J. And the conviction or judgment in the prior case is not evidence on an indictment for committing perjury in the prior case. *R.* v. *Goodfellow*, *C. & Mar.* 569.

It is necessary to prove in substance the whole of what is set out in the indictment as having been sworn by the defendant, and of the evidence connected with it and necessary to explain it; proving a part only, it seems, is not sufficient. *R.* v. *Jones*, *Peake* (3rd ed.), 51: *R.* v. *Dowlin*, *Peake* (3rd ed.), 227; 5 *T. R.* 317. And it must be proved literally or substantially as set out. *R.* v. *Leefe*, 2 *Camp.* 134; 11 *R. R.* 683. And the evidence must be clear and precise, and not ambiguous. *R.* v. *Bird*, 17 *Cox*, 387. Any variance in substance between the indictment and evidence in this respect used to be fatal: *see R.* v. *Taylor*, 1 *Camp.* 404: *R.* v. *Cooke*, 7 *C. & P.* 559. Variances between indictment and evidence can be amended under 14 *&* 15 *Vict. c.* 100, *ss.* 1, 25 (*ante*, pp. 52, 55. Amendment has been allowed of the inaccurate recital of the title of a statute; *R.* v. *Westley*, *Bell*, 193; 29 *L. J.* (*M. C.*) 35; of a superfluous insertion of the word "assizes;" *R.* v. *Child*, 5 *Cox*, 197; of a misdescription of the proceedings in which the perjury was alleged to have been committed; *R.* v. *Nevill*, 6 *Cox*, 69: *R.* v. *Tymms*, 11 *Cox*, 645; and of the justices before whom it was alleged to have been committed. *R.* v. *Western*, *L. R.* 1 *C. C. R.* 122; 37 *L. J.* (*M. C.*) 81. But amendment has been refused of an insufficient averment of materiality. *R.* v. *Harvey*, 8 *Cox*, 99, *Byles*, J. If it be stated that the defendant was sworn on the Gospels, and it be proved that he was sworn in a different

manner, according to the custom of his country, the variance will be fatal, unless amended. *R.* v. *McCarther, Peake* (3rd ed.), 211. But if it be not proved that he was sworn in any other manner, proof that he was sworn generally, and was examined, will support this allegation. *R.* v. *Rowley, Ry. & M.* 299; *and see ante*, pp. 406, 407. An allegation that the defendant "exhibited a certain information upon oath," does not sufficiently show that he was sworn. *R.* v. *Goodfellow, C. & Mar.* 569.

Corroboration.]—Some one or more of the assignments of perjury must be proved either by two witnesses, or by one witness with proof of other material and relevant facts substantially confirming his testimony. *R.* v. *Champney*, 2 *Lewin*, 258: *R.* v. *Lee*, 1 *Russ. Cr.* (6th ed.) 368: *R.* v. *Boulter*, 2 *Den.* 396; 21 *L. J.* (*M. C.*) 57; 3 *C. & K.* 236: *R.* v. *Gardiner*, 8 *C. & P.* 737; 2 *Mood. C. C.* 95: *R.* v. *Yates, C. & Mar.* 132: *R.* v. *Parker, C. & Mar.* 639: *R.* v. *Roberts*, 2 *C. & K.* 607: *R.* v. *Webster*, 8 *Cox*, 187; 1 *F. & F.* 515: *R.* v. *Braithwaite, Id.* 638; 8 *Cox*, 254 (*and see ante*, p. 409). A letter or account written by defendant contradicting his sworn evidence is corroboration. *R.* v. *Mayhew*, 6 *C. & P.* 315: *R.* v. *Shaw, L. & C.* 579; 34 *L. J.* (*M. C.*) 169: *R.* v. *Hare*, 13 *Cox*, 174. And the assignment so proved must be upon a part of the matter sworn which was material to the matter before the court at the time the oath was taken. Where the indictment was for perjury alleged to have been committed on the trial of A. for perjury, who was convicted, it was held to be no defence that the judgment against A. was afterwards reversed on error. *R.* v. *Meek*, 9 *C. & P.* 513. Upon an indictment for perjury in giving evidence before the quarter sessions, the prosecutor produced the examination of the defendant before a magistrate, in which he deposed in the direct negative to everything he had sworn before the court; but *Gurney*, B., held this not sufficient *per se* without other evidence to show that the statement before the court was false, and that before the magistrate true. *R.* v. *Wheatland*, 8 *C. & P.* 238. *See R.* v. *Knill*, 5 *B. & Ald.* 929, *n.*: *R.* v. *Hook, Dears. & B.* 606; 27 *L. J.* (*M. C.*) 222 (*ante*, p. 409). (*a*) On an indictment for perjury, in deposing in an affidavit that A. B., a defendant in a suit in which the party indicted was plaintiff, owed him 50*l.*, the assignment is not proved by evidence that the cause, after the making of the affidavit, was referred to an arbitrator, who made an award that A. B. owed the defendant nothing. *R.* v. *Fontaine-Moreau*, 11 *Q. B.* 1028; 17 *L. J.* (*Q. B.*) 187. Also, it must not only be proved that the matter sworn, or part of it, is false, but it must appear, either directly or from circumstances, that the defendant knew it to be so, and that he swore to it deliberately. (*See ante*, p. 1050.) Where the assignment of perjury was that the prisoner swore that she had not had connection with a "man," it was held by *Manisty*, J., that the evidence of connection with one man only could be received, but by *Lindley*, J., and *Thesiger*, L.J., that the evidence of several men that they had had connection with the prisoner, was admissible. *R.* v. *Adams*, 14 *Cox*, 215.

Indictment for Perjury upon a Trial of a Cause at the Assizes.
(*Common Law.*)

Surrey, to wit:—The jurors for our lord the King upon their oath present, that heretofore, to wit, at the assizes holden for the county of Surrey, on the thirteenth day of March, in the year of our Lord ——, at

(*a*) In a colonial case, *R.* v. *Cleland* [1901] 20 *N. Z. L. R.* 509, it is suggested that *R.* v. *Knill* was not merely criticized, but actually overruled by *R.* v. *Hook*.

Guildford, in the said county, before Sir A. B., knight, one of the justices of the High Court of Justice in England, assigned to take the assizes in and for the said county of Surrey, a certain action for trespass to the person and assault, wherein J. L. was plaintiff and J. W. was defendant, came on to be tried in due form of law, and was then and there tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid; upon which said trial J. S. appeared as a witness for and on behalf of the said J. W., the defendant in the action aforesaid, and was then sworn in due course of law [and took his corporal oath upon the Holy Gospel of God] before the said Sir A. B., knight, so being such justice as aforesaid, that the evidence which he the said J. S. should give to the court there, and to the said jury so sworn as aforesaid, touching the matter then in question between the said parties should be the truth, the whole truth, and nothing but the truth. [*Continue as in the precedent, ante*, p. 1057, *stating the material questions and false oath* (*examination or cross-examination*). *R.* v. *Dowlin, Peake* (3rd ed.), 227; 5 *T. R.* 311; 3 *R. R.* 679. *See the old precedents*, 4 *Went.* 266, 273; *Cro. Circ. Comp.* 351, 353. *The court by which the oath was administered must be correctly described. Where an indictment stated the oath to have been taken before justices assigned to take the assize, before A. B., one of the said justices, etc., and it appeared that the oath was administered when the judge was sitting under the commission of oyer and terminer and gaol delivery, it was held a fatal variance.* *R.* v. *Lincoln, R. & R.* 421. *Semble, that it could now be amended under* 14 & 15 *Vict. c.* 100, *s.* 1 (*ante*, p. 52). *But where it stated that the cause was tried at the assizes before* E. W., *one of the judges, etc., it was held to be proved in substance by the Nisi Prius Record, which stated, in the usual form, that the cause was tried before the two justices of assize, one of whom was* E. W. *R.* v. *Alford*, 14 *East*, 218, *n.*; 1 *Leach*, 150. *The allegation that the cause was "tried by a jury" is sufficient, although no verdict was given, the trial ending in a non-suit.* *R.* v. *Bray*, 9 *Cox*, 218. *Where the cause is tried by a judge without a jury, the issue joined should be averred to have been tried "by and before" the judge in question, as in the precedent, ante*, p. 1057.]

Evidence.

This will be in substance the same as under the last precedent (*ante*, p. 1059).

Indictment for Perjury on the Trial of an Indictment. (*Common Law.*)

Commencement as ante, p. 1057]—that on the —— day of ——, A. B. was in due form of law tried at a court of oyer and terminer and general gaol delivery, held before the Honble. Sir W. G. ——, knight, one of the justices of the High Court of Justice (*or at the general* [*or quarter*] *or adjourned general* [*or quarter*] *sessions of the peace for the county of* ——, *holden before* A. B., *esquire, and others, his Majesty's justices of the peace, acting in and for the said county*), upon a certain indictment charging him the said C. D. [*state charge shortly*]. *The rest of the indictment can be framed from the precedent, ante*, p. 1057. *For old precedents, see* 4 *Went.* 239, 275; 6 *Went.* 396; *Cro. Circ. Comp.* 359, 362, 364: *R.* v. *Stevens*, 5 *B. & C.* 246: *before a grand jury, R.* v. *Hughes*, 1 *C. & K.* 520, *n.* (*b*): *upon the hearing of an appeal at the quarter sessions, Cro. Circ. Comp.* 334; *R.* v. *Ward*, 6 *C. & P.* 366: *R.* v. *Dowlin*, 5 *T. R.* 311; 3 *R. R.* 679.

Evidence.

As to the proof of the proceedings where the perjury is alleged to have taken place on the trial of a former indictment, *see* 14 & 15 *Vict. c.* 99, *s.* 13 (*ante*, p. 360); 14 & 15 *Vict. c.* 100, *s.* 22 (*ante*, p. 1053); and *R. v. Newman*, 2 *Den.* 390; 21 *L. J.* (*M. C.*) 75. The production of the indictment alone is not sufficient evidence of the former trial, but it must be proved either by the production of the complete record of the trial, or of the certificate of the indictment and trial. *See* 14 & 15 *Vict. c.* 100, *s.* 22 (*ante*, p. 1053): *R.* v. *Coles*, 16 *Cox*, 165, *Stephen*, J.

If the indictment allege the perjury to have been committed on the hearing of a charge for a particular offence, it is not sufficient to prove a charge for a different offence in law, although the defendant's evidence given on that occasion would have been material to the charge alleged in the indictment. *R.* v. *Goodfellow*, *C. & Mar.* 569. As to other evidence, *see ante*, p. 1059. (*a*)

Indictment for Perjury in an Affidavit. (52 & 53 *Vict. c.* 10, *s.* 7, *ante*, p. 1054.)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that heretofore and at the time of the commission of the offence by A. B. hereinafter charged and stated, to wit, on the —— day of ——, A.D 1903, a certain action was pending in the Chancery Division of the High Court of Justice, wherein C. D. was plaintiff and E. F. defendant. And the jurors aforesaid upon their oath aforesaid do further present, that on the said —— day of ——, A.D. 1903, the said A. B. appeared before G. H., a commissioner duly appointed and acting under and by virtue of the *Commissioners for Oaths Act*, 1889, and was then and there sworn in due form of law by and before the said G. H. as to the truth of the matters contained in a certain affidavit in writing of him the said A. B., which he the said A. B. then produced to the said G. H., the said G. H. so being such commissioner as aforesaid, and then having competent power and authority to administer the said oath to the said A. B. in that behalf. And the jurors aforesaid upon their oath aforesaid do further present, that at the time when the said A. B. so swore in and by his said affidavit as hereinafter stated, it became and was a material question in the said action whether —— and whether —— [*see last precedent*]. And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., on the said —— day of ——, A.D. 1903, at ——, and within the jurisdiction of the said court, unlawfully, wilfully, and corruptly did swear falsely in a certain affidavit taken and made in accordance with the provisions of the *Commissioners for Oaths Act*, 1889, to wit, did falsely swear in his said affidavit so taken and made before the said G. H., being such commissioner as aforesaid, that —— and that ——. Whereas in truth and in fact —— and whereas in truth and in fact ——, as he the said A. B. well knew at the time when he did so swear as aforesaid. And so the jurors aforesaid upon their oath aforesaid do say, that the said A. B. in and by his said affidavit

(*a*) A. was indicted for perjury in evidence given by him on a former trial, on which he was acquitted. Held that the jury were rightly directed that they had no concern with the proceedings in the former trial, and that it was no defence that the first jury might have believed the incriminated evidence. *R.* v. *McDermott* [1899] 24 *Victoria L. R.* 636. *See ante*, p. 1059.

so taken and made as aforesaid, of his own act and consent, and of his own most wicked and corrupt mind, in manner and form as aforesaid, unlawfully, falsely, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury; against the form, etc., and against the peace, etc.

Misdemeanor: punishment, see ante, p. 1068. 52 & 53 *Vict. c.* 10, *s.* 7. *Having regard to the provisions of that section, the words "and so the jurors, etc., do say, etc.," would appear to be an essential averment. By s.* 7 *of that statute "swear" includes "affirmed" and "protest," and "affidavit" includes "affirmation, statutory or other declaration, acknowledgment, examination, and attestation or protestation of honour." It would seem, therefore, that the making of a false declaration is now indictable as perjury.* (*See ante,* p. 1054; *post,* pp. 1071, 1075.)

The form of indictment for perjury in an affidavit to hold to bail (given in Archbold (21st ed.), p. 927) *has been omitted in the present edition, because arrest on mesne process was abolished, except in crown suits, by s.* 6 *of the Debtors Act,* 1869 (32 & 33 *Vict. c.* 62), *which regulates arrest and bail by defendants suggested to be about to leave the realm. For old precedents of indictments for perjury in affidavits, see Went.* 336, 365; 4 *Went.* 230, 243, 246, 249, 253, 258, 263, 264, 271, 277, 278, 281, 287; *Cro. Circ. Comp.* 339, 340, 356: *in affidavit by a petitioning creditor, Cro. Circ. Comp.* 345: *in justifying bail,* 6 *Went.* 423, 424: *in an answer to a bill in equity, Cro. Circ. Comp.* 342, 357: *in depositions in equity,* 4 *Went.* 292: *in depositions in an ecclesiastical court, Id.* 235, 247.

It is not necessary to set out the jurat of the affidavit; R. v. Emden, 9 *East,* 437, 445; *nor to state or prove that it was filed in or exhibited to the court, or in any manner used by the defendant or others. R. v. Crossley,* 7 *T. R.* 315; 4 *R. R.* 445: *R. v. White, M. & M.* 271. *But an indictment for perjury, whether in* viva voce *evidence, or in an affidavit taken before* 52 & 53 *Vict. c.* 10, *s.* 7 (*ante,* p. 1054), *must have shown a judicial proceeding pending, in order to give jurisdiction to the person administering the oath. R. v. Pearson,* 8 *C. & P.* 119. *See R. v. Koops,* 6 *A. & E.* 198: *R. v. Gardiner,* 2 *Mood. C. C.* 95; 8 *C. & P.* 737. *Irregularity in the title of the affidavit seems immaterial. R. v. Christian, C. & Mar.* 388.

If perjury is assigned upon several parts of an affidavit, those parts may be set out in the indictment as if continuous, although they are in fact separated by the introduction of other matter. R. v. Callanan, 9 *Dowl. & Ry.* 97; 6 *B. & C.* 102. *See R. v. Solomon, Ry. & M.* 252: *R. v. Virgier,* 12 *A. & E.* 317; 9 *L. J.* (*M. C.*) 120; 4 *P. & D.* 161: *R. v. Bennett,* 2 *Den.* 240; 3 *C. & K.* 124; 20 *L. J.* (*M. C.*) 217; 5 *Cox,* 207.

Evidence.

1. It may be laid down as a general rule that every statement in the introductory part of the indictment, which cannot be rejected as surplusage, must be proved in substance as laid. The evidence must support the averments. *R. v. Bird,* 17 *Cox,* 387. It should also be proved distinctly, where the perjury is alleged to have taken place on a judicial inquiry, what the charge was, on the hearing of which the false evidence was given, as otherwise it would be impossible to ascertain whether it was material to the issue. *R. v. Carr,* 10 *Cox,* 564 (*C. C. R.*). And this must be proved by the best evidence (*see ante,* p. 315); therefore, where perjury is alleged as having been committed before justices at petty sessions on the hearing of a charge contained in a written information, that information must be produced, or its loss or destruction must be proved so as to let in secondary evidence of its contents. *R. v. Dillon,* 14 *Cox,* 4, *Lopes,* J. As to proof of records, judgments, etc., *see*

ante, p. 358, *et seq.*: *R.* v. *Scott*, 2 *Q. B. D.* 415; 46 *L. J.* (*M. C.*) 259 (*ante*, p. 1060). As to proof of proceedings on an appeal to quarter sessions, *see It.* v. *Ward*, 6 *C. & P.* 366.

2. The matter sworn must be proved. If in writing, and in existence, it must be produced. On an indictment for perjury in an affidavit, get the officer in whose custody the affidavit is to produce it at the trial; and prove, either directly or circumstantially, that it was sworn to and signed by the defendant (*see R.* v. *Barnes*, 10 *Cox*, 539), as, for instance, that the name subscribed to it is of the defendant's handwriting, and that an action between C. D. and E. F. was pending, or the like. Where the deponent was illiterate, it is necessary to show that he knew that the affidavit contained the statements on which the perjury is assigned, *i.e.*, that he gave instructions for their insertion, or had the affidavit read over to him. *R.* v. *Hailey*, 1 *C. & P.* 258: *R.* v. *Petricus*, 67 *J. P. Rep.* 378. It does not seem essential that the jurat should comply with *R. S. C. O.* 38, *r.* 13. *See R.* v. *Hailey*, 1 *C. & P.* 258; *Ry. & M.* 94. Where perjury was assigned on an affidavit of service of notice of application for leave to issue execution against a shareholder in a joint-stock company, the production of the affidavit alone without the notice annexed (to which the affidavit referred as being annexed) was held insufficient. *R.* v. *Hudson*, 1 *F. & F.* 56. Upon proof that the affidavit had been lost or destroyed, secondary evidence may be given of its contents, and of the defendant's signature to it. *R.* v. *Milnes*, 2 *F. & F.* 10. Upon an indictment for perjury in falsely swearing that there was no draft of a statutory declaration which had been prepared by the defendant, the materiality of the existence of such draft turned upon its contents, and the fact of certain alterations having been made in it. Parol evidence of the contents of the draft and of the alterations made in it was held inadmissible, no notice to produce such draft having been given to the defendant. *R.* v. *Elworthy*, *L. R.* 1 *C. C. R.* 103; 37 *L. J.* (*M. C.*) 3. On an indictment for perjury, in the usual form, setting forth, with proper innuendoes, a copy of a deposition before a magistrate, written in the English language, and signed by the defendant, he may be convicted on proof of a verbal deposition in the Welsh language, of which the written deposition, signed by him, is the substance. *R.* v. *Thomas*, 2 *C. & K.* 806.

To prove that the person who administered the oath had authority to do so, it is merely necessary to prove that he performed the duties of a certain office (although he may have only performed them on the single occasion on which he administered the oath. *R.* v. *Roberts*, 14 *Cox*, 101 (*C. C. R.*)), without showing his appointment; *R.* v. *Verelst*, 3 *Camp.* 432; 14 *R. R.* 775; and (if the court will not judicially notice it) that the person lawfully exercising the duties of that office has authority to administer an oath in such a case. As to proof of status of a commissioner of oaths, *see R.* v. *Howard*, 1 *M. & Rob.* 187: *R.* v. *Newton*, 1 *C. & K.* 469: *R.* v. *Verelst*, *ubi supra*.

Indictment for Perjury in the County Court.

An indictment for perjury in the county court can be framed on the precedent, ante, p. 1057, *mutatis mutandis, the action being averred to be tried thus: e.g.*, "in the county court of [Norfolk], holden at the [Shire Hall, Norwich], in the said county ——, by and before W. W., esquire, one of the judges of the county courts in England, duly appointed and acting in

accordance with the provisions of the *County Courts Act*, 1888" (*or where the trial is under the admiralty or bankruptcy jurisdiction, insert the appropriate averment*).

The indictment can be completed from the precedent ante, p. 1057.

County courts having bankruptcy jurisdiction act as the High Court. For old precedent, see R. v. *Lavey*, 3 *C. & K.* 26. *And see* 51 *& 52 Vict. c.* 43, *s.* 78, *as to liability of county court bailiffs to prosecution as for perjury if they wilfully or corruptly indorse false statements as to the fact or mode of service by them of county court process. Where the indictment alleged, that in the county court of Middlesex, holden at, etc., in the county of Middlesex, before J. M., then being the judge of the said court, a certain action of contract then pending in the said court, between A. B., plaintiff, and C. D., defendant, came on to be tried, upon which trial J. S. was duly sworn, etc., before the said J. M., then being judge of the said court, and then having sufficient and competent authority to administer the said oath to the said J. S. in that behalf: this was held to show sufficiently that the court in which the action was tried was held in pursuance of* 9 *&* 10 *Vict. c.* 95 (*rep.*; *see now* 51 *&* 52 *Vict. c.* 43); *and also that the proceeding was one over which that court had jurisdiction. Lavey* v. *R.*, 2 *Den.* 504; 17 *Q. B.* 496; 21 *L. J.* (*M. C.*) 10 (*Ex.*), *where R.* v. *Overton* (*ante*, p. 1055) *was distinguished. In R.* v. *Lawlor*, 3 *Ir. C. L. R.* 507: 6 *Cox*, 187 (*C. C. R. Ir.*), *an indictment for perjury in an inferior court was held sufficient which did not set out all the facts showing the authority of the court, but averred that "the case came on to be tried in due form of law before" the judge of the court, "he having then and there sufficient and competent authority to administer the said oath" to the accused. As to proper mode of averring jurisdiction, see also Walker* v. *R.*, 8 *E. & B.* 439; 27 *L. J.* (*M. C.*) 43.

Evidence.

On an indictment for perjury committed in the county court, the proceedings there should be proved by the production of the registrar's book, or a certified copy of entries therein. 51 *&* 52 *Vict. c.* 43, *s.* 28 (*ante*, p. 366): *R.* v. *Rowland*, 1 *F. & F.* 72 (*ante*, p. 366): *R.* v. *Roberts*, 14 *Cox*, 101 (*C. C. R.*) (*ante*, p. 366).

Indictment for Perjury before a Metropolitan Police Magistrate or other Justice.

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that heretofore and before the commission of the offence by A. B. hereinafter charged and stated, to wit, on the —— day of ——, A.D. ——, one C. D. appeared before E. F., esquire, one of the magistrates of the police courts of the metropolis, sitting at —— police court, in the metropolitan police district [or before X. Y., esquire, and V. Z., esquire, then and yet being two of the justices of our said lord the King assigned to keep the peace of our said lord the King in and for the county (or borough) of ——, and also to hear and determine divers crimes, trespasses, and offences committed in the said county (or borough)], and was thereupon charged in due form of law for that he (*state the charge*). And the jurors aforesaid upon their oath aforesaid do further present, that at and upon the hearing of the said charge against the said C. D., on the said —— day of ——, A.D. ——, the said A. B. appeared as a witness in support of the said charge, and was then sworn in due form of law [and did then take his corporal oath upon the

Holy Gospel of God] as such witness, the said E. F., esquire, so sitting as aforesaid, and then and there having competent power and authority to administer the said oath to the said A. B. in that behalf, that the evidence he should give to the court then touching the said charge should be the truth, the whole truth, and nothing but the truth. And the jurors aforesaid upon their oath aforesaid do further present, that at and upon the hearing of the said charge, and at the time when the said A. B. so deposed, swore, and gave evidence as hereinafter mentioned, it became and was a material question whether —— [*as in the assignment of perjury*]. And the jurors aforesaid upon their oath aforesaid do further present, that the said A. B., being so sworn as aforesaid [contriving and intending to pervert the due course of law and justice upon the hearing of the said charge], on the said —— day of ——, A.D. —— [in the parish of ——], at the —— police court, before the said E. F., so sitting as aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully, falsely, knowingly, wilfully, corruptly, and maliciously did say, depose, swear, and give evidence, amongst other things, in substance and to the effect following, that is to say, that —— (*assign the perjury, as ante*, p. 1057). Whereas in truth and in fact ——, as he the said A. B. well knew at the time when he did so say, depose, swear, and give evidence as aforesaid. And so the jurors aforesaid upon their oath aforesaid do say, that the said A. B., upon the said hearing of the said charge on the said —— day of ——, A.D. —— (*see ante*, p. 1057, *et seq.*). *See the precedents*, 4 *Went.* 232, 244; *Cro. Circ. Comp.* 332: *R.* v. *Gardiner*, 2 *Mood. C. C.* 95; 8 *C. & P.* 737: *and for an indictment for perjury before justices on the hearing of a charge of an offence punishable on summary conviction, R.* v. *Shaw, L. & C.* 579; 34 *L. J.* (*M. C.*) 169. *A collection of old precedents of indictments for perjury will also be found in* 2 *Stark. Crim. Plead.* 533–555 (2nd ed.): *and* 3 *Chit. Cr. L.* 349, *et seq. And as to the indictment, see also ante*, pp. 1055–1059.

Evidence.

It is necessary to prove that the justice had jurisdiction over the subject-matter of the information and complaint (*vide ante*, p. 1045, *et seq.*).

On an indictment for perjury in bastardy proceedings, evidence must be given of the complaint, by producing the original of the order made, or secondary evidence. *R.* v. *Newall*, 6 *Cox*, 21, *Wightman*, J. Production of the summons is not essential. *R.* v. *Smith, L. R.* 1 *C. C. R.* 110; 37 *L. J.* (*M. C.*) 6, which apparently overrules on this point *R.* v. *Newall, ubi supra*, and *R.* v. *Whybrow*, 8 *Cox*, 438. Where a sworn information is necessary to give jurisdiction, it must be produced, or secondary evidence of it given. *R.* v. *Hurrell*, 3 *F. & F.* 271. So, too, if the perjury is assigned on statements in the information. *R.* v. *Dillon*, 14 *Cox*, 4. The conviction, if any, is irrelevant, and not admissible; *R.* v. *Goodfellow, C. & Mar.* 569; nor are remarks by the justices. *R.* v. *Britton*, 17 *Cox*, 627; *and see ante*, p. 1060. On a trial for perjury alleged to have been committed before justices on the hearing of an information under the *Licensing Acts* against the keeper of a licensed house, his licence must be produced in order to show the jurisdiction of the justices. *R.* v. *Lewis*, 12 *Cox*, 163, *Byles*, J.: *R.* v. *Willis*, 12 *Cox*, 164, *Cleasby*, B., *after consultation with Byles*, J. So on a trial for perjury alleged to have been committed before justices on the hearing of an information under s. 18 of the *Licensing Act*, 1872, against the defendant for being disorderly on and refusing to quit licensed premises, the licence itself must be produced in order to prove that the premises were licensed, and, therefore, that the justices had jurisdiction. *R.* v. *Evans*, 17 *Cox*, 37.

In *R.* v. *Lakin*, March 10, 1900, *Walton*, K.C., Commissioner, after consulting *Bruce*, J., refused to stop an indictment for perjury before justices by a licensed person where the prosecution failed to produce the licence, and stated that if necessary he would reserve the question; but in the end the jury acquitted. (*See* 35 *L. J. Newsp.* 191.)

Indictment for Perjury at a Coroner's Inquest.

Commencement as ante, p. 1057]—that heretofore and at the time of the committing of the offence by A. B. hereinafter charged and stated, to wit, on the —— day of ——, A.D. ——, at [*the coroner's court, in the parish of Hammersmith, in the county of London*], an inquest was duly held before C. L. D., esquire, one of his Majesty's coroners for the said county, touching the death of one E. F. And the jurors aforesaid ——. [*The rest of the indictment can be framed from the precedents, ante*, pp. 1057, 1066.]

As to the power of the coroner to administer an oath, see 50 *&* 51 *Vict. c.* 71, *s.* 4 (1). *As to procedure at an inquest, see ante*, p. 153, *et seq.*

By 6 *&* 7 *Vict. c.* 83, *s.* 1 (*rep.*), *coroners were empowered to appoint deputies, provided that no deputy shall act "except during the illness of the coroner or his absence from any lawful or reasonable cause." By s.* 2, "*no inquisition shall be quashed by reason of such inquisition having been taken before any deputy instead of the coroner himself.*" *The prisoner being indicted for perjury committed upon an inquest held before a deputy coroner, and the objection having been taken that there was no lawful or reasonable cause for the absence of the coroner, it was held* (1) *that the question of lawful or reasonable cause was for the judge and not for the jury*; (2) *that whatever the cause of absence, by s.* 2, *a valid inquisition might have been founded upon the inquest, and therefore the deputy had jurisdiction, and perjury was committed. R.* v. *Johnson, L. R.* 2 *C. C. R.* 15; 42 *L. J.* (*M. C.*) 41. *The Coroners Act*, 1892 (55 *&* 56 *Vict. c.* 56), *s.* 1, *sub-s.* 3, *contains a provision similar to* 6 *&* 7 *Vict. c.* 83, *s.* 1, *but does not contain any provision similar to that contained in s.* 2.

SUBORNATION OF PERJURY.

Common Law.

Subornation of perjury by the common law is the procuring of a man to take a false oath amounting to perjury, who actually takes such oath. 1 *Hawk. c.* 69, *s.* 10; *Steph. Dig. Cr. L.* (6th ed.) 109; 2 *Chit. Cr. L.* 317.

Statute.

14 *&* 15 *Vict. c.* 100 (*Criminal Procedure Act*, 1851, *s.* 21—*Form of indictment for subornation of perjury.*—In every indictment for subornation of perjury (*post*, p. 1069), or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or for inciting, causing, or procuring (*post*, p. 1071) any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, wherever such perjury or other offence aforesaid shall have been actually

committed, to allege the offence of the person who actually committed such perjury or other offence in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully and corruptly did cause and procure the said person the said offence, in manner and form aforesaid, to do and commit; and wherever such perjury or other offence aforesaid shall not have been actually committed (*see post*, p. 1071), it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury. [*This section superseded* 23 *G.* 2, *c.* 11 (*rep.*): *omitting* (1) *the clause rendering it necessary to aver the authority of the court before which the oath was taken to administer an oath; see* 14 & 15 *Vict. c.* 99, *s.* 16 (*ante*, p. 1052); *and* (2) *the clause requiring a proper averment alleging the falsity of the matter on which perjury is assigned.*]

Indictment for Subornation of Perjury. (*Common Law.*)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that heretofore, to wit, in the Trinity sittings of the High Court of Justice in the King's Bench Division of the said court holden at the Royal Courts of Justice, in the county of London, issue was joined in an action for assault then pending in the said King's Bench Division, whereas one J. L. was plaintiff, and one J. W. was defendant. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards and before the trial of the said issue as hereinafter mentioned, and whilst the same was depending, to wit, on the first day of June, in the year aforesaid, J. S., wickedly contriving and intending to pervert the due course of law and justice, then, to wit, on the day and year aforesaid, unlawfully, corruptly, wickedly and maliciously did solicit, suborn, instigate and endeavour to persuade one J. N. to be and appear as a witness at the trial of the said issue, for and on behalf of the said J. W., the defendant in the said issue, and upon the said trial falsely to swear and give in evidence, to and before the jurors which should be sworn to try the issue aforesaid, certain matters material and relevant to the said issue, and in the matters therein and thereby put in issue, in substance, and to the effect following, that is to say, that [the said J. W. (meaning the defendant in the action aforesaid) did, on a certain day then past, to wit, on the tenth day of April in the year aforesaid, beat, wound, and bruise the said J. L. (meaning the plaintiff in the action aforesaid), and did knock him the said J. L., down, and with a large stick did then and there beat, wound and bruise, and greatly disfigure the said J. L., whilst he was so down].* And the jurors first aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, at the Trinity sittings of the said King's Bench Division of the said High Court of Justice before the Right Honourable Richard Everard, Baron Alverstone, Lord Chief Justice of England, to wit, on the day and year first aforesaid, the issue aforesaid came on to be tried, and was then and there tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid: upon which said trial the said J. N., in consequence, and by the means, encouragement, and effect of the said wicked and corrupt subornation and procurement of the said J. S. did then appear as a witness for and on behalf of the said J. W., the defendant in the action above mentioned, and was then in due form of law sworn [and took his corporal oath upon the Holy Gospel of God], before the said Richard Everard, Baron Alverstone, Lord Chief Justice of England, that the evidence which

he the said J. N. should give to the court there, and to the jury, so sworn as aforesaid, touching the matter then in question between the said parties, should be the truth, the whole truth, and nothing but the truth; and that at and upon the trial of the said issue so joined between the said parties as aforesaid, it became and was a material question, whether the said J. W. assaulted and beat the said J. L.: and the said J. N. being so sworn as aforesaid, then, at the trial of the said issue, upon his oath aforesaid, unlawfully, falsely, corruptly, and wilfully, before the said jurors so sworn and taken between the said parties as aforesaid, and before the said Richard Everard, Baron Alverstone, Lord Chief Justice of England, aforesaid, did depose and swear (amongst other things) in substance, and to the effect following, that is to say: that [*here set out J. N.'s evidence, in substance the same as is above stated, where the subornation is charged*]: * Whereas, in truth and in fact, the said J. W. did not, etc. [*so proceeding to assign the perjury as in the precedent, ante*, p. 1057]; and whereas, in truth and in fact, the said J. S., at the time when he so solicited, suborned, instigated, and endeavoured to persuade the said J. N. falsely and corruptly to swear as aforesaid, well knew that [*etc., pursuing the words in the assignment of perjury*]: And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the said first day of June, in the said year of our Lord ——, did unlawfully, corruptly, wickedly, and maliciously suborn and procure the said J. N. to commit wilful and corrupt perjury in and by his oath aforesaid, before the said jurors so sworn and taken between the said parties as aforesaid, and before the said Richard Everard, Baron Alverstone, Lord Chief Justice of England, as aforesaid; against the peace of our lord the King, his crown and dignity. (*See the precedents, Cro. Circ. Comp.* 379, 380; 4 *Went.* 234, 250.) 14 & 15 *Vict. c.* 100, *s.* 21 (*ante*, p. 1068), *contains certain provisions for simplifying the form of indictment for subornation of perjury. Misdemeanor punishable in the same manner as perjury.* (*See ante*, pp. 1051, 1058.) *No indictment can be preferred for subornation of perjury unless one or other of the preliminary steps required by* 22 & 23 *Vict. c.* 17, *s.* 1, *as extended by* 30 & 31 *Vict. c.* 35, *s.* 1, *has been taken* (*see ante*, p. 7, *et seq.*). *It is submitted that the facts justifying an indictment for subornation would also support an indictment for counselling, procuring, etc., within s.* 8 *of the Accessories and Abettors Act*, 1861. *For a precedent of an indictment for conspiracy to pervert the due course of law, by means of perjury, see post, Book II. Part III. s.* 1.

Subornation of perjury is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the perjury committed, as directed, *ante*, p. 1059, *et seq.*; for unless this be proved, the defendant cannot be found guilty of the subornation; 1 *Hawk. c.* 69, *s.* 10; and the mere production of the record of J. N.'s conviction for the perjury (if he were convicted) would not be sufficient evidence of the perjury having been committed. *R.* v. *Reilly*, 1 *Leach*, 454.

And prove the previous subornation, as laid in the indictment, namely, that the defendant solicited or procured of J. N. to prove so and so upon the trial of the issue, knowing the same to be false, or that J. N., by giving such evidence, would be committing perjury.

ATTEMPTS TO SUBORN TO COMMIT PERJURY.

The attempt to persuade a witness to take a false oath, which, if taken, would amount to perjury, is a misdemeanor at common law. 2 *Hawk.* c. 69, *s.* 10: *cf. R.* v. *Higgins*, 2 *East*, 5; *and see per Lord Kenyon*, C.J., at p. 17; 2 *Chit. Cr. L.* 480. An indictment for attempted subornation can readily be framed from that for subornation (*ante*, pp. 1069, 1070), by omitting the words between the * * and substituting "incite" for "suborn," and for "suborn and procure."

This and the following cognate offences are not triable at quarter sessions. 5 & 6 *Vict.* c. 48, *s.* 1 (*ante*, p. 126).

INCITEMENT TO GIVE FALSE EVIDENCE.

It is a misdemeanor to incite a witness to give particular evidence where the inciter does not know whether it is true or false, or to offer a bribe to swear to a particular thing, whether true or false. *R.* v. *Darby*, 7 *Mod.* 100, 101: *R.* v. *Edwards*, 1 *Russ. Cr.* (6th ed.) 293: *R.* v. *Cole* [1902] 3 *Ont. L. R.* 389; *and cf. R.* v. *Mawbey*, 6 *T. R.*, at p. 637, *Lawrence*, J. It is a misdemeanor to agree to give a person money to prove a deed to be forged, for the purpose of obtaining a verdict. *R.* v. *Johnson*, 3 *Mod.* 1; *and post, Book II. Part III. s.* 2. The offence differs from subornation in that it is not necessary to prove that the evidence was in fact given, and from attempted subornation in that it is not necessary to prove that the evidence was false to the knowledge of the witness. A precedent for inciting to give false evidence can be framed from that for attempted subornation, *supra*, by omitting the averment as to knowledge by the defendant of the falsity. As to dissuading a witness from giving evidence, *see post*, p. 1078.

FABRICATION OF FALSE EVIDENCE.

It is an indictable misdemeanor to fabricate evidence with intent to mislead a judicial tribunal, even if the tribunal never sits and the evidence is not used. *R.* v. *Vreones* [1891] 1 *Q. B.* 360; 60 *L. J.* (*M. C.*) 62; 17 *Cox*, 267. For form of indictment, *see that case.* The making use of a false instrument in order to pervert the course of justice is a misdemeanor. *O'Mealy* v. *Newell*, 8 *East*, 364, *Lord Ellenborough*, C.J. So is publishing a false affidavit knowingly. *R.* v. *O'Brian*, 2 *Str.* 1143; *and see post*, p. 1078.

FALSE OATHS IN PROCEEDINGS NOT JUDICIAL.

It is a misdemeanor at common law to take a false oath with a fraudulent intention in a matter of public concern, although it is not taken in a judicial proceeding, if the oath is administered by a person having power to administer it. *Ex parte Overton*, 2 *Rose*, 257: *R.* v. *Foster*, *R. & R.* 459: *R.* v. *Chapman*, 1 *Den.* 432; 18 *L. J.* (*M. C.*) 152; 2 *C. & K.* 846; 3 *Cox*, 467: *R.* v. *Hodgkiss*, *L. R.* 1 *C. C. R.* 212; 39 *L. J.* (*M. C.*) 14; *see Steph. Dig. Cr. L.* (6th ed.) 110. And in *R.* v. *Stone*, *Dears.* 251; 23 *L. J.* (*M. C.*) 14; 6 *Cox*, 235, *Pollock*, C.B., said that a false oath taken in a judicial proceeding before a person having no power to administer it is a misdemeanor, as being an attempt to mislead the court. Where oaths or affidavits (in which are included affirmations, statutory or other declarations, etc., *see ante*, p. 1054) are taken under the *Commissioners for*

Oaths Act, 1889 (52 & 53 *Vict. c.* 10, *ante*, p. 1054), the deponent is guilty of perjury in every case in which he would have been guilty of that offence if the oath had been taken in a judicial proceeding. (*See ante*, p. 1054).

The numerous statutory provisions for punishing such oath as perjury or as a misdemeanor in particular cases are collected in the *Official Index to the Statutes* (ed. 1904), *tit.* "*Perjury*," 4, 5, 6.

Indictment for taking a False Oath before a Surrogate.
(4 *G.* 4, *c.* 76, *s.* 14.)

For precedents, see R. v. *Fairlie*, 9 *Cox*, 206: *R.* v. *Chapman* (*ante*, p. 1071).

Evidence.

The evidence will be in substance the same as *ante*, pp. 1059, 1064, except as to proof that the proceeding is judicial.

FALSE STATUTORY DECLARATIONS WHERE OATH FORBIDDEN OR NOT REQUIRED.

Statutes.

5 & 6 *W.* 4, *c.* 62 (*Statutory Declarations Act*, 1835), *ss.* 2–4.]—*Provide for substitution by Treasury of declarations for oaths required for verifying matters or documents for the purposes of certain Government Departments. For the warrants effecting substitution, see Statutory Rules and Orders Revised* (ed. 1904), *vol.* 11, *tit.* "*Statutory Declaration.*"

Certain false declarations as to customs are also punishable under 39 & 40 *Vict. c.* 36, *s.* 168; *as to excise, under* 32 & 33 *Vict. c.* 14, *s.* 25; *and as to taxes, under* 43 & 44 *Vict. c.* 19, *s.* 66.

Sect. 5.]—If any person shall make and subscribe any such declaration as hereinbefore mentioned in lieu of any oath, solemn affirmation, or affidavit, by any Act or Acts relating to the revenues of customs or excise, stamps and taxes, or post office, required to be made on the doing of any Act or for verifying any book account, entry, or return, or for any purpose whatsoever, and shall wilfully make therein any false statements as to any material particular, the person making the same shall be deemed guilty of a misdemeanor.

Sects. 6, 7.]—*Post*, p. 1076.

Sect. 18.]— . . . It shall and may be lawful for any justice of the peace, notary public, or other officer now by law authorized to administer an oath [*see* 52 & 53 *Vict. c.* 10, *as to commissioners for oaths*] to take and receive the declaration of any person voluntarily making the same before him in the form in the schedule to this Act annexed: and if any declaration so made shall be false or untrue in any material particular the person wilfully making such false declaration shall be deemed guilty of a misdemeanor. [*This section extends to voluntary declarations generally. R.* v. *Boynes*, 1 *C. & K.* 65.]

Sect. 21.]—In any case where a declaration is substituted for an oath under the authority of this Act or by virtue of any power or authority hereby given, or is directed and authorized to be made or subscribed under the authority of this Act, or by virtue of any power hereby given, any person who shall wilfully and corruptly make and subscribe any such declaration knowing the same to be untrue in any material particular, shall be deemed guilty of a misdemeanor. [*For indictment, see post*, p. 1074.]

Schedule.

Schedule.]—I, A. B., do solemnly and sincerely declare that ——, and I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the *Statutory Declarations Act*, 1835. (*See* 44 & 45 *Vict.* c. 41, *s.* 68.)

[5 & 6 *W.* 4, c. 62, *applies to statutory declarations made before commissioners of oaths, etc., in cases in which the proceeding is not judicial, and the taking of an oath or the equivalent affirmation is forbidden. See* 52 & 53 *Vict.* c. 10, *ante*, p. 1054. *The numerous statutes punishing particular forms of false declarations in verification of facts or documents are collected in the Official Index to the Statutes* (ed. 1904), *tit.* "*Perjury*," 6.]

5 & 6 *Vict.* c. 38, *s.* 1.]—*Quarter sessions have no jurisdiction to try indictments for* "(7) making or suborning any other person to make a false oath, affirmation, or declaration punishable as perjury or as a misdemeanor." *See ante*, p. 126.

14 & 15 *Vict.* c. 100, *s.* 20—*Form of indictment for false declarations, etc.*]—*Ante*, p. 1053.

28 & 29 *Vict.* c. 36, *s.* 11 (*County Voters Registration Act*, 1865), *s.* 11.]—Any person falsely or fraudulently signing any such declaration as is mentioned in *s.* 10 of that Act, in the name of any other person, whether such person shall be living or dead, and every person transmitting as genuine any false or falsified declaration, knowing the same to be false or falsified, and any person knowingly and wilfully making any false statement of fact in such declaration, shall be guilty of a misdemeanor, and punishable by fine or imprisonment for a term not exceeding one year.

35 & 36 *Vict.* c. 93 (*Pawnbrokers Act*, 1872), *s.* 29.]— . . . If any person makes any false declaration under this Act, either as an applicant or as identifying an applicant, knowing the same to be false in any material particular, he shall be guilty of a misdemeanor and shall be liable to the punishment attaching by law to perjury. [*The form of declaration is given in sched.* 3, *No. V. It is made before a magistrate. Similar provision is made by* 5 & 6 *W.* 4, c. 62, *s.* 12. *For indictment, see post*, p. 1074.]

52 & 53 *Vict.* c. 10 (*Commissioners for Oaths Act*, 1889), *ss.* 7, 9, 11.]—*Ante*, p. 1054.

52 & 53 *Vict.* c. 63 (*Interpretation Act*, 1889), *s.* 21.]—In this Act and in every other Act, whether passed before or after the commencement of this Act, the expression "statutory declaration" shall, unless the contrary intention appears, mean a declaration made by virtue of the *Statutory Declarations Act*, 1835 (*ante*, p. 1072).

55 & 56 *Vict.* c. 4, s. 4—*Soliciting an infant to make an affidavit or statutory declaration for the purpose of a loan.*]—*See post, Book II. chap. vi. s.* 3.

For list of other similar statutory offences, *see Official Index to Statutes* (ed. 1904), *tit.* "*Perjury*," 6.

Indictment for making a False Statutory Declaration. (5 & 6 *W.* 4, c. 62, *s.* 21, *ante*, p. 1073.)

Commencement as ante, p. 433]—unlawfully, wilfully, and corruptly did make and subscribe a certain declaration, made under the authority of the *Statutory Declarations Act*, 1835, to wit, a declaration made before G. H., in accordance with the provisions of the said last-mentioned statute, knowing the same to be untrue in a material particular, to wit, untrue in that the said A. B. therein solemnly and sincerely declared that —— [*as in assignment of perjury, ante*, p. 1057]——whereas, in truth and in fact, —— as he, the said A. B., well knew at the time when he made the said solemn declaration aforesaid (*state the truth*). Against the form, etc. [*as ante*, p. 465]. *It is to be noted that on indictments under ss.* 5, 18, *the word "corruptly" is not essential.*

As to the effect of the Commissioners for Oaths Act, 1889 (52 & 53 *Vict.* c. 10), *on this offence, see ante*, p. 1064.

Misdemeanor (5 & 6 *W.* 4, c. 62, *s.* 21): *punishable by fine or imprisonment without hard labour. See ante*, p. 238.

This offence is not triable at quarter sessions. 5 & 6 *Vict.* c. 38, *s.* 1 (7) (*ante*, p. 126).

Evidence.

Prove the authority of the person taking the declaration, that it was taken, and the materiality and falsity of the statement impugned in the same manner as on a charge of perjury. Corroboration is necessary (*ante*, pp. 409, 1061).

Where the declaration confirms any writing, the latter must be produced or secondary evidence of it, given after proof of proper notices to produce. *R.* v. *Cox*, 9 *Cox*, 301; 4 *F.* & *F.* 42. On an indictment for a false declaration as to the occurrence of a fire in the defendant's house, it was held that to prove the declaration to be wilfully false, evidence might be given that certificates sent to the insurers with the declaration were forged; *R.* v. *Boynes*, 1 *C.* & *K.* 65.

Indictment for making a False Declaration of the Loss of a Pawnbroker's Ticket. (35 & 36 *Vict.* c. 93, *s.* 29, *ante*, p. 1073.)

Northumberland, to wit:—The jurors for our lord the King upon their oath present, that J. S. did, on the sixth day of April, in the year of our Lord ——, at the parish of Tynemouth, in the borough of Tynemouth, in the county of Northumberland, unlawfully make a false declaration before J. B. B., esquire, one of his Majesty's justices of the peace for the said borough of Tynemouth, he the said J. S. then knowing the said declaration to be false in a certain material particular, that is to say in this, to wit, it was in the said declaration alleged by the said J. S. that he the said J. S. had lost a certain note or memorandum, being a pawnbroker's ticket;

whereas in truth and in fact he the said J. S. had not then lost the said ticket as he the said J. S. well knew at the time he made the said false declaration; against the form, etc. (*as ante*, p. 465).

As to the form of the indictment, see R. v. *Parker, L. R.* 1 *C. C. R.* 225; 39 *L. J.* (*M. C.*) 60; 11 *Cox*, 478, *ante*, p. 305.

Misdemeanor: punishable as perjury. 35 *&* 36 *Vict. c.* 93, *s.* 29 (*ante*, p. 1073). *Not triable at quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1 (7) (*ante*, p. 126).

To make a false declaration as to a pledge above the value of 10*l. is not an offence within the section. R.* v. *Tregoning*, 63 *J. P.* 504.

Evidence.

It is not necessary to call the magistrate before whom the declaration was made. *R.* v. *Browning*, 3 *Cox*, 437. And it is sufficient to prove his handwriting and that he acted within the district for which he was commissioned. *R.* v. *Morgan*, 1 *Cox*, 109, decided on 5 *&* 6 *W.* 4, *c.* 62, *s.* 12 (*and see ante*, p. 344). Two witnesses are necessary to falsify the declaration. *R.* v. *Browning, ubi supra*: 1 *Russ. Cr.* (6th ed.) 403, *n.* And it is necessary to prove that the pledge was not for more than 10*l. R.* v. *Tregoning, ubi supra.*

Indictment for making, and abetting the making, etc., a False Declaration under the Naturalization Act, 1870 (33 *&* 34 *Vict. c.* 14).

Commencement as in last precedent]—unlawfully, wilfully, and corruptly did make and subscribe a certain declaration under the *Naturalization Act*, 1870, purporting to be made in pursuance of regulations made by one of his Majesty's principal secretaries of state under the said Act, he the said A. B., then well knowing the said declaration to be untrue in certain material particulars, that is to say in this, to wit, that the said A. B., in and by the said declaration, did depose and declare that his name then was C. D., and that he the said A. B. then was a householder, and that he the said A. B. had personally known and been intimately acquainted with one M. S. for a period of five years then last past, whereas in truth and in fact the name of him the said A. B. was not C. D., and whereas in truth and in fact the said A. B. was not then a householder, and whereas in truth and in fact the said A. B. had not personally known the said M. S. for a period of five years then last past. And that the said M. S. on the said —— day of —— in the year aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully did aid, abet, counsel and procure the said A. B. the said misdemeanor, in manner and form aforesaid, to do and commit against the form, etc. [*as ante*, p. 465].

This precedent is framed from R. v. *Jefferies and Stearn, C. C. C., April Sessions*, 1897. *Quære, whether this offence is not also indictable as perjury under s.* 7 *of the Commissioners for Oaths Act*, 1889 (52 *&* 53 *Vict. c.* 10), *ante*, p. 1054. *In R.* v. *Rosenblum, Central Criminal Court, Nov.*, 1898, *an indictment was so framed; but the question of its validity was not raised.*

Misdemeanor: punishable by fine or imprisonment without hard labour (or both: see ante, pp. 238, 240). *Not triable at quarter sessions.* 5 *&* 6 *Vict. c.* 38, *s.* 1 (7), *ante*, p. 126.

Evidence.

Prove the regulations as directed, *ante*, p. 348, with reference to statutory rules, and the offence as directed, *ante*, p. 1074.

Sect. 6.

ADMINISTERING, ETC., VOLUNTARY OATHS, ETC.

Statute.

5 & 6 *W.* 4, *c.* 62 (*Statutory Declarations Act*, 1835), *s.* 13.]— . . . It shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath no jurisdiction or cognizance by some statute in force at the time being; provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial or punishment of offences, or touching any proceedings before either of the houses of parliament, or any committee thereof respectively, nor to any oath, affidavit or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively.

Sect. 6—*Act not to apply to oath of allegiance.*]—Provided always, that nothing in this Act contained shall extend or apply to the oath of allegiance in any case in which the same now is or may be required to be taken by any person who may be appointed to any office, but that such oath of allegiance shall continue to be required, and shall be administered and taken, as well and in the same manner as if this Act had not been passed. [*See Promissory Oaths Act*, 1868 (31 & 32 *Vict. c.* 72), *and* 1871 (34 & 35 *Vict. c.* 48).]

Sect. 7—*Not to apply to oaths in courts of justice, etc.*]—Provided also, that nothing in this Act contained shall extend or apply to any oath, solemn affirmation, or affidavit, which now is or hereafter may be made or taken, or be required to be made or taken, in any judicial proceeding in any court of justice, or in any proceeding for or by way of summary conviction before any justice or justices of the peace, but all such oaths, affirmations and affidavits shall continue to be required, and to be administered, taken and made, as well and in the same manner as if this Act had not been passed.

Indictment.

Commencement as ante, p. 1074]—J. S., on the —— day of ——, A.D. ——, then being one of the justices of our said lord the King, assigned to keep the peace in and for the said county, did unlawfully administer to and receive from a certain person, to wit, one J. N., a certain oath ("*oath, affidavit, or solemn affirmation*"), touching certain matters and things whereof the said J. S., at the time and on the occasion aforesaid, had not any jurisdiction or cognizance by any statute in force at the time being, to wit, at the time of administering and receiving the said oath; the same oath not being in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of any offence, or touching any proceedings before either of the houses of parliament, or any committee thereof respectively, nor

being an oath required by the laws of any foreign country to give validity to any instrument in writing, designed to be used in such foreign country; that is to say, a certain oath touching and concerning [*state the subject-matter of the oath, so as to show that it was not one of which the justice had jurisdiction or cognizance, and was not within the exceptions*]; against the form [*as ante*, p. 465]. *The indictment must negative the exceptions in the statute, and must show the subject-matter touching which the oath was administered, so as to enable the court to draw the legal inference that it was one of which the defendant had not cognizance; but it is not necessary to set out the oath verbatim. R.* v. *Nott*, 4 *Q. B.* 768; 12 *L. J.* (*M. C.*) 143; *Dav. & M.* 1; *C. & Mar.* 288.

Misdemeanor, as being a breach of the positive directions of the statute 5 & 6 *W.* 4, *c.* 62, *s.* 13 (*see ante*, p. 3). *Fine or imprisonment, or both. See ante*, pp. 238, 240. *This offence seems not to be triable at quarter sessions.* 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove that the defendant is a justice of the peace for the county mentioned in the indictment; evidence of his acting as such will, *primâ facie*, be sufficient. Prove that he administered to or received from J. N. an oath of the nature and touching the subject-matter mentioned in the indictment. It is not necessary to show that he acted *wilfully* in contravention of the statute; the doing so, even inadvertently, is punishable. *R.* v. *Nott*, *ubi supra.*

Sect. 7.

EMBRACERY.

Common Law.

Embracery is a misdemeanor indictable at common law, punishable by fine and imprisonment, and consists in attempting by bribes or any corrupt means whatsoever, other than evidence and argument in open court, to influence or instruct jurors, or to incline them to favour one party to a judicial proceeding. 1 *Hawk. c.* 85; 1 *Russ. Cr.* (6th ed.) 486: *R.* v. *Young*, 2 *East*, 14, *cit.* It is referred to as a crime in 34 *Edw.* 3, *c.* 8, and 38 *Edw.* 3, *st.* 1, *c.* 12 (both repealed), and an alternative remedy against persons embracing freeholders or jurors is given by 32 *H.* 8, *c.* 9, *s.* 3. But the criminal remedy continues (*see* 6 *G.* 4, *c.* 50, *s.* 61). In *R.* v. *Baker*, 113 *Cent. Crim. Ct. Sess. Pap.* 374, an indictment for embracery was quashed as insufficient. On a second indictment for the same offence preferred at a subsequent session, the prisoner was convicted. *Id.* p. 589.

Sect. 8.

INTERFERENCE WITH WITNESSES.

Common Law.

At common law interference with witnesses in courts of justice, by threats or persuasion to induce them not to give evidence, is a misdemeanor, punishable on indictment or information. 2 *Chit. Cr. L.* 220, 235: 2 *Taylor, Ev.* (9th ed.) 873: *R.* v. *Lawley*, 2 *Str.* 904: *R.* v. *Steventon*, 2 *East*, 362: *R.* v. *Loughran*, 1 *Crawf. & Dix.* (*Ir.*) 79: *R.* v. *Talley* [1875] 82 *Cent. Crim. Ct. Sess. Pap.* 518; also noted in *Stone's Justice's Manual* (37th ed.), 224; *and see R.* v. *Gray* [1903] 22 *N. Z. L. R.* 52, where the defendant was indicted for dissuading a witness from giving evidence. It is also summarily punishable as a contempt of court (*see* 1 *Russ. Cr.* (6th ed.) 197, 293, 487, *n.*: *Shaw* v. *Shaw*, 2 *Sw. & Tr.* 517; *and see R.* v. *Steventon, ubi supra*, and *Onslow's and Whalley's cases*, *L. R.* 9 *Q. B.* 219; 12 *Cox*, 358. To prevent a witness duly summoned from attending court is punishable as a contempt; *R.* v. *Hall*, 2 *W. Bl.* 1110: *Commonwealth* v. *Feeley*, 2 *Virg. Cas.* 1; or, in the event of combination, is indictable as a conspiracy to pervert the course of justice. 3 *Chit. Cr. L.* 1151: *R.* v. *Hamp*, 6 *Cox*, 167; *and post, Book II. Part III. s.* 1, *tit.* "*Conspiracy.*"

Statute.

55 *& 56 Vict. c.* 64 (*Witnesses Public Inquiries Protection Act*, 1892), *s.* 1.]—In this Act the word "inquiry" shall mean any inquiry held under the authority of any royal commission, or by any committee of either house of parliament, or pursuant to any statutory authority, whether the evidence at such inquiry is or is not given on oath, but shall not include any inquiry by a court of justice.

Sect. 2.]—Every person who commits any of the following acts, that is to say, who threatens or in any way publishes, damnifies or injures, or attempts to punish, damnify, or injure any person for having given evidence upon any inquiry, or upon account of the evidence which he has given upon any such inquiry shall, unless such evidence was given in bad faith, be guilty of a misdemeanor, and be liable on conviction thereof to a maximum penalty of one hundred pounds, or to a maximum imprisonment of three months.

Sect. 3.]—A prosecution for any offence under this Act may be heard and determined by a court of summary jurisdiction, under the *Summary Jurisdiction Acts*; provided that should either the complainant (*qu.* informant) or the party charged object to the case being dealt with summarily, the court shall send such case for trial to the quarter sessions or assizes, or, in cases arising within the metropolitan area, to the Central Criminal Court.

Sects. 4, 5.]—*Power to order the offender to pay compensation to parties aggrieved, and costs of prosecution; mode of enforcing the order.*

Sect. 7.]—*Saving as to privilege of parliament, and powers under other statutes.*

Indictment for attempting to dissuade, etc., a Witness from giving Evidence on a Charge of Felony. (*Common Law.*)

Commencement as ante, p. 433]—that heretofore, and before the commission of the offence by the said A. B. and C. D., in this count charged and stated, to wit, on the —— day of ——, A.D. ——, one E. F. and one G. H. were duly given into custody on a charge of felony, and that afterwards, to wit, on the —— day of ——, A.D. ——, the said E. F. and G. H. were charged, before K. L., esquire, one of the magistrates of the police courts of the metropolis, sitting at the M. police court, with the said felony [*specify the felony in accordance with the appropriate precedents, ante*], and the jurors aforesaid, on their oath aforesaid, do further present that upon the hearing of the said charge against the said E. F. and G. H. by the said magistrate, one N. O. was a material witness as to the truth of the said charge that the said A. B. and C. D., being evil-disposed persons and contriving and intending to obstruct and impede the due course of justice on the —— day of ——, A.D. ——, in the parish aforesaid, in the city of London, and within the jurisdiction of the said court, unlawfully did attempt and endeavour to dissuade, hinder and prevent the said N. O. from appearing before the said magistrate, so sitting as aforesaid, at the said police court to testify the truth and give evidence before the said magistrate touching the said charge against the said E. F. and G. H., to the great obstruction, hindrance and delay of public justice, in contempt of our said lord the King and his laws, and to the evil example of all others in the like case offending, and against the peace, etc. [*This precedent is framed from the indictment in R.* v. *Moyle and Brennan* (*Cent. Crim. Ct. Nov. Sess.* 1898). *See* 2 *Chit. Crim. Law*, 235: *R.* v. *Steventon*, 2 *East*, 362: *R.* v. *Gray* [1903] 23 *N. Z. L. R.* 52; *and ante*, p. 146.]

Misdemeanor: punishable by fine or imprisonment without hard labour (*or both*). (*See ante*, pp. 238, 240.)

Sect. 9.

Barratry, Champerty, and Maintenance.

Common Law.

Barratry.]—It is an indictable misdemeanor to be a common barrator, *i.e.*, "habitually to move, excite or maintain suits and quarrels." 8 *Co. Rep.* 36. The offence is rarely prosecuted. See the old authorities collected 1 *Hawk. c.* 81, and the *Encyclopædia of English Law*, *s.v. Barratry*, *Vol. II.* p. 23. Jurisdiction over the offence was given to sessions of the peace by 34 *Edw.* 3, *c.* 1. As to indictment, *see* precedent, *post*, p. 1080, taken from *R.* v. *Bellgrave* (*Guildford Assizes*, 1889). By 12 *G.* 1, *c.* 29, *s.* 4, solicitors practising after conviction of common barratry are liable on summary conviction in the High Court to transportation (penal servitude) for seven years. *See Steph. Dig. Cr. L.* (6th ed.) 113.

Champerty and maintenance.]—Champerty and maintenance are indictable misdemeanors, possibly at common law, but more probably under the statutes named below. *See Metropolitan Bank* v. *Pooley*, 10 *App. Cas.* 210, *Ld. Selborne*: *contra*, *Pechell* v. *Watson*, 8 *M. & W.* 691. "Champertors be they that move pleas or suits or cause to be moved either by their own procurement or by others, and sue them at their proper costs for to

have part of the land in variance, or part of the gains." 33 *Edw.* 1 (*Ordinacio de Conspiratoribus*). Champerty is punishable at the King's pleasure, or by fine and imprisonment, if committed by the King's officers. *See* 3 *Edw.* 1, *c.* 25; 13 *Edw.* 1 (*Stat. West. Sec.*), *c.* 49; 28 *Edw.* 1, *c.* 11, and the *Statutum de Conspiratoribus*, 1 *Rev. Stat.* (2nd ed.) 77. As to what is champertous, *see Re Thomas* [1894] 1 *Q. B.* 747: *Rees* v. *De Bernardy* [1896] 2 *Ch.* 437. As to venue, *see* 31 *Eliz. c.* 5. Maintenance is said to consist in the unlawful taking in hand or upholding of or assisting in civil suits, or quarrels of others, to the disturbance of common right, and from motives other than charitable motives. *See Bradlaugh* v. *Newdegate*, 11 *Q. B. D.* 1: *Harris* v. *Brisco*, 17 *Q. B. D.* 504: *Alabaster* v. *Harness* [1895] 1 *Q. B.* 339 (A.). It is not maintenance to assist another in a criminal prosecution. *Harris* v. *Brisco, ubi supra. See* 1 *Hawk. cc.* 83, 84; 1 *Russ. Cr.* (6th ed.) 447; *Roscoe, Cr. Ev.* (12th ed.) 616.

Indictment for Maintenance and Barratry.

Surrey, to wit:—The jurors for our lord the King upon their oath present, that F. B., on the 20th day of September, A.D. 1903, and on divers days and times between that day and the 17th day of February, A.D. 1904, did unlawfully and unjustly maintain and uphold a certain action, then depending in the High Court of Justice, King's Bench Division, wherein W. F., M. F. his wife, and O. F. an infant, by W. F. his next friend, were the plaintiffs, and the London and South Western Railway Company were the defendants, for the recovery of damages for injuries alleged to have been caused by the negligence of the defendants in the said action; against the form, etc. [*as ante*, p. 465].

Second Count: And the jurors aforesaid, upon their oath aforesaid, do further present that F. B. on the —— day of ——, A.D. 1903, and on divers other days, as well before and afterwards, was and yet is a common barrator, and that he the said F. B., on the said 8th day of August, A.D. 1903, and on the divers other times aforesaid, divers quarrels, strifes, suits, and controversies among the liege subjects of our lord the King then and there did move, procure, set up, and excite, to the common nuisance of the liege subjects of our lord the King, and against the peace of our said lord the King, his crown and dignity.

This precedent is framed from the indictment in R. v. *Bellgrave* (*Guildford Assizes*, 1889). *The prosecutor may be ordered to give particulars of the acts relied on as constituting the offence.* (*See ante*, p. 70.)

Misdemeanors: punishable by imprisonment, without hard labour, and (*or*) *fine* (*ante*, pp. 238, 240, 1079).

Sect. 10.

BRIBERY OF PUBLIC OFFICIALS.

Common Law.

It has been held to be a misdemeanor at common law to bribe a privy councillor (*R.* v. *Vaughan*, 4 *Burr.* 2494, 2500), or to bribe a juryman. *Young's case*, 2 *East*, 14, 16, *cit.* (*and see Embracery, ante*, p. 1077). The offer of a bribe is an attempt to bribe, and is also a misdemeanor. 3 *Co.*

Inst. 147: *R.* v. *Vaughan, ubi supra.* So is the taking of a bribe by an officer judicial or ministerial. *Id., and see* 3 *Edw.* 1 (*Stat. West. Prim.*), *c.* 26 (*post*, p. 1083); 20 *Edw.* 3, *c.* 1 (*rep.*); *Com. Dig. Officer* (1); 1 *Hawk. c.* 67; 3 *Chit. Cr. L.* 683. Some of the text-books confine the offence of bribery to bribery of officers of justice (*see* 3 *Steph. Hist. Cr. L.* 250; 3 *Co. Inst.* 145; *Lord Macclesfield's case*, 16 *St. Tr.* 767), but this definition of the offence seems too narrow and confined. *See R.* v. *Beale*, 1 *East*, 183, *cit.*: *R.* v. *Vaughan*, 4 *Burr.* 2494. And an attempt to bribe a custom house officer has been held indictable. *R.* v. *Cassano*, 5 *Esp.* 231. Payment, or the promise of payment, for votes at the election of an assistant overseer of a parish, is bribery, and as such has been held to be an indictable common law misdemeanor. *R.* v. *Lancaster*, 16 *Cox*, 737, where *Wills*, J., held that the nature of the office of the person bribed was immaterial so long as it was public. *See R.* v. *Bowler, C. & Mar.* 559: *R.* v. *Boyes*, 2 *F. & F.* 157. On this subject *see also ante*, p. 145.

Statutes.

The purchase or sale of public offices is punishable under 5 *& 6 Edw.* 6, *c.* 16, and 49 *G.* 3, *c.* 126. *See* 3 *Chit. Cr. L.* 681 (*c.*); 1 *Russ. Cr.* (6th ed.) 433. It is said to be regarded at common law as a form of bribery. *See R.* v. *Pollman*, 2 *Camp.* 229, *n.*; 11 *R. R.* 698. The taking of bribes by Indian officials is punishable in England under 33 *G.* 3, *c.* 52, *s.* 62. *See Ilbert, Government of India*, 259: *R.* v. *Douglas*, 13 *Q. B.* 42.

As to bribery at parliamentary and municipal elections, *see post, ch. vi. ss.* 9, 10. As to bribery, etc., of or by members of public bodies, *see post, ch. vi. s.* 11.

Bribery of customs officers and their acceptance of bribes is punished by fine under 39 *& 40 Vict. c.* 36, *s.* 217, and like provisions are made as to officers of inland revenue, by 53 *& 54 Vict. c.* 21, *s.* 10. But the offences created by these statutes are not indictable.

Indictment for attempting to bribe a Constable to refrain from making Inquiries as to Bail. (Common Law.)

Commencement as ante, p. 1057]—that heretofore, to wit, on the —— day of ——, A.D. ——, Y. Z., esquire, then and yet being one of the magistrates of the police courts of the metropolis sitting at the —— police court in the metropolitan police district, did duly commit one A. B. to prison to take his trial at the then ensuing sessions of the said C. C. C. commencing on the —— day of ——, in the year aforesaid, upon a charge of larceny on the high seas, and did, in the due exercise of his discretion in that behalf, offer to admit the said A. B. to bail upon his procuring and producing one surety in the sum of 100*l.* who would, in the opinion of the said Y. Z., esquire, so being such magistrate as aforesaid, be sufficient to ensure the appearance of the said A. B. at the said time and place when and where he was to be tried for the said offence; and afterwards, to wit, on the —— day of ——, in the year aforesaid, C. D. did tender himself as such surety in the sum of 100*l.* for the said A. B., and thereupon it became and was the duty of E. F. and G. H., then being police constables and detective sergeants of the metropolitan police, to inquire and ascertain the position and means of the said C. D. and report truly to the said magistrate thereupon.

And the jurors, etc., present that the said C. D. on the said —— day of

——, in the year aforesaid, at the parish of ——, in the county of London, and within the jurisdiction of the said court, well knowing the premises, but contriving and unlawfully intending to pervert the due course of law and justice and to prevent due inquiries into and a true report to the said magistrate upon his position and means, unlawfully, wickedly and corruptly did give the sum of 1*l.*, and did offer the further sum of 5*l.*, to each of the said police constables E. F. and G. H. then being entrusted with the duty of inquiring and reporting to the said magistrate as aforesaid to induce them to refrain from making due inquiries into the position and means of him the said C. D. and to induce them to report to the said Y. Z., esquire, so being such magistrate as aforesaid, without such inquiries and contrary to their duty in that behalf, that he the said C. D. was a proper person to be accepted by the said magistrate as a surety for the appearance of the said A. B. at the said sessions of the C. C. C. to take his trial for the said offence of larceny on the high seas. And so the jurors, etc., do say that the said C. D., on the said —— day of ——, in the year aforesaid, within the jurisdiction aforesaid, in manner and form aforesaid, did unlawfully attempt and endeavour to bribe the said E. F. and G. H., so being such police constables as aforesaid, to neglect and omit to do their duty as such police constables and to refrain from making due inquiries into the position and means of the said C. D. and to report to the said magistrate without such due inquiries, contrary to their duty in that behalf, in contempt of our lord the King and his laws, to the evil example of all others in like case offending, and against the peace, etc.

[*Recent instances of trials for offences of this nature are R.* v. *Richardson* [1890] 111 *Cent. Crim. Ct. Sess. Pap.* 612 (*from the indictment in which case the above precedent is framed*), *and R.* v. *Lehwess* [1904] 140 *Cent. Crim. Ct. Sess. Pap.* 731, *where the defendant attempted to bribe a constable to refrain from giving evidence against him for offences under the Motor Car Act*, 1903.]

Misdemeanor at common law: punishable with fine or imprisonment without hard labour, or both (*see ante*, pp. 238, 240), *whether the bribe was accepted or not.* 3 *Co. Inst.* 147.

Bribery is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Indictment for attempting to bribe a Constable to refrain from executing Warrant. (*Common Law.*)

Surrey to wit:—The jurors for our lord the King upon their oath present, that heretofore, to wit, on the first day of June, in the year of our Lord ——, one A. C., esquire, then and yet being one of the justices of our said lord the King, assigned to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers crimes, trespasses, and other offences committed in the said county [*see present forms of commission of peace, Stat. Rules and Orders Revised* (ed. 1904), *vol.* 2., *tit.* "*Clerk of the Crown in Chancery*"] made a certain warrant under his hand and seal, in due form of law, bearing date the day and year aforesaid, directed to all constables and other peace officers of the said county, and especially to J. N., thereby commanding them, upon sight thereof, to take and bring before him the said A. C., so being such justice as aforesaid, or some other of his Majesty's justices of the peace for the said county, the body of D. F., late of the parish aforesaid, in the county aforesaid, to answer [*etc., etc., as in the warrant*]: and which said warrant afterwards, to wit, on the day and year aforesaid, was

delivered to the said J. N., then being one of the constables and peace officers of the same county, to be executed in due form of law. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., well knowing the premises, but contriving and unlawfully intending to pervert the due course of law and justice, and to prevent the said D. F. from being arrested and taken under and by virtue of the warrant aforesaid, afterwards, to wit, on the day and year aforesaid, unlawfully, wickedly and corruptly did offer unto the said J. N., so being constable as aforesaid, and having in his custody and possession the said warrant so delivered to him to be executed as aforesaid, the sum of ten pounds, if he the said J. N. would refrain from executing the said warrant, and from taking and arresting the said D. F. under and by virtue of the same, for and during fourteen days from that time, that is to say, from the time he the said J. S. so offered the said sum of ten pounds to the said J. N. as aforesaid: and so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the said first day of June, in the year aforesaid, in manner and form aforesaid, did unlawfully attempt, and endeavour to bribe the said J. N., so being constable as aforesaid, to neglect and omit to do his duty as such constable, and to refrain from taking and arresting the said D. F. under and by virtue of the warrant aforesaid: in contempt of our lord the King and his laws, to the evil and pernicious example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. [*For an instance of attempts to bribe a justice of the peace, see R.* v. *Gurney*, 10 *Cox*, 550.]

Punishment as under the last precedent.

Evidence.

Prove the warrant and the delivery of it to J. N.; and prove that J. S. knew that J. N. had the warrant and offered him ten pounds to refrain from executing it, as stated in the indictment.

Sect. 11.

EXTORTION BY PUBLIC OFFICIALS.

Statutes.

3 *Edw.* 1 (*Stat. West. I'rim.*), *c.* 26—*Extortion by King's officers.*]—And that *no sheriff* nor other the King's officer take any reward to do his office, but shall be paid of that which they take by the King, and he that so doth shall yield twice so much, and shall be punished at the King's pleasure. [*Rep. as to sheriffs and their officers*, 50 & 51 *Vict. c.* 55, *s.* 39.]

10 *W.* 3, *c.* 12, *ss.* 7, 8.]—*Ante*, p. 98.

55 *G.* 3, *c.* 50, *s.* 9—*Extortion by gaolers and clerks of court.*]—Any clerk of assize, clerk of the peace, clerk of the court, or their deputies or other officers exacting such fees, shall be rendered incapable of holding his or their offices, and shall be guilty of a misdemeanor. [*The prohibited fees are enumerated in s.* 5 *and in* 8 & 9 *Vict. c.* 114, *s.* 1 *ante*, p. 228.]

Sect. 13.]—Any gaoler who shall exact from any prisoner any fee or

gratuity for or on account of the entrance, commitment, or discharge of such prisoner, or who shall detain any prisoner in custody for non-payment of any fee or gratuity, shall be rendered incapable of holding his office, be guilty of a misdemeanor, and be punished by fine and imprisonment.

50 & 51 *Vict.* c. 55, *s.* 29 (2) (*b*)—*Extortion by sheriffs or their officers punishable in the same way as contempt of court.*]—*As to the effect of this section, see Lee* v. *Dangar* [1892] 1 *Q. B.* 231; 2 *Q. B.* 337: *Shoppee* v. *Nathan* [1892] 1 *Q. B.* 245: *Bagge* v. *Whitehead* [1892] 2 *Q. B.* 355: *Trustee of Woolford's Estate* v. *Levy* [1892] 1 *Q. B.* 772.

50 & 51 *Vict.* c. 71 (*Coroners Act*, 1887), *s.* 8 (2).]—A coroner who is guilty of extortion, or of corruption or wilful neglect of his duty, or of misbehaviour in the discharge of his duty, shall be guilty of a misdemeanor. . . . [*Here follow provisions for removal from office.*]

Indictment against a Constable for Extortion. (*Common Law.*)

Surrey, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, then being one of the constables of the county of S., did take and arrest one J. N., by colour of a certain warrant, commonly called a bench warrant, which he the said J. S. then alleged to be in his possession: and that the said J. S. afterwards, and whilst the said J. N. so remained in his custody as aforesaid, to wit, on the day and year aforesaid, unlawfully, corruptly, deceitfully, extorsively, and by colour of his said office did extort, receive, and take of and from the said J. N. the sum of five shillings (*see Lake's case*, 3 *Leon.* 268) as and for a fee due to him the said J. S. as such constable as aforesaid for the obtaining and discharging of the said warrant, as he the said J. S. then alleged; whereas, in truth and in fact, no fee whatever was then due from the said J. N. to the said J. S. as such constable as aforesaid in that behalf; in contempt (*as in last precedent*). *Lay the venue in the jurisdiction where the offence was committed* (*see ante*, p. 47). *See the precedents, Cro. Circ. Comp.* 193, 194, 195; 4 *Went.* 146; *and see* 3 *Co. Inst.* 148, 149: *R.* v. *Baines*, 2 *Ld. Raym.* 1265.

Misdemeanor: fine or imprisonment, without hard labour (*ante*, pp. 238, 240), *or both, and amotion from office.* 1 *Hawk* c. 68, *s.* 5.

Extortion is triable at quarter sessions. *R.* v. *Loggen*, 1 *Str.* 73, 75; 3 *Co. Inst.* 149; 5 & 6 *Vict.* c. 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the arrest, and prove that the defendant exacted money as a fee due to him as stated in the indictment. The sum stated is not material; proof of a less sum will maintain the indictment. *R.* v. *Burdett*, 1 *Ld. Raym.* 148; *and see R.* v. *Gillham*, 6 *T. R.* 265: *R.* v. *Higgins*, 4 *C. & P.* 247: *Lake's case*, 3 *Leon.* 268.

The gist of the offence lies in taking under colour of office from any person any money or valuable thing which is not due from him; if the act is done otherwise than in good faith. *Beawfage's case*, 10 *Co. Rep.* 102 *a*. And it is equally extortion where a greater fee is exacted than what is legally due, as where money is exacted as a fee, where none whatever is payable. *See* 1 *Hawk.* c. 68, *s.* 1: *R.* v. *Baines*, 2 *Ld. Raym.* 1265;

2 *Salk.* 680. The offence may be committed by judicial or executive officers. *See cases collected*, 1 *Russ. Cr.* (6th ed.) 425; *Encycl. Laws of England, tit.* "*Extortion.*" For a gaoler to detain the corpse of a prisoner for a debt due to him is a misdemeanor. *R.* v. *Fox*, 2 *Q. B.* 246: *R.* v. *Scott, Id.* 248, *n.*: *Jones* v. *Ashburnham*, 4 *East*, 455, 460. For other offences akin to extortion, *see Official Index to Statutes* (ed. 1904), *tit.* "*Extortion*," 1. As to trial in England of Indian officials for extortion, *see ante*, p. 1081, and *Ilbert, Government of India*, 261. As to extortion of turnpike tolls, *see R.* v. *Hamlyn*, 4 *Camp.* 379.

Sect. 12.

Misconduct of Officers of Justice.

Common Law.

Every malfeasance or culpable non-feasance of an officer of justice with relation to his office is a misdemeanor, and punishable with fine or imprisonment, or both. *See R.* v. *Wyat*, 1 *Salk.* 380 (neglect by a constable to levy a penalty under a justice's warrant directed to him); *Crowther's case, Cro. Eliz.* 654 (refusal by a constable on notice to pursue a felon); and 2 *Chit. Cr. L.* 267; 1 *Russ. Cr.* (6th ed.) 416–421. As to misconduct by sheriffs and their officers, *see* 50 & 51 *Vict. c.* 55, *s.* 29 (*ante*, p. 1084). As to misconduct by coroners, *see* 50 & 51 *Vict. c.* 71, *s.* 8 (2), and *R.* v. *Whitcomb*, 1 *C. & P.* 124.

Indictment against a Constable for not conveying an Offender to Prison.
(*Common Law.*)

Proceed as in the precedent, ante, pp. 1032, 1033, *as far as the* *, *and then proceed thus*:]—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., so being one of the constables of the said —— as aforesaid, and being so commanded by the said A. C., the said justice as aforesaid, unlawfully and contemptuously did then neglect and refused to convey the said J. N. to the said prison, as he the said J. S. by virtue of his office aforesaid, by law should and ought to have done: to the great hindrance of justice, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. *See the precedents, Cro. Circ. Comp.* 143, 151, 170.

Evidence.

Prove the charge before the magistrate, the warrant and the delivery of it to the defendant, as directed *ante*, p. 1033. And prove that the defendant neglected or refused to convey the offender to prison in pursuance of the warrant. It is unnecessary to prove the defendant's appointment as constable; proof that he was accustomed to act as such will be sufficient (*ante*, p. 344).

Indictment against a Magistrate for committing in a Case where he had no Jurisdiction. (*Common Law.*)

Surrey, to wit:—The jurors for our lord the King upon their oath present, that on the first day of June in the year of our Lord ——, one T. C., then being one of the constables and police officers of the county of S., brought one J. N. before J. S., esquire, then and yet being one of the justices of our said lord the King assigned to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers crimes, trespasses, and other offences committed in the said county; and the said J. N. was then charged before the said J. S. with having committed a certain supposed misdemeanor, in having vilified the character and hurt the trade of one A. C., of the parish aforesaid, miller; [and the said J. N. was then and there examined before the said J. S., as such justice as aforesaid, touching the said supposed offence so to him charged as aforesaid (*see precedent ante*, p. 1032)]. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., so being such justice as aforesaid, wickedly and maliciously contriving and intending to oppress, injure and aggrieve the said J. N. in this behalf, and to put him to great charge and expense, and to cause him to undergo and suffer great pain, torture and anguish of body and mind, afterwards, to wit, on the day and year aforesaid, did order and direct that the said J. N. should find sureties for his personal appearance at the then next general quarter sessions of the peace of our said lord the King, to be holden in and for the said county of M., to answer the said charge; and, because the said J. N. did not and could not conveniently find such sureties as aforesaid, he the said J. S., being such justice as aforesaid, wickedly and maliciously contriving and intending as aforesaid, wrongfully, unjustly and maliciously, and contrary to the laws of this realm, did then by virtue and under colour of a certain warrant under his hand and seal, as such justice as aforesaid, commit the said J. N. a prisoner to a certain prison called the —— Prison, situate at the parish aforesaid, in the county aforesaid, to be there safely kept until he the said J. N. should find such sureties as aforesaid, and until he should be fully examined concerning the premises; and then ordered, directed, and commanded the then keeper of the said prison to keep the said J. N. under close confinement in the said prison, and to deny him the use of pen, ink, and paper, and to allow no letter to be delivered to or from the said J. N., and also to allow no person to see or speak to him the said J. N. And the jurors aforesaid, upon their oath aforesaid, do further present that the said J. S., by virtue and under colour of the warrant aforesaid, afterwards, to wit, on the day and year aforesaid, and from thence, for a long space of time, to wit, for the space of ten days then next following, wrongfully, unjustly and maliciously, and contrary to the laws of this realm, did cause and procure the said J. N. to be closely confined and imprisoned in the said prison, and to be denied the use of pen, ink, and paper, and to be restrained from all communications with his relations and friends; whereby the said J. N. during all that time underwent and suffered great pain, torture and anguish of body and mind, and was deprived of his liberty, and prevented from finding such sureties as aforesaid, and was put to great charge and expense in and about obtaining his discharge and release from the said commitment and imprisonment: to the great scandal of the administration of justice in this kingdom, in contempt of our lord the King and his laws, to the evil example, etc. (*as in last precedent*).

As to cases in which magistrates have been prosecuted, see ante, p. 147.

Where magistrates are guilty of oppression, or other wilful malfeasance in

the execution of their duties, they have generally been proceeded against by information, and not by indictment. (*See ante*, pp. 146, 147.) *But such an information can readily be framed from this precedent, by observing the forms given ante*, pp. 143, 151. *See the precedents, Cro. Circ. Comp.* 242, 244; 4 *Went.* 364, 418, 424; 6 *Went.* 455. *See also a precedent of an indictment against a coroner for refusing to take an inquisition, Cro. Circ. Comp.* 170; *and see* 2 *Chit. Cr. L.* 255.

Misdemeanor: fine or imprisonment (*without hard labour, ante*, pp. 238, 240), *or both.*

Evidence.

Prove the charge before J. S., the warrant, etc., and the imprisonment; together with any circumstances of aggravation laid in the indictment. Also, if the case will admit of it, evidence may be given of any circumstances which indicate that the commitment proceeded from malice or other undue motive upon the part of the magistrate. *See R.* v. *Sainsbury*, 4 *T. R.* 451; 2 *R. R.* 433. The *Justices Protection Act*, 1848 (11 & 12 *Vict. c.* 44), does not seem to apply to criminal proceedings against a justice.

Sect. 13.

DISOBEYING THE ORDERS OF JUSTICES.

. Disobedience of an order of justices is a misdemeanor at common law. *See* 2 *Chit. Cr. L.* 279 and the cases citod *infra.*

Indictment at Quarter Sessions against a Chief Constable for disobeying an Order of Sessions. (*Common Law.*)

County of London, to wit:—The jurors for our lord the King upon their oath present, that at the general quarter sessions of the peace of our lord the King, holden for the county of London, at the New Sessions House on Clerkenwell Green, in and for the county aforesaid, by adjournment, to wit, on the day of ——, in the year of our Lord ——, before F. C., J. W., W. R., and R. M., esquires, and others their fellows, justices of our said lord the King assigned to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers crimes, trespasses, and other offences (*see note to precedent, ante*, p. 1082), committed in the said county, it was ordered by the same justices and court there, that [*etc., proceeding to state the substance of the order of sessions in the past tense*]; of which said order the said J. S., one of the chief constables [*or other officers*] in the order aforesaid named, afterwards, to wit, on the day and year aforesaid, had notice. Nevertheless, the said J. S., then being one of the chief constables in the order aforesaid mentioned, unlawfully and contemptuously, upon being served with the said order, did neglect and refuse to [*etc., here insert what the order required of him*], as by the said order he the said J. S. was required to do; nor hath he the said J. S. at any time since complied with the said order, although often requested so to do; in contempt, etc. (*as in last precedent*). *The precedent editions prior to the 22nd dealt with high constables. Under* 32 & 33 *Vict. c.* 47, *that office has been discontinued, and the chief constable of the county for most purposes substituted.*

Misdemeanor: fine and imprisonment, without hard labour (*ante*, pp. 238, 240), *or both.*

As to this form of offence, see ante, p. 5, *and* 1 *Russ. Cr.* (6th ed.) 883; *and as to essentials of the indictment, see R.* v. *Gilkes*, 8 *B. & C.* 439; 3 *C. & P.* 52. *The service of the order must be averred. R.* v. *Moorhouse*, 4 *Dougl.* 388.

See the precedent of indictments, against an overseer of the poor for not paying a weekly sum to a pauper in pursuance of an order of justices (*Cro. Circ. Comp.* 327: *see R.* v. *Meredith*, *R. & R.* 46: *R.* v. *Booth*, *Id.* 47, *n.*: *R.* v. *Warren*, *Id.* 48, *n.*; 1 *Russ. Cr.* (6th ed.) 420); *against the treasurer of a county for disobeying an order to pay costs made under* 7 *G.* 4, *c.* 64 (*R.* v. *Jones*, 2 *Mood. C. C.* 171; 9 *C. & P.* 401) (*see ante*, p. 257); *or under a lawful order of quarter sessions* (*R.* v. *Wilkinson*, 2 *M. & Rob.* 431); *against the father of a bastard child, for not obeying an order of maintenance* (4 *Went.* 227: *and see R.* v. *White*, *Cald.* 183: *R.* v. *Robinson*, 2 *Burr.* 799: *R.* v. *Balme*, 2 *Cowp.* 648: *R.* v. *Fearnley*, 1 *T. R.* 316: *R.* v. *Davis*, *Say.* 163: *R.* v. *Gould*, 1 *Salk.* 381: *R.* v. *Cant*, *C. & Mar.* 521; 2 *Mood. C. C.* 271: *R.* v. *Brisby*, 1 *Den.* 416; 2 *C. & K.* 962: *R.* v. *Ferrall*, 2 *Den.* 51; 20 *L. J.* (*M. C.*) 39); *for disobedience to an order of justices for payment of a church-rate* (*R.* v. *Bidwell*, 1 *Den.* 222; 2 *C. & K.* 564; 17 *L. J.* (*M. C.*) 99: *R.* v. *Williams*, 1 *Den.* 529; *see* 31 *& 32 Vict. c.* 109); *for disobedience by the stewards of a benefit society to an order by justices to readmit a member*, *R.* v. *Gilkes*, 3 *C. & P.* 52. *It is sufficient to set out the substance of the order correctly; it need not be set out verbatim according to the tenor. R.* v. *Bidwell*, *ubi supra.*

Evidence.

Produce the order. Prove a personal service of a copy of it upon the defendant, and upon all the defendants if there be more than one and the order be joint and not several. *See R.* v. *Kingston*, 8 *East*, 41. And prove that the defendant did not obey the order. *See R.* v. *Fearnley*, 1 *T. R.* 316.

Sect. 14.

COMPOUNDING OFFENCES.

Common Law.

Compounding felony.]—The offence of theft-bote at common law is committed "where the owner not only knows of the felony, but taketh of the thief his goods again, or amends for the same to favour or maintain him, that is, not to prosecute him to the intent that he may escape." 3 *Co. Inst.* 134.

The punishment of theft-bote is ransom and imprisonment. *Id.* 134; 1 *Hale*, 619; 2 *Hale*, 400; 1 *Hawk. c.* 59, *ss.* 5, 6; 2 *Chit. Cr. L.* 220. It has been held that the offence can be committed by a person not the owner of the goods. *R.* v. *Burgess*, 16 *Q. B. D.* 141, 147 (*C. C. R.*). The offence is usually now described as compounding a felony. It differs from misprision of felony, which can be committed without taking any active steps to protect the felon from justice. *See* 3 *Co. Inst.* 140; 1 *Hale*, 373; 1 *Chit. Cr. L.* 232; 1 *Russ. Cr.* (6th ed.) 411. The offence of compounding is complete when the agreement not to prosecute is made, whether it is

performed or not (*R.* v. *Burgess, ubi supra*); and the agreement not to prosecute for felony is no defence to an indictment for the felony preferred in breach of the agreement. *R.* v. *Daly*, 9 *C. & P.* 342: *cf. Re Bryant*, 27 *J. P.* 277, 289. It is said that except where the attorney-general enters a *nolle prosequi* (*ante*, p. 139), it is necessary to obtain the leave of the court to abandon a prosecution after the indictment is found, whether the prosecution desire to effect this purpose by offering no evidence, or otherwise. *R.* v. *Nicholson, Cent. Crim. Ct., June* 28, 1899, *Darling*, J. In *R.* v. *Roxburgh*, 12 *Cox*, 8, where, on a trial for felony, the jury disagreed, *Cockburn*, C.J., directed their discharge, that the accused might plead guilty to a common assault, and make compensation for the injuries caused. In the 21st edition of this work, at p. 186, it was stated that "it has not been infrequent on trials at the Central Criminal Court, and probably in other criminal courts, for the prosecutor to abandon the prosecution, the person accused agreeing to bring no action for false imprisonment or malicious prosecution." An instance of this practice will be found in *Jones* v. *German* [1896] 2 *Q. B.* 418, 422; [1897] 1 *Q. B.* 374; 65 *L. J.* (*M. C.*) 212. But it does not appear that such arrangements are made with the sanction or approval of the court; and it is submitted that if made they are not enforceable. (*a*)

Withdrawing from or stifling prosecutions for misdemeanor.]—Except in cases within 18 *Eliz. c.* 5 (*post*, p. 1091), there seems to be no precedent of an indictment for compounding a misdemeanor, or stifling a prosecution for misdemeanor, unless it is done under circumstances constituting a conspiracy to pervert or defeat justice (*see* 1 *Steph. Hist. Cr. L.* 502; 1 *Russ. Cr.* (6th ed.) 412; 1 *Chit. Cr. L.* 3), or amounting to interference with witnesses (*see ante*, p. 1078). The illegality of such a transaction from the point of view of enforcing any contract made for such a purpose is well established, (*a*) and it is the undoubted right of the crown to proceed

(*a*) Contracts to stifle or withdraw from a prosecution for any offence, even if made with the sanction of a court, are illegal and unenforceable, either at law or in equity. *Windhill Local Board* v. *Vint*, 45 *Ch. D.* 351: *In re Campbell*, 14 *Q. B. D.* 32: *Kaufmann* v. *Gerson* [1904] 1 *K. B.* 591 (*C. A.*): *Johnson* v. *Ogilby*, 3 *P. Wms.* 277; 24 *Eng. Rep.* 1064: *Collins* v. *Blantern*, 2 *Wils.* (*K. B.*) 341; 1 *Smith, L. C.* (11th ed.) 369: *Edgcombe* v. *Rodd*, 5 *East*, 294, 302; 7 *R. R.* 500: *Rawlings* v. *Coal Consumers Association*, 48 *L. J.* (*M. C.*) 111. They do not affect the jurisdiction to proceed with the trial of the offence in question, *Re Bryant*, 27 *J. P.* 277, 289; and even in civil proceedings, though the illegality is not pleaded, the court may intervene and dismiss the action. *Scott* v. *Brown* [1892] 2 *Q. B.* 724; 61 *L. J.* 638: *Whitmore* v. *Farley*, 14 *Cox*, 617; 29 *W. R.* 825.

In *Windhill Local Board* v. *Vint*, *ubi supra*, the plaintiffs, a local board, had indicted the defendants for obstructing a highway. At the trial of the indictment, a compromise was made by the parties and sanctioned by the judge, and afterwards confirmed by deed. By this deed the defendants covenanted to restore the road within seven years, and the plaintiffs covenanted that when that had been done they would consent to a verdict of "not guilty" on the indictment. The defendants failed to restore the road, and the plaintiffs then brought an action on their covenant. It was held by the Court of Appeal, affirming the judgment of *Stirling*, J., that as the indictment was for a public inquiry, the agreement to consent to a verdict of "not guilty" was illegal, and that the plaintiffs could not maintain an action on the defendant's covenant.

The following cases have been held to fall within the rule: A contract to stop an election petition (*Coppock* v. *Bower*, 4 *M. & W.* 361; 8 *L. J.* (*Ex.*) 9); securities given to stop a prosecution for cheating at cards (*Osbaldiston* v. *Simpson*, 13 *Sim.* 513); a promissory note given on condition that the plaintiff would not prosecute the defendant for obtaining money by false pretences (*Clubb* v. *Hutson*, 18 *C. B.* (*N. S.*) 414: *cf. Pool* v. *Bousfield*, 1 *Camp.* 55; 10 *R. R.* 633); a bill accepted by a person accused of embezzlement in consideration of refraining from prosecution, unless it is in the hands of a *bonâ fide* holder for value without notice (*Fivaz* v. *Nicholls*, 2 *C. B.* 501: *cf. Wallace* v. *Hardacre*, 1 *Camp.* 45); a bond given to secure abstention from prosecution

with a prosecution for a misdemeanor notwithstanding any such transaction. Moreover, by *s.* 5 of the *Prosecution of Offences Act*, 1879 (42 & 43 *Vict. c.* 22), it is the duty of every clerk to a justice or to a police court to transmit, in accordance with the regulations under the Act (printed in *Statutory Rules and Orders Revised* (ed. 1904), *vol.* 4, *tit.* "*Criminal Procedure, E.*," p. 7), to the Director of Public Prosecutions a copy of the information and of all depositions and other documents relating to any case in which a prosecution for an offence instituted before such justice or court is withdrawn or is not proceeded with within a reasonable time. In the draft Criminal Code of 1878 it was provided (art. 127) that "every one shall be guilty of an indictable offence, and shall be liable on conviction to two years' imprisonment with hard labour, who wilfully attempts *in any way*, though not otherwise criminal, to obstruct, prevent, pervert, or defeat the course of justice or the administration of the law." (*Cf. Steph. Dig. Cr. L.* (6th ed.) 122.) This clause appears to have been considered by the judges who reported on the code to state the existing law. (*See their report*, p. 21.) As will be seen, it is not confined to cases of conspiracy (*post*, *Book II. Part III. s.* 1), or interference with witnesses (*ante*, p. 1078), or fabrication of evidence (*ante*, p. 1071), or incitement to give false evidence (*ante*, p. 1071). And the clause is wide enough to cover cases of assisting a misdemeanant to escape arrest, or compounding or stifling a prosecution for misdemeanor. The old distinction between felony and

(*Cannon* v. *Rands*, 11 *Cox*, 631). As to substituting a genuine for a forged bill, *see Wallace* v. *Hardacre*, *ubi supra*. As to lending money to take up a forged bill, *see Re Mapleback*, 4 *Q. B. D.* 150, 156; 13 *Cox*, 374.

Where a third person acting under undue influence enters into a contract for the *express* purpose of securing another from criminal prosecution, the contract is invalid. *Williams* v. *Bayley*, *L. R.* 1 *H. L.* 200; 35 *L. J.* (*Ch.*) 717: *Jones* v. *Merionethshire Permanent Benefit Building Society* [1892] 1 *Ch.* 173; 65 *L. J.* (*Ch.*) 138; 17 *Cox*, 889: *McClatchie* v. *Haslam*, 17 *Cox*, 402 (*C. A.*): *and see Kaufmann* v. *Gerson* [1904] 1 *K. B.* 591. But to invalidate a contract of this kind there must be pressure and more than mere inducement (*Flower* v. *Sadler*, 9 *Q. B. D.* 83; 10 *Q. B. D.* 572: and *McClatchie* v. *Haslam*, *ubi supra*), and the discontinuance of the proceedings must be part of the consideration. *See Harding* v. *Cooper*, 1 *Stark.* (*N. P.*) 467.

For the rule to apply it would seem that the prosecution must have been instituted, or that there are reasonable grounds, not necessarily amounting to complete proof, for commencing it. *Kirwan* v. *Goodman*, 9 *Dowl.* 330; 5 *Jur.* (*O. S.*) 293: and *Rourke* v. *Mealy*, 4 *L. R. Ir.* 166, *Palles*, C.B.: *S. C. sub nom. Bourke* v. *Mealy*, 14 *Cox*, 329: *Davies* v. *London, etc., Marine Ins. Co.*, 8 *Ch. D.* 469; 47 *L. J.* (*Ch.*) 511.

The following cases have been held not to fall within the rule: Where a man gave a warrant of attorney to secure a debt, the mere fact that he believed he would not be prosecuted for his conduct when incurring the debt was held not to invalidate the warrant. *Ward* v. *Lloyd*, 6 *M. & G.* 785; 7 *Scott* (*N. R.*) 499: *cf. Ex parte Critchley*, 15 *L. J.* (*Q. B.*) 124; 3 *D. & L.* 527. A payment of money to postpone a trial for perjury has been held not to be illegal. *Harvey* v. *Morgan*, 2 *Stark.* (*N. P.*) 17, *Lord Ellenborough*, C.J., *sed quære*. An agreement *after* conviction to pay part of the expenses of a prosecution for misdemeanor has been held legal (*Beeley* v. *Wingfield*, 11 *East*, 46; 10 *R. R.* 431); but arrangements of this kind are seldom approved by the court. *See Re Parkinson*, 56 *L. T.* (*N. S.*) 715.

It is suggested in *Keir* v. *Leeman*, 6 *Q. B.* 308; 9 *Q. B.* 371; 13 *L. J.* (*Q. B.*) 359; 15 *L. J.* (*Q. B.*) 360, that a compromise may be legally made of an offence which might be made the subject of a civil action, such as common assault or libel; and in *Fisher* v. *Apollinaris Co.*, *L. R.* 10 *Ch. App.* 297, it was held that as the prosecutor had the choice in a trade-mark case between civil and criminal remedies, he could legally compromise as to the criminal remedy. But some of the dicta in this case (at p. 302) are inconsistent with the conclusion of the *C. A.* in *Windhill Local Board* v. *Vint* (*ante*, p. 1089, *n.*), which appears also to be inconsistent with *Fallows* v. *Taylor*, 7 *T. R.* 475: *Crooke* v. *Lord Powerscourt*, 16 *W. R.* 969: *Drage* v. *Ibberson*, 2 *Esp.* 643: and *Elworthy* v. *Bird*, 2 *Bing*, 258; and it is settled that where the assault is coupled with riot, a compromise is illegal (*Keir* v. *Leeman*, *ubi supra*), and no bar to an action for malicious prosecution.

misdemeanor has to a great extent disappeared during the present century, and the considerations of public policy stated in *Windhill Local Board* v. *Vint* (45 *Ch. D.* 351), and by *Palles*, C.B, in *Dillon* v. *O'Brien* (20 *L. R. Ir.* 316; 16 *Cox*, 245), point to the conclusion that with respect to criminal responsibility for compounding a misdemeanor, there is no ground for a different rule from that in force as to compounding a felony, except perhaps in the case of common assault (*Keir* v. *Leeman*, 6 *Q. B.* 308; 9 *Q. B.* 371), or where the prosecution is one merely to try a civil right, *e.g.* in cases which fall within the *Evidence Act*, 1877 (40 & 41 *Vict. c.* 14). Even in the last class of cases, any compromise of the prosecution has been held to be illegal. *Windhill Local Board* v. *Vint* (*ubi supra*). And there is another rule of law which also points in the same direction, viz. that any indemnity given to bail, whether by the prisoner or by a third person, is illegal and unenforceable. *Consolidated Exploration and Finance Co.* v. *Musgrave* [1900] 1 *Ch.* 37.

In *R.* v. *Broome*, 18 *L. T.* (*O. S.*) 19, *Martin*, B., said that it was no objection to bail for a prisoner that they had been indemnified by or on behalf of the prisoner. This dictum was followed by *Fulton*, Recorder, in *R.* v. *Stockwell*, 66 *J. P.* 376, where he held an agreement to indemnify bail was not indictable unless a deliberate intention to pervert justice was proved. But it is submitted that these decisions are both erroneous.

Statutes.

18 *Eliz. c.* 5, *ss.* 4, 5.]—*Compounding informations on penal statutes without leave of the court; misdemeanor.* [*This statute is said not to apply to offences punishable on summary conviction. See Paley on Convictions* (8th ed.), 56; *but independently of the statute, such informations cannot legally be compromised. Edgcombe* v. *Rodd*, 5 *East*, 294: *R.* v. *Wiltshire Justices*, 8 *L. T.* 242: *ex parte Bryant*, 27 *J. P.* 277: *White* v. *Spettigue*, 13 *M. & W.* 603.]

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 20—*Taking reward for restoring stolen dog.*]—Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any dog which shall have been stolen, or which shall be in the possession of any person not being the owner thereof, shall be guilty of a misdemeanor, *and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any time not exceeding eighteen months, with or without hard labour.* [*This section re-enacts* 8 & 9 *Vict. c.* 47, *s.* 6, *with the additions italicized.*]

Sect. 101—*Taking money for restoring property stolen, etc.*]—Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to (*sic*) any chattel, money, valuable security, or other property whatsoever which shall by any felony or misdemeanor have been stolen, taken, obtained, *extorted, embezzled*, converted, *or disposed of*, as in this Act before mentioned, shall (unless he *shall have used all due diligence to* cause the offender to be brought to trial for the same) be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years . . . or to be imprisoned . . . and, if a male under the age of eighteen (*sic*) years, with or without whipping. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 58, *with the additions italicized.*]

Sect. 102—*Advertising reward for the return of stolen property.*]—Whosoever shall publicly advertise a reward for the return of any property whatsoever which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost the money so paid or advanced, or any other sum of money or reward for the return of such property, or shall print or publish any such advertisement, shall forfeit the sum of fifty pounds for every such offence to any person who will sue for the same by action of debt, to be recovered with full costs of suit. [*This section re-enacts* 7 & 8 *G.* 4, *c.* 29, *s.* 59. *It has been held to apply to the offer of a reward for a stolen dog, "No questions will be asked." Mirams* v. *Our Dogs Publishing Co., Ltd.* [1901] 2 *K. B.* 564; 70 *L. J.* (*K. B.*) 879.]

33 & 34 *Vict. c.* 65 (*Larceny* (*Advertisements*) *Act*, 1870), *s.* 3—*Limitation of actions for advertisements of reward for return of stolen property.*]—Every action against the printer or publisher of a newspaper to recover a forfeiture under *s.* 102 of the *Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), shall be brought within six months after the forfeiture is incurred, and no such action against the printer or publisher of a newspaper shall be brought unless the assent in writing of her Majesty's attorney-general or solicitor-general for England, if the action is brought in England, or for Ireland, if the action is brought in Ireland, has been first obtained to the bringing of such action.

Sect. 2—*Definition of "newspaper."*]—In this Act the term "newspaper" means a newspaper as defined for the purposes of the Acts for the time being in force relating to the carriage of newspapers by post. [*See* 33 & 34 *Vict. c.* 79, *s.* 6; 44 & 45 *Vict. c.* 19; 54 & 55 *Vict. c.* 46, *s.* 2.]

Indictment for Compounding a Felony. (*Common Law.*)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that heretofore, to wit, on the first day of June, in the year of our Lord ——, at the parish of A. in the county of M., and within the jurisdiction of the said court, one A., the wife of J. N., feloniously stole, took, and carried away one silver spoon, of the goods and chattels of one J. S., against the peace of our lord the King, his crown and dignity. And that the said J. S., well knowing the said felony to have been by the said A. so as aforesaid done and committed, but contriving and intending unlawfully and unjustly to pervert the due course of law and justice in that behalf, and to cause and procure the said A., for the felony aforesaid, to escape with impunity, afterwards, to wit, on the day and year aforesaid, unlawfully, and for wicked gain's sake, did compound the said felony with the said J. N., the husband of the said A., and did then exact, take, receive, and have of and from the said J. N. the sum of twenty-six shillings, for and as a reward for compounding the said felony and desisting from all further prosecution against the said A. for the felony aforesaid: [and that the said J. S., on the day and year aforesaid, did thereupon desist, and from that time hitherto hath desisted from

all further prosecution of the said A. for the felony aforesaid;] to the great hindrance of justice, in contempt of our lord the King and his laws, and against the peace of our lord the King, his crown and dignity. [*See the precedents*, 4 *Went.* 327; 2 *Chit. Cr. L.* 220. *An indictment for compounding a felony need not allege that the defendant desisted from prosecuting the felon. R.* v. *Burgess*, 16 *Q. B. D.* 141; 55 *L. J.* (*M. C.*) 97.

Misdemeanor at common law: punishable by fine or imprisonment without hard labour, or both (*ante*, pp. 238, 240). *See* 1 *Hawk. c.* 59, *s.* 6, *etc.*; *Steph. Dig. Cr. L.* (6th ed.), p. 122.

Evidence.

Prove the felony to have been committed by A. N., as directed *ante*, p. 431; and prove that J. S. received twenty-six shillings, or some part thereof, from J. N. upon an understanding that J. S. would not further prosecute A. N. for the felony; and that in fact he has not further prosecuted her since for the same. But a person commits this offence of "compounding" a felony as soon as he enters into the agreement not to prosecute, although he may in fact afterwards prosecute (*R.* v. *Burgess*, 16 *Q. B. D.* 141; 55 *L. J.* (*M. C.*) 97; 15 *Cox*, 779); and although he may not be the owner of the stolen property, nor a material witness for the prosecution. *Id.* This decision overrules *R.* v. *Stone*, 4 *C. & P.* 379.

Indictment for taking a Reward for the recovery of Stolen Property.
(24 & 25 *Vict. c.* 96, *s.* 101, *ante*, p. 1091.)

Commencement as in last precedent]—feloniously and corruptly, did take and receive from one J. N. certain money and reward, to wit, the sum of five pounds of the moneys of the said J. N., under pretence ("*under pretence or upon account*") of helping the said J. N. to [recover] certain goods and chattels ("*chattel, money, valuable security, or other property whatsoever*") of him the said J. N., to wit, to (*here describe the property*) before then feloniously stolen, taken, and carried away ("*by any felony or misdemeanor stolen, taken, obtained, extorted, embezzled, converted, or disposed of*"), the said J. S., not having used all due diligence to cause the person by whom the said goods and chattels were so stolen, taken, and carried away as aforesaid, to be brought to trial for the same; against the form [*as ante*, p. 465].

Felony: penal servitude for not more than seven and not less than three years, or imprisonment not exceeding two years, with or without hard labour; and, if a male under the age of eighteen years, with or without whipping. 24 & 25 *Vict. c.* 96, *s.* 101; 54 & 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 & 25 *Vict. c.* 96, *s.* 117 (*ante*, p. 431).

An indictment under 24 & 25 *Vict. c.* 96, *s.* 20 (*ante*, p. 1091), *can be easily framed from this precedent.*

Evidence.

Prove that the goods, etc., were stolen or obtained in the mode stated in the indictment: and prove that the defendant received the money from J. N., or some person on his behalf, upon the pretence or account stated in the indictment. It was decided to be an offence within 4 *G.* 1, *c.* 11, *s.* 4 (*rep.*), which was similar to the present section, to take money under pretence of helping a man to goods stolen from him, though the

defendant had no acquaintance with the felon, and did not pretend that he had; and though he had no power to apprehend the felon, and though the goods were never restored, and the defendant had no power to restore them. *R.* v. *Ledbitter*, 1 *Mood. C. C.* 76. And where A. had her goods stolen, and B., who knew the thieves, received money from A. to endeavour to purchase the stolen property from the thieves for A., but not meaning to bring the thieves to justice; it was held that B. was guilty of the felony of taking money on account of helping A. to the return of stolen goods within 7 & 8 *G.* 4, *c.* 29, *s.* 58 (*rep.*), which was similar to the present enactment. *R.* v. *Pascoe*, 1 *Den.* 456; 2 *C. & K.* 927; 18 *L. J.* (*M. C.*) 186. As to advertising a reward for the return of stolen property, *see* 24 & 25 *Vict. c.* 96, *s.* 102 (*ante*, p. 1092).

Indictment for compounding Information on a Penal Statute without Leave of the Court. (18 *Eliz. c.* 5, *ante*, p. 1091.)

For precedents, see 2 *Chit. Cr. L.* 222, *and R.* v. *Southerton*, 6 *East*, 126; 8 *R. R.* 428.

Misdemeanor (18 *Eliz. c.* 5, *ss.* 4, 5; 56 *G.* 3, *c.* 138, *s.* 2 (*ante*, p. 238)): *fine and imprisonment, without hard labour, or both* (*ante*, pp. 238, 240).

Evidence.

For decisions as to what is within the statute, *see R.* v. *Southerton*, *ubi supra*: *R.* v. *Gotley*, *R. & R.* 84: *R.* v. *Crisp*, 1 *B. & Ald.* 282. A person may be convicted under the statute for taking money as a reward for forbearing to prosecute, although in fact no offence liable to a penalty has been committed by the person from whom money is taken. *R.* v. *Best*, 2 *Mood. C. C.* 125; 9 *C. & P.* 368.

Sect. 15.

LIBELS REFLECTING ON THE ADMINISTRATION OF JUSTICE, AND CONTEMPT OF COURT.

There are three different kinds of contempt; one kind of contempt is scandalizing the court itself; another, abusing parties who are concerned in causes; another, prejudicing mankind against persons before the cause is heard. *R.* v. *Read and Huggonson*, 2 *Atk.* 469, 471, *Lord Hardwicke*, L.C.

Scandalizing the court itself.]—"Committals for contempt of court are ordinarily in cases where some contempt *ex facie* of the court has been committed, or for comments upon cases pending in the courts. However, there can be no doubt that there is a third head of contempt of court by the publication of scandalous matter of the court itself." *McLeod* v. *St. Aubyn* [1899] *App. Cas.* 549, 561. In that case it was said that summary proceedings for this offence are obsolete in England; but in *R.* v. *Gray* [1900] 2 *Q. B.* 36; 69 *L. J.* (*Q. B.*) 502; 64 *J. P.* 484, the publication of a scurrilous personal attack upon a judge, with reference to observations made by him in the course of a case which had been concluded, was held to be summarily punishable as a contempt of court, and the law as laid down in *R.* v. *Almon*, *Wilmot's Opinions*, 243; 5 *Burr*, 2685, was followed. The defendant in a criminal case may be committed for contempt if he

insults the court, even in his address to the jury. *R.* v. *Davison*, 4 *B. & Ald.* 329; 1 *St. Tr., N. S.* 1366: *and see R.* v. *Giles, ante*, p. 186.

The offence of "scandalizing the court" is also a misdemeanor punishable on information or indictment. It may be committed by words either spoken or written; but for spoken words to be indictable, they must be used of the judge or magistrate in his office and with intent to defame him in that capacity. *R.* v. *Weltje*, 2 *Camp.* 142, *Lord Ellenborough*, C.J.: *cf. R.* v. *Pocock*, 2 *Str.* 1157: *R.* v. *Read and Huggonson, ubi supra*; 2 *Chit. Cr. L.* 916.

It is an aggravated misdemeanor to publish an invective against judges and juries with a view to bring into suspicion and contempt the administration of justice. *R.* v. *White*, 30 *St. Tr.* 1131; 1 *Camp.* 359, *n.*; 10 *R. R.* 705, *n.*: *Re McDermott, L. R.* 1 *P. C.* 260; 2 *P. C.* 341: *Macleod* v. *St. Aubyn* [1899] *App. Cas.* 549, where the authorities are collected at pp. 550, 551. But it is lawful with candour and decency to discuss the merits of the verdict of a jury, or the decision of a judge, which are matters of public interest and concern, and the defence of fair comment, if proved, negatives the presumed malice of the publication.

Libels on a judge or jury may, in certain events, be seditious; in which case it would seem that justification cannot be pleaded under *s.* 6 of *Lord Campbell's Act* (6 & 7 *Vict. c.* 96, *post*, p. 1121), nor fair comment and absence of malice under *s.* 4 of the *Law of Libel Amendment Act*, 1888 (51 & 52 *Vict. c.* 64, *post*, p. 1121). *R.* v. *M'Hugh* [1901] 2 *Ir. Rep.* 569; *and see ante*, p. 997.

Prejudicing the fair trial of cases pending.]—It is a misdemeanor punishable on information or indictment to publish, either verbally or by writing, comments, whether defamatory or not, or even to give theatrical representations, relating to pending cases, which are calculated to prejudice the fair trial of those cases, and so interfere with the course of justice. *See R.* v. *Tibbits and Windust* [1902] 1 *K. B.* 77; 20 *Cox.* 70 (*C. C. R.*), in which case the defendants were convicted on an indictment charging them with the publication in a newspaper of articles affecting the character and conduct of persons under remand before justices for an indictable offence, there being a count charging each article as (1) an attempt to pervert the course of justice, and (2) an act calculated to have that result. The facts in that case were also held to support counts for conspiracy to pervert the course of justice: following *R.* v. *Jolliffe*, 4 *T. R.* 285; 2 *R. R.* 383: *R.* v. *Fisher*, 2 *Camp.* 563; 11 *R. R.* 799 (*a*): *R.* v. *Williams*, 2 *L. J.* (*O. S.*) *K. B.* 30; 26 *R. R.* 624: *Onslow's and Whalley's cases, L. R.* 9 *Q. B.* 219, 227: *Skipworth's case, Id.* 230; *and see Re Pollard, L. R.* 2 *P. C.* 106: *Re a special reference from the Bahama Islands* [1893] *App. Cas.* 138.

This kind of interference with the course of justice is also punishable summarily as a contempt of court. Where the case is pending in any branch of the High Court, including courts of assize and the Central Criminal Court, or where a case is pending before justices which must ultimately be tried before a court of assize, the High Court can summarily punish for any publication calculated to interfere with a fair trial, and it is not necessary to proceed by indictment or information, nor to wait till application can be made to the court of trial. *R.* v. *Parke* [1903] 2 *K. B.* 432, where the prior and conflicting decisions on the subject are collected

(*a*) *It is to be observed that in R.* v. *Fisher the indictment charged the defendant with publishing, with intent to deprive R. S. of the benefit of an impartial trial (upon a certain charge), a scandalous, malicious, and defamatory libel "of and concerning the said charge and the matter thereof."*

and reviewed. The power may be exercised against a corporate body (*R.* v. *Freeman's Journal* [1902] 2 *Ir. Rep.* 82), and even after the disagreement of the jury on the first trial if further proceedings were contemplated or naturally to be anticipated. *Id.* The procedure is by motion to the King's Bench Division for a rule calling upon the party whose conduct is complained of to show cause why a writ of attachment should not issue against him for his contempt. *See Short and Mellor, Cr. Off. Pr.*, p. 394, *et seq.*

Indictment for a Libel upon a Judge and Jury in the execution of their Duties. (Common Law.)

Commencement as ante, p. 433;—that heretofore, to wit, on the twentieth day of June, A.D. ——, at the Royal Courts of Justice, in the county of London, in the King's Bench Division of the High Court of Justice, before the Right Honourable *Richard Everard, Baron Alverstone*, Lord Chief Justice of England, a certain action then pending in the said King's Bench Division, in which A. B. was plaintiff, and C. D. was defendant, came on to be tried in due form of law, and was then and there tried by a certain jury of the country in that behalf duly sworn and taken between the parties aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., being a wicked and ill-disposed person, wickedly and maliciously contriving and intending to bring the administration of justice in this kingdom into contempt and to scandalize and vilify the said Lord Chief Justice of England, and the jurors by whom the said action was so tried as aforesaid, and to cause it to be believed that [*here state the effect of the libel; see* pp. 988, 989] on the twenty-first day of June, in the year aforesaid, wickedly and maliciously did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, and scandalous libel, of and concerning the administration of justice in this kingdom, and of and concerning the trial of the said action, and of and concerning the said Lord Chief Justice of England, and the jurors by whom the said issues in the action were so tried as aforesaid, according to the tenor and effect following; that is to say [*here set out the libel, together with such innuendoes as may be requisite* (*see ante*, p. 944, *post*, p. 1123)]; to the great scandal and reproach of the administration of justice in this kingdom, in contempt, etc. [*as ante*, p. 989].

Misdemeanor: fine or imprisonment, without hard labour (*ante*, p. 238), *or both. See R.* v. *Hart and White*, 30 *St. Tr.* 1131; 1 *Camp.* 359, *n.*; 10 *R. R.* 705, *n.*: *R.* v. *Watson*, 2 *T. R.* 199; 1 *R. R.* 461.

This offence is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126). *No indictment can be preferred for libel unless one or other of the preliminary steps required by* 22 & 23 *Vict. c.* 17, *s.* 1 (*ante*, p. 7), *has been taken.* 44 & 45 *Vict. c.* 60, *s.* 6 (*post*, p. 1121). *Nor can any criminal prosecution be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein without the order of a judge at chambers, the application for which shall be made on notice to the person accused, who shall have an opportunity of being heard against it.* 51 & 52 *Vict. c.* 64, *s.* 8 (*post*, p. 1122). *It would seem from R.* v. *M'Hugh* [1901] 2 *Ir. Rep.* 569, *that defence of justification could not be pleaded to an indictment of this kind, on the ground that the offence is in substance a seditious libel. But see R.* v. *Gray*, 10 *Cox.* 184 (*Ir.*), *ante*, p. 996. *As to the evidence, see post*, p. 1130.

Indictment for Slanderous Words to a Magistrate in the execution of his Office. (*Common Law.*)

Middlesex, to wit:—The jurors for our lord the King upon their oath present, that heretofore, to wit, on the first day of June, in the year of our Lord ——, one J. S. was brought before J. N., esquire, then and yet being one of the justices of our said lord the King, assigned to keep the peace of our said lord the King in and for the county of M., and also to hear and determine divers crimes, trespasses, and other offences committed in the said county; and the said J. S. was then charged before the said J. N., upon the oath of one A. C., that he the said J. S. had then lately before feloniously stolen, taken, and carried away divers goods and chattels of the said A. C. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. being a scandalous and ill-disposed person, and wickedly and maliciously intending and contriving to scandalize and vilify the said J. N. as such justice as aforesaid, and to bring the administration of justice in this kingdom into contempt afterwards, and whilst the said J. N., as such justice as aforesaid, was examining and taking the depositions of divers witnesses against him the said J. S., in that behalf, to wit, on the day and year aforesaid, wickedly and maliciously, in the presence and hearing of divers good and liege subjects of our lord the King, did publish, utter, pronounce, declare, and say with a loud voice to the said J. N., and whilst he the said J. N. was so acting as such justice as aforesaid, "You are a scoundrel and a liar; you would hang your own father if you could make a groat by his execution;" to the great scandal and reproach of the administration of justice in this kingdom, to the great scandal and damage of the said J. N., in contempt, etc. [*as ante*, p. 989].

Misdemeanor: fine or imprisonment, without hard labour (*ante*, pp. 238, 240), *or both. See R.* v. *Revel*, 1 *Str.* 421: *R.* v. *Pocock*, 2 *Str.* 1157: *R.* v. *Weltje*, 2 *Camp.* 142; 11 *R. R.* 687: *Ex parte Duke of Marlborough*, 5 *Q. B.* 955: *R.* v. *Rea*, 17 *Ir. C. L. Rep.* 584; 2 *Chit. Cr. L.* 916; *and cases collected in Odgers on Libel* (3rd ed.), p. 530. *It is not clear whether this offence is to be regarded as sedition, or contempt of court, or a distinct form of crime. If there be any doubt as to the words, lay them differently in different counts. Justices out of general or quarter sessions have no power to commit for contempt, even if committed in their presence. Judges of inferior courts of record have no jurisdiction to commit for contempt unless committed* in facie curiæ. *R.* v. *Lefroy*, *L. R.* 8 *Q. B.* 134: *R.* v. *Judge of Brompton County Court* [1893] 2 *Q. B.* 195; 62 *L. J.* (*Q. B.*) 604.

Evidence.

Prove the charge before the magistrate; and prove that whilst the magistrate was in the execution of his duty, taking the depositions of the witnesses, the defendant addressed him, and spoke the words laid in some one of the counts of the indictment. It is sufficient to prove that the magistrate was acting as such. *Berryman* v. *Wise*, 4 *T. R.* 366; 2 *R. R.* 413: *R.* v. *Gordon*, 1 *Leach*, 515. As to the proof of the words, *see ante*, pp. 992, 998, *post*, p. 1130.

It appears not to be sufficient to prove that slanderous words were spoken of a magistrate in his absence; *R.* v. *Weltje*, 2 *Camp.* 142; 11 *R. R.* 687; nor to a magistrate out of court to his face, unless there was an intent to provoke to a breach of the peace. *Ex parte Chapman*, 4 *A. & E.* 773; *and see ante*, p. 1096.

CHAPTER IV.

OFFENCES AGAINST THE PUBLIC PEACE.

SECT. 1. *Unlawful Assembly*, p. 1098.
2. *Rout*, p. 1100.
3. *Riot*, p. 1101..
4. *Affray, etc.*, p. 1107.
5. *Forcible Entry and Detainer*, p. 1108.
6. *Pound-breach and Rescue of Distress*, p. 1114.
7. *Challenge to Fight*, p. 1114.
8. *Sending Letters containing Threats to Murder or to injure Property*, p. 1116.
9. *Defamatory Libel*, p. 1118.

SECT. 1.

UNLAWFUL ASSEMBLY.

Common Law.

An unlawful assembly at common law is an assembly of three or more persons (*a*) for purposes forbidden by law, such as that of committing a crime by open force; *Steph. Dig. Cr. Law* (6th ed.), 55; or (*b*) with intent to carry out any common purpose, lawful or unlawful, in such a manner as to endanger the public peace, or to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it. *Steph. Dig. Cr. Law* (6th ed.), 55; 1 *Hawk.* c. 65, *s.* 9: *R.* v. *Hunt*, 3 *B. & Ald.* 566; 22 *R. R.* 485; 1 *St. Tr., N. S.* 171: *R.* v. *Brodribb*, 6 *C. & P.* 571: *R.* v. *Dewhurst*, 1 *St. Tr., N. S.* 529: *R.* v. *Stephens*, 2 *St. Tr., N. S.* 1189: *Redford* v. *Birley*, 1 *St. Tr., N. S.* 1071: *R.* v. *Vincent*, 3 *St. Tr., N. S.* 1037; 9 *C. & P.* 91: *R.* v. *Graham*, 16 *Cox*, 420: *R.* v. *Clarkson*, 17 *Cox*, 483 (*C. C. R.*). Assemblies under arms even for self-defence appear to be unlawful, except where they are for defence of a dwelling-house. *See* 1 *Russ. Cr.* (6th ed.) 570; 25 *Edw.* 3, *st.* 5, *c.* 2 (*ante*, p. 928). It includes meetings forbidden by statute as unlawful assemblies or unlawful combinations or associations; *R.* v. *O'Connell*, 2 *St. Tr., N. S.* 629: *R.* v. *Ball*, 6 *C. & P.* 563: *R.* v. *Dixon*, 6 *C. & P.* 601; 3 *St. Tr., N. S.* 1281; meetings to intimidate the executive or parliament; *see Redford* v. *Birley*, 1 *St. Tr., N. S.* 1071: *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1, 779; meetings for the purpose of spreading sedition or listening to seditious speeches; *Redford* v. *Birley, ubi supra*: *R.* v. *Fussell*, 6 *St. Tr., N. S.* 723; assemblies to obstruct the officers of the law; *R.* v. *M'Naughten*, 14 *Cox*, 576 (*Ir.*); or for the purpose of night poaching, *R.* v. *Brodribb*, 6 *C. & P.* 571. In *R.* v. *Clarkson*, 17 *Cox*, 483, a march of a Salvation Army band through

the streets of a town in which street music was prohibited, was held not to be an unlawful assembly, on the ground that the men did not know that their acts were calculated to cause a breach of the peace. *See also Beatty* v. *Gillbanks*, 9 *Q. B. D.* 308; 51 *L. J. (M. C.)* 117; 15 *Cox*, 138: *Beaty* v. *Glenister*, 51 *L. T. (N. S.)* 304. "There is no authority for the proposition that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act," *per Field*, J., in *Beatty* v. *Gillbanks*, *ubi supra*: *and see R.* v. *Clarkson*, 17 *Cox*, 483 (*C. C. R.*). As to meetings for illegal drilling or training, *see ante*, p. 1006.

It appears to be immaterial whether the common purpose of the assembly is unlawful or lawful if the manner of the meeting endangers the public peace or causes general alarm. *Steph. Dig. Cr. Law* (6th ed.), 55. An assembly of persons to witness a prize-fight is an unlawful assembly, and every one present and countenancing the fight is guilty of an offence. *R.* v. *Billingham*, 2 *C. & P.* 234; 31 *R. R.* 665: *R.* v. *Perkins*, 4 *C. & P.* 537: *and see R.* v. *Hunt*, 1 *Cox*, 177: *R.* v. *Coney*, 8 *Q. B. D.* 534; 51 *L. J. (M. C.)* 66. As to the difference between a mere sparring match and an unlawful fight, *see R.* v. *Young*, 10 *Cox*, 371; *and R.* v. *Orton*, 14 *Cox*, 226 (*C. C. R.*) (*ante*, p. 791). Persons assembling for a lawful purpose, and with no intention of carrying it out unlawfully, but with the knowledge that their assembly will be opposed, and with good reason to suppose that a breach of the peace will be committed by those who oppose it, are not guilty of an unlawful assembly. *Beatty* v. *Gillbanks*, *ubi supra*. If at a meeting lawfully convened seditious words are spoken, of such a nature as are likely to produce a breach of the peace, that meeting may become unlawful. *R.* v. *Burns*, 16 *Cox*, 355.

It is said that the distinction between a riot, rout, and unlawful assembly is that the first is a tumultuous meeting of persons who are guilty of actual violence; the second where they endeavour to commit an act which would make them rioters; and the last where they meet with an intention to make a riot, but neither carry their purpose into effect, nor make any endeavour towards it. 3 *Co. Inst.* 176; 2 *Hawk. c.* 65, *ss.* 1, 8, 9; 2 *Chit. Cr. L.* 488: *R.* v. *Birt*, 5 *C. & P.* 154: *R.* v. *Woolcock*, 5 *C. & P.* 516. This seems too narrow; *see* 3 *St. Tr., N. S.* 1350, *Alderson*, B.; 9 *C. & P.* 93, *n.*; because even if the purpose were treasonable the assembly would still be unlawful, and in most of the modern cases of unlawful assembly the object of unlawful meetings has been treasonable or seditious: *see R.* v. *Rankin*, 7 *St. Tr., N. S.* 711: and not merely in support of some private enterprise, which is the case in an unlawful assembly leading to riot (*see post*, p. 1101).

Persons who attend or speak at such a meeting, in pursuance of previous agreement or in approval of its object, are guilty of the offence or of conspiracy: but these persons are not liable who merely attend out of curiosity. *R.* v. *Rankin*, 7 *St. Tr., N. S.* 711, 789, *Alderson*, B.: *cf. R.* v. *Coney*, 8 *Q. B. D.* 534: *R.* v. *Atkinson*, 11 *Cox*, 330. It is the right and duty of magistrates and the police to disperse an assembly which is in fact unlawful. 2 *H.* 5, *st.* 1, *c.* 8: *Redford* v. *Birley*, 1 *St. Tr., N. S.* 1071, 1239, *Abbott*, C.J.: *R.* v. *Neale*, 9 *C. & P.* 431; 3 *St. Tr., N. S.* 1312, *Littledale*, J.: *O'Kelly* v. *Harvey*, 15 *Cox*, 435; 14 *L. R. Ir.* 165. The meeting need not first be proclaimed nor the proclamation under the *Riot Act* read; *R.* v. *Fursey*, 3 *St. Tr., N. S.* 543; 6 *C. & P.* 81; and force may be used after refusal to disperse; *R.* v. *Jones*, 6 *St. Tr., N. S.* 811; and it is illegal and riotous to resist dispersal. *R.* v. *Fursey*, *R.* v. *Jones*, *ubi supra*: *R.* v. *Williams*, 6 *St. Tr., N. S.* 775: *R.* v. *Sharpe*, *Id.* 1125; 3 *Cox*, 288.

Statutes.

5 *Ric.* 2, *st.* 1, *c.* 7; 17 *Ric. c.* 8.]—*See post*, p. 1108.

13 *H.* 4, *c.* 7.]—*Arrest, etc., of offenders in case of riot, assembly, or rout.*

2 *H.* 5, *st.* 1, *c.* 8.]—*Penalty for default of justices in execution of* 13 *H.* 4, *c.* 7.

13 *Car.* 2, *st.* 1, *c.* 5, *s.* 1—*Punishment of persons repairing to the number of over ten at one time to the King or either House of Parliament on pretence of presenting or delivering any petition, remonstrance, or declaration, or other address—Two witnesses necessary.*]—*As to how far this Act is in force, see R.* v. *Lord George Gordon*, 21 *St. Tr.* 486, 487, 646; 1 *St. Tr., N. S.* 428, *n.*

57 *G.* 3, *c.* 19 (*Seditious Meetings Act*, 1817), *s.* 25—*Meetings of more than fifty persons within a mile of Westminster Hall, during sittings of Parliament or of the Superior Courts* (*see* 36 & 37 *Vict. c.* 66, *s.* 76), *for the purpose or on the pretext of considering or preferring a petition, complaint, remonstrance, or address to the King or either House of Parliament, for alteration of matters in church or state, to be an unlawful assembly.*]—*See R.* v. *Hunt*, 1 *St. Tr., N. S.* 1, 180, *n.*: *Ex parte Lewis*, 21 *Q. B. D.* 191.

60 *G.* 3 & 1 *G.* 4, *c.* 1—*Unlawful meetings for purposes of drilling.*]—*Ante*, p. 1006.

Indictment.

An indictment for unlawful assembly can be framed from the precedents of indictments for riot (*post*, pp. 1101, 1103), *omitting the words "riotously and routously." See also R.* v. *Clarkson*, 17 *Cox*, 483 (*C. C. R.*).

Evidence.

Prove the assembly as directed, *post*, p. 1102.

Sect. 2.

Rout.

Rout is a disturbance of the peace by persons who assemble together with an intention to do something which if executed will amount to riot, and who actually make a move towards the execution of their common purpose, but do not complete it. *Redford* v. *Birley*, 1 *St. Tr., N. S.* 1071, 1211, 1214, *Holroyd*, J.; 1 *Russ. Cr.* (6th ed.) 569; 1 *Hawk. c.* 65, *s.* 8; *Steph. Dig. Cr. Law* (6th ed.), 56.

Indictments for the offence are not now drawn, as the jury can convict of rout on an indictment for riot if the complete riot is not proved. *See ante*, p. 215, *et seq.*

SECT. 3.

RIOT.

Common Law.

Riot is a tumultuous disturbance of the peace by three or more persons who assemble together of their own authority, with an intent mutually to assist one another against any who oppose them in the execution of an enterprise of a private nature, and afterwards actually execute the same in a violent and turbulent manner to the terror of the people. *See* 1 *Hawk. c.* 65; 2 *Chit. Cr. L.* 487.

It is distinct from treason, in that the act need not be a resistance to the authority or prerogative of the Crown. *R.* v. *Lord George Gordon*, 21 *St. Tr.* 486, 644: *R.* v. *Hardie*, 1 *St. Tr., N. S.* 623, 765: *R.* v. *Frost*, 4 *St. Tr., N. S.* 85: *R.* v. *Forbes*, 2 *St. Tr., N. S.* 939. It is distinct from sedition (*see ante*, p. 989). As to rout and unlawful assembly, *see ante*, pp. 1098–1100. As to the powers and duties of sheriffs, justices, soldiers, and private citizens in suppressing riot and resisting or arresting rioters, *see R.* v. *Pinney*, 3 *St. Tr., N. S.* 11: *R.* v. *Kennett*, 5 *C. & P.* 282, *n.*: *Featherstone Riot Report, Parl. Pap.* (1893–1894, *C.* 7234), where the powers and duties of the military forces of the Crown for suppressing riots are dealt with. Peace officers may use force to suppress a riot. *R.* v. *Fursey*, 3 *St. Tr., N. S.* 543. Assault on peace officers engaged in dispersing an unlawful assembly may be a riot. *R.* v. *Williams*, 6 *St. Tr., N. S.* 775. And it is an indictable misdemeanor to refuse to assist a peace officer in quelling a riot. *R.* v. *Brown*, *C. & Mar.* 314: *R.* v. *Sherlock*, *L. R.* 1 *C. C. R.* 20; 35 *L. J.* (*M. C.*) 92; 10 *Cox*, 170, *ante*, p. 864.

Indictment for Riot and Assault. (*Common Law.*)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., J. W., and E. W., together with divers other evil-disposed persons, to the number of ten and more, to the jurors aforesaid unknown, on the first day of June, in the year of our Lord ——, at the parish of B., in the county of M., and within the jurisdiction of the said court, unlawfully, riotously, and routously did assemble and gather together, to disturb the peace of our said lord the King; and being so then and there assembled and gathered together, in and upon one A., the wife of J. N., in the peace of our lord the King then and there being, unlawfully, riotously, and routously did make an assault, and her the said A. then and there unlawfully, riotously, and routously did beat, wound, and ill-treat, so that her life was greatly despaired of; and other wrongs to the said A. then and there unlawfully, riotously, and routously did, to the great disturbance and terror of the liege subjects of our lord the King then and there being; in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. *See the precedents, Cro. Circ. Comp.* 413, *et seq.*; 4 *Went.* 150, 305, *et seq.*; 2 *Chit. Cr. L.* 488. *For an indictment for incitement to commit a riot, Id.* 506. *You may add a count for a common assault.* (*See ante*, p. 832.)

The words "to the terror, etc.," *have been held essential in an indictment for riot at common law. R.* v. *Hughes*, 4 *C. & P.* 373: *R.* v. *Cox*, 4 *C. & P.*

538. *On this indictment the jury may acquit of riot, and convict of rout, unlawful assembly, or assault. See ante,* p. 218. *On an indictment for riotous demolition of a house, it is said that the jury may negative the felony, and convict of simple riot under* 14 & 15 *Vict. c.* 100, *s.* 9 (*ante,* p. 219). *Casey* v. *R., Ir. Rep.* 8 *C. L.* 408 (*C. C. R.*).

Misdemeanor: fine or imprisonment, or both. By 3 *G.* 4, *c.* 114 (*ante,* p. 237), *the imprisonment may be with hard labour.*

This offence is triable at quarter sessions. 34 *Edw.* 3, *c.* 1; 15 *Ric.* 2, *c.* 2; 5 & 6 *Vict. c.* 38, *s.* 1 (*ante,* p. 126). *Restrictions are imposed by* 21 *Jac.* 1, *c.* 8, *s.* 4, *on removal of indictments for riot from quarter sessions.*

Evidence.

That J. S., etc., together with divers others.]—It must be proved that three persons at least were present and engaged in this unlawful assembly and assault, otherwise the defendants must be acquitted; for unless committed by three or more, it is no riot. 2 *Hawk. c.* 47, *s.* 8: *R.* v. *Scott,* 3 *Burr.* 1262; 1 *W. Bl.* 291, 350: *R.* v. *Sadbury,* 1 *Ld. Raym.* 484: *R.* v. *Ingram,* 2 *Salk.* 593. The death of one or more of four persons indicted for riot does not defeat proceedings against the survivors. *R.* v. *Scott, ubi supra.*

Unlawfully, riotously, and routously did assemble.]—It must be proved that these three or more persons assembled together; and that their assembling was accompanied with some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as were calculated to inspire people with terror; *R.* v. *Hughes,* 4 *C. & P.* 373: *R.* v. *Graham,* 16 *Cox,* 420: such as being armed, using threatening speeches, turbulent gestures, or the like. 1 *Hawk. c.* 65, *s.* 5. If an assembly of persons be not accompanied with such circumstances as these, it can never be deemed a riot, however unlawful their intent, or however unlawful the acts which they actually commit. *Id.*; *Lambarde,* 178; *Dalt. c.* 137. It is a sufficient terror and alarm, however, to sustain the indictment, if *any one* of the King's subjects be in fact terrified. *R.* v. *Phillips,* 2 *Mood. C. C.* 252; *S. C. as R.* v. *Langford, C. & Mar.* 602. If persons meet at a fair or wake, or on any other lawful and innocent occasion, and on a sudden quarrel they fight together, this is no riot, but an affray merely; but if upon a dispute arising, they form themselves into parties, with promises of mutual assistance, and then fight, it is a riot; for, in this latter case, the design to break the peace is as premeditated as if they had originally met for that purpose. 1 *Hawk. c.* 65, *s.* 3. Where a riot ensues on a meeting and in consequence of speeches there, which incite to violence, the speakers may be convicted as rioters, though absent when it occurs. *R.* v. *Sharpe,* 3 *Cox,* 288, *Wilde,* C.J. Where a riot is proved to have taken place, the mere presence of a person among the rioters, even although he possessed the power, and refused to exercise it, of stopping the riot, does not render him liable as one of the rioters. *R.* v. *Atkinson,* 11 *Cox,* 330, *Kelly,* C.B. In order to render him so liable, it must be shown that he did something by word or act to take part in, help, or incite to the riotous proceedings. *Id.*

The acts of the rioters may be proved severally, before evidence is given to connect their fellow rioters, as in conspiracy. *See R.* v. *Cooper,* 1 *Russ. Cr.* (6th ed.) 585, where earlier cases to the contrary are collected.

It is not necessary, to constitute a riot, that the *Riot Act* should be read. Before the proclamation can be read, a riot must exist; and the

effect of the proclamation will not change the character of the meeting, but will make those guilty of a felony who do not disperse within one hour after the proclamation is read. *R.* v. *Fursey*, 3 *St. Tr., N. S.* 543; 6 *C. & P.* 81.

In and upon one A. did make an assault, etc.]—Prove the assault and battery as directed *ante*, p. 833, *et seq.* And this must be proved, otherwise the defendants must be acquitted of the riot, although it would seem that they may still be found guilty of the rout or of the unlawful assembly. For, where persons assemble together for the purpose of doing an act, and the assembly is such as is above described, if they do not proceed to execute their purpose, it is but an unlawful assembly, not a riot; if, after so assembling, they proceed to execute the act for which they assembled, but do not execute it, it is termed a rout; but if they not only so assemble, but proceed to execute their design, and actually execute it, it is then a riot. 1 *Hawk. c.* 65, *s.* 1; *Dalt. c.* 136: *R.* v. *Birt*, 5 *C. & P.* 154: *R.* v. *Vincent*, 3 *St. Tr., N. S.* 1037; 9 *C. & P.* 91.

It is immaterial, however, whether the act done be unlawful or not; doing it in a manner calculated to inspire people with terror is equally punishable, whether it be lawful or otherwise. 1 *Hawk. c.* 65, *s.* 7. Yet, where the object of the assembly is lawful, it in general requires stronger evidence of the terror of the means, to induce a jury to return a verdict of guilty, than if the object were unlawful; and it has even been held, that, if a number of persons assemble for the purpose of abating a public nuisance, and appear with spades, iron crows, and other tools for that purpose, and abate it accordingly, without doing more, it is no riot, *Dalt. c.* 137, unless threatening language or other misbehaviour, in apparent disturbance of the peace, be at the same time used. *Id.*

Indictment for Riot. (Common Law.)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., J. W., and E. W., together with divers other evil-disposed persons, to the number of fifty and more, to the jurors aforesaid unknown, on the first day of June, and in the year of our Lord ——, being then armed with sticks, staves, and other offensive weapons, at the parish of B., in the county of L., and within the jurisdiction of the said court, unlawfully, riotously, and routously did assemble and gather together to disturb the peace of our said lord the King, and being so assembled and gathered together, armed as aforesaid, did then and there unlawfully, riotously, and routously make a great noise, riot, and disturbance, and did then and there remain and continue armed as aforesaid, making such noise, riot, and disturbance, for the space of an hour and more then next following, to the great disturbance and terror not only of the liege subjects of our said lord the King there being and residing, but of all other the liege subjects of our said lord the King then passing and repassing in and along the King's common highway there; in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Misdemeanor: fine or imprisonment, or both. Under 3 *G.* 4, *c.* 114 (*ante*, p. 237), *hard labour may be imposed. As to the evidence, see ante*, p. 1102.

Statutes.

1 *G.* 1, *st.* 2, *c.* 5 (*Riot Act*), *s.* 1—*Twelve or more rioters remaining one hour after proclamation.*]—Whereas of late many rebellious riots and tumults have been in divers parts of this kingdom, to the disturbance of the public peace, and the endangering of his Majesty's person and government, and the same are yet continued and fomented by persons disaffected to his Majesty, presuming so to do, for that the punishments provided by the laws now in being are not adequate to such heinous offences; and by such rioters, his Majesty and his administration have been most maliciously and falsely traduced, with an intent to raise divisions, and to alienate the affections of the people from his Majesty; Therefore, for the preventing and suppressing of such riots and tumults, and for the more speedy and effectual punishing the offenders therein, be it enacted, *etc.*, that if any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace at any time after the last day of July, in the year of our Lord 1715, and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the county, or his under-sheriff, or by the mayor, bailiff or bailiffs, or other head officer, or justice of the peace of any city or town corporate, where such assembly shall be, by proclamation to be made in the King's name, in the form hereinafter directed, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation, that then such continuing together, to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony. . . .

Sect. 2—*Form of proclamation.*]—And . . . the order and form of the proclamations that shall be made by the authority of this Act shall be as hereafter followeth, (that is to say) the justice of the peace, or other person authorized by this Act to make the said proclamation, shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded silence to be while proclamation is making, and after that, shall openly and with a loud voice make or cause to be made, proclamation in these words, or like in effect:

"Our sovereign lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations or to their lawful business, upon the pains contained in the Act made in the first year of King George, for preventing tumults and riotous assemblies.

"God save the King."

And every such justice and justices of the peace, sheriff, under-sheriff, mayor, bailiff, and other head officer aforesaid, within the limits of their respective jurisdictions, are hereby authorized, empowered, and required, on notice or knowledge of any such unlawful, riotous, and tumultuous assembly, to resort to the place where such unlawful, riotous, and tumultuous assembly shall be, of persons to the number of twelve or more, and there to make or cause to be made proclamation in manner aforesaid.

Sect. 5—*Opposing proclamation.*]—Provided always . . . that if any person or persons do or shall, with force and arms, wilfully and knowingly oppose, obstruct, or in any other manner wilfully or knowingly let, hinder, or hurt any person or persons that shall begin to proclaim, or go to proclaim, according to the proclamation hereby directed to be made, whereby such proclamation shall not be made, that then every such opposing, obstructing, letting, hindering or hurting such person or persons so beginning or going to make such proclamations as aforesaid, shall be adjudged felony; . . . and that also, every such person or persons so being unlawfully, riotously and tumultuously assembled to the number of twelve, as aforesaid, or more, to whom proclamation should or ought to have been made if the same had not been hindered as aforesaid, shall likewise, in case they or any of them, to the number of twelve or more, shall continue together, and not disperse themselves within one hour after such let or hindrance so made, having knowledge of such let or hindrance so made, shall be adjudged felons. . . .

Sect. 8—*Limitation of proceedings.*]—Provided always, that no person or persons shall be prosecuted by virtue of this Act, for any offence or offences committed contrary to the same, unless such prosecution be commenced within twelve months after the offence committed. [*See ante*, pp. 94, 95.]

7 *W.* 4 *&* 1 *Vict. c.* 91 (*Punishment of Offences Act*, 1837), *s.* 1.]—*Recites* 1 *G.* 1, *st.* 2, *c.* 5, *ss.* 1, 5, *and* enacts, that "if any person shall . . . be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable . . . to be transported beyond the seas for the term of the natural life of such person. . . . [*Rest rep.* 55 *&* 56 *Vict. c.* 19 (*S. L. R.*). *Penal servitude was substituted for transportation by* 20 *&* 21 *Vict. c.* 3, *ante*, p. 235.]

24 *&* 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 11—*Riotously demolishing buildings, etc.*]—*Ante*, p. 670.

Sect. 12—*Riotously damaging buildings, etc.*]—*Ante*, p. 670.

24 *&* 25 *Vict. c.* 100, *s.* 39—*Riotously preventing loading or navigation of vessels.*]—*Punishable on summary conviction.*

Sect. 40—*Riotous interference with the trade in corn.*]—*Punishable on summary conviction.*

Indictment of Rioters remaining one hour together after Proclamation.
(1 *G.* 1, *st.* 2, *c.* 5. *s.* 1, *ante*, p. 1104.)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., J. W., and E. W., together with divers other evil-disposed persons, to the number of twelve and more, to the jurors aforesaid unknown, on the first day of June, in the year of our Lord ——, at the parish of B., in the county of London, and within the jurisdiction of the said court, unlawfully, riotously, and tumultuously did assemble together, to the disturbance of the public peace: * And that the said J. S., J. W., E. W. and the said other persons to the jurors aforesaid unknown, being so unlawfully, riotously, and tumultuously

assembled together, to the disturbance of the public peace as aforesaid, afterwards, and whilst they were so assembled as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, one A. C., esquire, then being one of the justices of our said lord the King, assigned to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers crimes, trespasses, and other offences committed in the said county [*or* "then being a magistrate of the police courts of the metropolis"], as near to them the said J. S., J. W., E. W. and the said other persons to the jurors aforesaid unknown, so unlawfully, riotously, and tumultuously assembled as aforesaid, as he the said A. C. could then and there safely come, did then and there command, and cause to be commanded, silence to be while the proclamation was making, and that the said A. C., after that, did then and there as near to them the said J. S., J. W., E. W. and the said other persons so assembled as aforesaid, as he the said A. C. could then and there safely come, openly and with a loud voice make, and cause to be made, proclamation, according to the form of the statute in such case made and provided, in these words following, that is to say: "Our sovereign lord the King chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the Act made in the first year of the reign of King George the First, for preventing tumults and riotous assemblies. God save the King." And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., J. W., E. W. and the said other persons, to the number of twelve and more, to the jurors aforesaid unknown, being so required and commanded by the said A. C., the justice aforesaid, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, did then and there, to the number of twelve and more, notwithstanding the said proclamation so made as aforesaid, feloniously, unlawfully, riotously, and tumultuously remain and continue together for the space of one hour after such command so made by the said proclamation as aforesaid; in contempt of our said lord the King and his laws [to the great disturbance and terror of the quiet and peaceable subjects of our said lord the King], to the evil example of all others in the like case offending; against the form [*as ante*, p. 465].

Care must be taken to set out the proclamation correctly. Where the indictment omitted the words "of the reign of," in setting out the proclamation, the variance was (*before* 14 *&* 15 *Vict. c.* 100, *s.* 1, *ante*, p. 52), *held fatal. R. v. Woolcock*, 5 *C. & P.* 516, *Patteson, J. The words* "to the terror, etc.," *do not seem to be essential in this indictment. R. v. James*, 5 *C. & P.* 153. *As to the common law rule, see ante*, p. 1101.

Felony: 1 *G.* 1, *st.* 2, *c.* 5, *s.* 1: *penal servitude for life or for not less than three years, or imprisonment not exceeding two years, with or without hard labour.* 7 *W.* 4 *&* 1 *Vict. c.* 91. *s.* 1 (*ante*, p. 1104); 20 *&* 21 *Vict. c.* 3 (*ante*, p. 235); 54 *&* 55 *Vict. c.* 9, *s.* 1 (*ante*, p. 235). *Opposing the making of the proclamation is also felony*, 1 *G.* 1, *st.* 2, *c.* 5, *s.* 5 (*ante*, p. 1105), *and subject to the same punishment.*

This offence is not triable at quarter sessions. 5 *&* 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

1. Prove that the defendants, together with others, to the number of twelve at least, were "unlawfully, riotously, and tumultuously" assembled together, "to the disturbance of the public peace." It does not seem from the words of the statute that it is necessary that a riot should have

actually been committed, or that the indictment should contain the words "to the terror, etc.," as in the precedents *ante*, pp. 1101, 1103; it seems to be sufficient that the assembly was of such a nature, and gathered together under such circumstances, that if they had done the act for the purpose of which they were assembled, it would have been a riot. *R.* v. *James*, 5 *C. & P.* 153.

2. Prove that silence was commanded, and proclamation made, as stated in the indictment. The proclamation must be read correctly. Where the magistrate in reading the proclamation omitted the words "God save the King," it was held that persons remaining after the proclamation could not be capitally convicted. *R.* v. *Child*, 4 *C. & P.* 442. The offence is no longer capitally punishable. *See ante*, p. 1105.

3. Prove that the defendants, together with others, to the number of twelve or more, "unlawfully, riotously, and tumultuously" remained and continued together for one hour or more after proclamation so made; computed from the first reading of the proclamation. *R.* v. *Woolcock*, 5 *C. & P.* 516.

4. Prove that the prosecution was commenced (*see ante*, p. 97) within twelve months after the offence committed. 1 *G.* 1, *st.* 2, *c.* 5, *s.* 8. The expression "month" in this section means lunar month. *See Lacon* v. *Hooper*, 6 *T. R.* 224, 226: *Bruner* v. *Moore* [1904] 1 *Ch.* 305.

Sect. 4.

Affray, etc.

An affray is a public offence to the terror of the King's subjects. 3 *Co. Inst.* 158.

Statute.

2 *Edw.* 3 (*Stat. Northampton*), *c.* 3—*Riding or going armed in affray of the peace.*]—*See* 3 *Co. Inst.* 160: *R.* v. *Meade*, 19 *T. L. R.* 540, *where before Wills, J., a conviction was obtained on an indictment under this statute against a man who discharged firearms in the public street.*

Indictment for an Affray. (*Common Law.*)

Middlesex, to wit:—The jurors for our lord the King upon their oath present, that J. S. and J. W., on the first day of June, in the year of our Lord ——, being unlawfully assembled together and arrayed in warlike manner, in a certain public street and highway, situate in the parish of B., in the county of M., unlawfully, and to the great terror and disturbance of divers liege subjects of our said lord the King then and there being, did make an affray; in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Misdemeanor at common law: fine or imprisonment, without hard labour, or both. See ante, pp. 238, 240; *and see* 3 *Co. Inst.* 158; 1 *Hawk. c.* 63; 1 *Russ. Cr.* (6th ed.) 587; *Steph. Dig. Cr. Law* (6th ed.), p. 54.

The words "public street and highway" *seem to be essential. R.* v. *O'Neill, Ir. Rep.* 6 *C. L.* 1.

Evidence.

Prove that the defendants fought in a public street or highway; for if it be in private, it is an assault and battery merely, and not an affray. 1 *Hawk.* c. 63, *s.* 1. No quarrelsome or threatening words whatever will amount to an affray. *Id. s.* 2; 1 *Hale*, 456.

Sect. 5.

FORCIBLE ENTRY AND DETAINER.

A forcible entry is when a man enters into lands or tenements, *manu forti*. *Co. Litt.* 257; *Com. Dig. Forcible Entry* (*A.* 2). A forcible detainer is when a man who has entered peaceably, maintains his possession by force. *Com. Dig. Justice* (*B.* 1). *See* 3 *Chit. Cr. L.* 1135.

Statutes.

5 *Ric.* 2, *st.* 1, *c.* 7 (*c.* 8 *in Ruffhead*)—*Forcible entries forbidden.*]—And also the King defendeth, that none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict (*sic*), he shall be punished by imprisonment of his body, and thereof ransomed at the King's will. [*For indictment, see post*, p. 1110.]

15 *Ric.* 2, *c.* 2—*Confirmation of statutes against riots or forcible entries.*] —*Item*, it is accorded and assented, that the ordinances and statutes, made and not repealed, of those that make entries with strong hand into lands and tenements, or other possessions whatsoever, and them hold with force, and also of those that make insurrections or great ridings (*sic*), riots, routs, or assemblies, in disturbance of the peace, or of the common law, or in affray of the people, shall be holden and kept, and fully executed; joined to the same, that at all times that such forcible entry shall be made, and complaint thereof cometh to the justices of peace or to any of them, that the same justices or justice take sufficient power of the county, and go to the place where such force is made; and if they find any that hold such place forcibly after such entry made, they shall be taken and put in the next gaol, there to abide convict (*sic*) by the record of the same justices or justice, until they have made fine and ransom to the King: and that all the people of the county, as well the sheriffs as other, shall be attendant upon the same justices to go and assist the same justices to arrest such offenders, upon pain of imprisonment, and to make fine to the King. And in the same manner it shall be done of them that make such forcible entries in benefices or offices of Holy Church.

17 *Ric.* 2, *c.* 8—*Duties of sheriff as to arrest of rioters, etc., within* 5 *Ric.* 2, *c.* 7.]—*See ante*, p. 1101.

8 *H.* 6, *c.* 9.]—*After the recital of* 15 *Ric.* 2, *c.* 2 (*supra*), *enacts*, And for that the said statute does not extend to entries in (*sic*) tenements in peaceable manner and after holden with force, nor if the persons which enter with force into lands and tenements be removed and voided before the coming of the said justices or justice, as before, nor any pain ordained if the sheriff

do not obey the commandments and precepts of the said justices for to execute the said ordinance, many wrongful and forcible entries be daily made in (*sic*) lands and tenements by such as have no right; and also divers gifts, feoffments, and discontinuances sometimes made to lords, and other puissant persons, and extortioners within the said counties where they be conversant, to have maintenance, and sometimes to such persons as be unknown to them so put out, to the intent to delay and defraud such rightful possessors of their right and recovery for ever, to the final disherison of divers of the King's faithful liege people, and likely daily to increase, if due remedy be not provided in this behalf: our lord the King considering the premisses hath ordained that the said statute, and all other statutes of such entries or alienations made in times past, shall be holden and duly executed; joined to the same that from henceforth where any doth make any forcible entry in (*sic*) lands and tenements or other possessions, or them hold forcibly, after complaint thereof made within the same county where such entry is made, to the justices of peace, or to one of them, by the party grieved, that the justices or justice so warned, within a convenient time shall cause, or one of them shall cause, the said statute duly to be executed, and that at the costs of the party so grieved: and, moreover, though that such persons making such entry be present, or else departed before the coming of the said justices or justice, notwithstanding the same justices or justice in some good town next to the tenements so entered, or in some other convenient place, according to their discretion, shall have, or either of them shall have authority and power to inquire by the people of the same county, as well of them that make such forcible entries in (*sic*) lands and tenements, as of them which the same hold with force; and if it be found before any of them, that any doth contrary to this statute, then the said justices or justice shall cause to reseise the lands and tenements so entered or holden as afore, and shall put the party so put out in full possession of the said lands or tenements so entered or holden as before: [*Avoidance of feoffments, etc., made after forcible entry—Duty of sheriffs as to juries, etc.*] Provided always, that they which keep their possessions with force in any lands and tenements, whereof they or their ancestors, or they whose estate they have in such lands and tenements, have continued in possession in the same by three years or more be not endamaged by force of this statute. [*As to the summary powers of justices to convict on view under these Acts, see Ex parte Davy*, 2 *Dowl. Pract. Cas.* (*N. S.*) 24: *R.* v. *Oakley*, 4 *B. & Ad.* 307; 2 *L. J.* (*M. C.*) 24: *R.* v. *Wilson*, 1 *A. & E.* 627; 3 *Id.* 817; 3 *L. J.* (*M. C.*) 96; 4 *Id.* 11: *Attwood* v. *Joliffe*, 3 *New Sess. Cas.* 116. *They are not now exercised. For indictment, see post*, p. 1112.]

31 *Eliz. c.* 11.]—*After reciting above proviso to* 8 *H.* 6, *c.* 9: *enacts* "That no restitution upon any indictment of forcible entry, or holding with force, be made to any person or persons, if the person or persons so indicted hath had the occupation or hath been in quiet possession, by the space of three whole years together, next before the day of such indictment so found, and his, her, or their estate or estates therein not ended nor determined; which the party indicted shall and may allege for stay of restitution, and restitution to stay until that be tried if the other will deny or traverse the same . . ." [*Here follows a provision as to costs.*]

21 *Jac.* 1, *c.* 8, *s.* 4—*Limitations on certiorari of indictments for forcible entry.*]—*Ante*, p. 134.

21 *Jac.* 1, *c.* 15—*Restitution of possession.*]—Be it enacted by the

authority of this present parliament that such judges, justices or justice of the peace, as by reason of any Act or Acts of Parliament now in force, are authorized and enabled upon inquiry, to give restitution of possession unto tenants of any estate of freehold, of their lands or tenements which shall be entered upon with force, or from them withholden by force, shall by reason of this present Act have the like and the same authority and ability from henceforth upon indictment of such forcible entries, or forcible withholding before them duly found, to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knights' service, tenants by *elegit*, statute-merchant and staple, of lands or tenements by them so holden which shall be entered upon by force, or holden from them by force. [*For indictment, see post*, p. 1112.]

Indictment for a Forcible Entry into a Freehold. (5 *Ric.* 2, *st.* 1, *c.* 7, *ante*, p. 1108.)

Middlesex, to wit:—The jurors for our lord the King upon their oath present, that one J. N., on the first day of June, in the year of our Lord ——, was seised in his demesne as of fee of and in a certain messuage, with the appurtenances, to wit, a certain messuage known as No. —, A. Street, situate and being in the parish of B., in the county of M.; and the said J. N., being so seised thereof as aforesaid, J. S. afterwards, to wit, on the day and year aforesaid, with divers other persons to the jurors aforesaid unknown, into the said messuage and appurtenances aforesaid, with force and arms, and with strong hand, unlawfully did enter, and the said J. N. from the peaceable possession of the said messuage, with the appurtenances aforesaid, with force and arms, and with strong hand [*or* "with multitude of people"], unlawfully did expel and put out; and the said J. N. from the possession thereof, so as aforesaid, with force and arms, and with strong hand, being unlawfully expelled and put out, the said J. S. from the said first day of June, in the year aforesaid, until the day of the taking of this inquisition, from the possession of the said messuage, with the appurtenances aforesaid, with force and arms, and with strong hand, unlawfully and injuriously did keep out, and still doth keep out; to the great damage of the said J. N.; against the form [*as ante*, p. 465]. *The above count has been framed from the indictment in R.* v. *Fraser* [1895] *Cent. Crim. Ct. Counts for riot, affray, and assault may be added. See the precedents*, 4 *Went.* 149; 6 *Went.* 403, 428; 10 *Cox, App. xlix. A second count may be added for forcible detainer, see post*, p. 1113. *It used to be held necessary to describe the premises with the same certainty as in a declaration in ejectment, on account of the restitution which follows conviction.* 1 *Russ. Cr.* (6th ed.) 726. *But it would seem that this strictness is unnecessary, except as to the writ of restitution* (*see R.* v. *Child*, 2 *Cox*, 102, *Rolfe*, B.), *and that minor variances are now amendable under* 14 *&* 15 *Vict. c.* 100, *s.* 1 (*ante*, p. 52). *If the estate J. N. had in the premises were not a fee-simple, but an estate in tail, or for life merely, describe it as such. See R.* v. *Bowser*, 8 *Dowl. Pract. Cas.* 128.

Misdemeanor: imprisonment, and ransom at the King's will (*i.e., fine at the discretion of the court*). 5 *Ric.* 2, *st.* 1, *c.* 7, *ante*, p. 1108.

Evidence.

The prosecutor must prove:—*First*, that he was seised in fee of the premises in question, or otherwise in lawful possession, at the time of

the forcible entry. The prosecutor's title is not part of the issue, and probably need not, for purposes of conviction, be stated with precision. *See R.* v. *Child*, 2 *Cox*, 102: *R.* v. *Hoare*, 6 *M. & Sel.* 266; 18 *R. R.* 368. And proof that he was in the actual occupation of the premises, or in the perception of the rents and profits, is sufficient *primâ facie* evidence of his seisin. *See Lows* v. *Telford*, 1 *App. Cas.* 414; 45 *L. J.* (*Ex.*) 613; 13 *Cox*, 226: *Jayne* v. *Price*, 5 *Taunt.* 326; 15 *R. R.* 518. This presumption, however, may be rebutted, either by direct evidence of his having a less estate, or by evidence of circumstances from which the jury may presume it. *Jayne* v. *Price*, *ubi supra*. But it is immaterial whether the estate thus proved be an estate by right or by wrong; for even if the defendant have a right of entry, still his asserting that right "with strong hand, or with multitude of people," is equally an offence within the statute as if he had no right; and this is so even where a landlord forcibly ejects a tenant whose term has expired. *Taunton* v. *Costar*, 7 *T. R.* 431; 4 *R. R.* 481; *and see Newton* v. *Harland*, 1 *Scott* (*N. R.*) 474. If he was a mere trespasser, apparently the statute does not apply. *Browne* v. *Dawson*, 12 *A. & E.* 624: *Scott* v. *Brown*, 51 *L. T.* (*N. S.*) 746: *Collins* v. *Thomas*, 1 *F. & F.* 416, *Lord Campbell*, C.J.: *R.* v. *Dillon*, 2 *Chit.* (*K. B.*) 314. And the statute, however, does not extend to a case where the party ousted had the bare custody of the premises for the defendant; 1 *Hawk. c.* 64, *s.* 32; but it extends to the forcible ouster of one joint tenant, or tenant in common, by another. *Id. s.* 33. It may be considered a good general rule, also, that the statute extends to all hereditaments to which the defendant, if he had a right, might have asserted that right by a peaceable entry.

Secondly, the prosecutor must prove the forcible entry. An entry "with strong hand," or "with multitude of people," is the offence described in the statute. Therefore, an entry by breaking the doors or windows, etc., whether any person be in the house or not, especially if it be a dwelling-house, is a forcible entry within the statute. *See* 1 *Hawk. c.* 64, *s.* 26. So, an entry where personal violence is done to the prosecutor, or to any of his family or servants, or to any person or persons keeping the possession for him (*Id. s.* 26), or even where it is accompanied with such threats of personal violence (either actual, or to be implied from the actions of the defendant, or from his being unusually armed or attended, or the like), as were likely to intimidate the prosecutor or his family, etc., and to deter them from defending their possession (*Id. ss.* 20, 21, 27: *Milner* v. *Maclean*, 2 *C. & P.* 17), is a forcible entry within the statute. But an entry by an open window, or by opening the door with a key, or by mere trick or artifice, such as by enticing the owner out and then shutting the door upon him, or the like, without further violence; *Com. Dig. Forc. Ent.* (*A.* 3); 1 *Hawk. c.* 64, *s.* 26; or if effected by threats to destroy the owner's goods or cattle merely, and not by threats of personal violence, 1 *Hawk. c.* 64, *s.* 28, is not deemed a forcible entry. A mere trespass will not support an indictment for forcible entry; there must be such force or show of force as is calculated to prevent resistance. *R.* v. *Smyth*, 5 *C. & P.* 201; 1 *M. & Rob.* 155. If, however, whilst the owner is out of his house, the defendant forcibly withhold him from returning to it, and in the meantime send persons to take possession of it peaceably, this is said to be a forcible entry. 1 *Hawk. c.* 64, *s.* 26. Also, where a party having right, and whose entry is congéable, enters or makes claim, and the other party afterwards continues to hold possession by force; this is considered a forcible *entry* in the party so holding; because his estate is defeated by the entry or claim, and his continuance in possession is deemed a new entry. *Id. ss.* 22, 34; *Co. Litt.* 251.

Where the party entering has in fact no right of entry, all persons in his company, as well as those who do not use violence as those who do, are equally guilty; but if he have a right of entry, then those only who use or threaten violence; 3 *Bac. Abr. Forc. Ent.* (*B.*); or who actually abet those who do, are guilty. A wife may be guilty of a forcible entry into the dwelling-house of her husband, and other persons also, if they assist her in the force, although her entry in itself is lawful. *R.* v. *Smyth*, *ubi supra*.

Thirdly, as to the expulsion; it is necessary to prove the expulsion, and that the prosecutor is still kept out of possession, merely for the purpose of obtaining restitution of the premises; 1 *Hawk. c.* 64, *s.* 41; but it is no part of the offence described by the statute, which mentions a forcible entry merely. No restitution shall be awarded, if the defendant has been permitted to remain quietly in possession for three years, previously to the finding of the indictment. 31 *Eliz. c.* 11 (*ante*, p. 1109).

Absence of title in the prosecutor is no defence, the gist of the offence being the force. *R.* v. *Williams*, 4 *Man. & Ry.* 471: *R.* v. *Studd*, 14 *W. R.* 806; 14 *L. T.* (*N. S.*) 623: *Beddall* v. *Maitland*, 17 *Ch. D.* 174: *cf. Edwick* v. *Hawkes*, 18 *Ch. D.* 199.

A judge at the assizes may, in his discretion, refuse to award restitution, after an indictment for forcible entry and detainer has been found by a grand jury; and the High Court will not review his decision. *R.* v. *Harland*, 2 *M. & Rob.* 141; 8 *A. & E.* 826; 1 *Per. & D.* 93; 8 *L. J.* (*M. C.*) 60: *R.* v. *Hake*, 4 *Man. & Ry.* 483, *n.* After conviction the writ is of right and as of course: *see Short and Mellor, Cr. Off. Pr.* 1447. As to the form of a writ of restitution, *see Dalt. c.* 182.

Indictment for a Forcible Entry into a Leasehold, etc. (21 *Jac.* 1, *c.* 15, *ante*, p. 1109.)

This may be the same as the last precedent, with such alterations only as are necessary to adapt it to a term of years, tenancy by copy of court-roll, or tenancy by elegit, etc., as thus:]—that J. N., late of, etc., etc., was possessed of a certain messuage with the appurtenances, situate and being in, etc., for a certain term of years, whereof divers, to wit, ten years, were then to come, and are still unexpired: and the said J. N. being so possessed thereof, *etc., etc.* (*as in the last precedent*).

Evidence.

The evidence is the same as in the last case, except as to the proof of the estate of the prosecutor in the premises.

Indictment for a Forcible Detainer. (8 *H.* 6, *c.* 9, *ante*, p. 1108.)

The same as in the last two precedents respectively, to the end of the statement of the seisin or possession; then proceed thus:]—*and* the said J. N. being so seised [*or* possessed] thereof, J. S. afterwards, to wit, on the day and year aforesaid, into the said messuage, with the appurtenances aforesaid, unlawfully did enter, and the said J. N. from the peaceable possession of the said messuage, with the appurtenances aforesaid, then and there unlawfully did expel and put out; and the said J. N. from the possession

thereof so as aforesaid being unlawfully expelled and put out, the said J. S., from the said third day of August in the year aforesaid, until the day of the taking of this inquisition, from the possession of the said messuage, with the appurtenances aforesaid, with force of arms and with strong hand unlawfully and injuriously did keep out, and the said messuage with the appurtenances and the possession thereof unlawfully and forcibly did hold and detain, and still doth hold and detain with force and arms and strong hand from the said J. N.; to the great damage of the said J. N.; against the form (*as ante*, p. 465). *See* 3 *Chit. Cr. L.* 1136 *a.*

Evidence.

Prove the seisin or possession, as in the two former cases. Prove an entry; whether peaceable or not is immaterial. Proof of the expulsion, which *ex vi termini* implies force, is not material, as the gist of the offence is the forcible detainer merely. Holding the premises from the prosecutor by force, however, must be proved: and the same violence or terror which will make an entry forcible, will also make a detainer forcible. 1 *Hawk. c.* 64, *s.* 30; 1 *Russ. Cr.* (6th ed.) 311. But merely refusing to go out of the house (1 *Hawk. c.* 64, *s.* 30); or a tenant at will denying possession to his lessor; or a man keeping out of his land, by force, a person claiming common upon it (*Com. Dig. Forc. Det.* (*B.* 2)), is not a forcible holding within the meaning of the statutes. *See R.* v. *Oakley*, 4 *B. & Ad.* 307; 2 *L. J.* (*M. C.*) 24: *R.* v. *Wilson*, 1 *A. & E.* 627; 3 *L. J.* (*M. C.*) 96: *R.* v. *Wilson*, 3 *A. & E.* 817; 4 *L. J.* (*M. C.*) 114.

Indictment for a Forcible Entry and Detainer. (*Common Law.*)

For precedent of such indictment, see the 22nd edition of this work, p. 1057. *It is said that an indictment will lie at common law for a forcible entry, although it is generally brought on the statutes. Per Wilmot, J., in R.* v. *Bake*, 3 *Burr.* 1731: *but see R.* v. *Storr*, 3 *Burr.* 1698. *It is said to have been proper to indict at common law where the entry was made without legal title* (1 *Hawk. c* 64, *s.* 1: *R.* v. *Wilson*, 8 *T. R.* 357; 4 *R. R.* 694); *or where the prosecutor would on an indictment under the old statutes have been incompetent as a witness. R.* v. *Williams*, 9 *B. & C.* 549; 4 *Man. & Ry.* 471.

Misdemeanor at common law: fine or imprisonment, without hard labour, or both. See ante, pp. 238, 240.

Evidence.

The evidence of the forcible entry, upon this indictment, must be stronger than is required to support an indictment on the statutes; that is to say, there must be proof of such a force as constitutes a public breach of the peace, or such proceedings as constitute a riot or unlawful assembly (*ante*, pp. 1098, 1101). *R.* v. *Wilson, ubi supra: R.* v. *Bake, ubi supra.*

It is not necessary to set forth, or prove the particulars of the prosecutor's estate in the messuage, etc., because in this case there is no restitution: stating that J. N. was possessed, and proving his possession, will be sufficient. *R.* v. *Wilson, supra.* For the same reason, it does not seem to be necessary to prove the expulsion or detainer, unless where the prosecutor has failed to prove the entry to have been forcible. (*See ante*, p. 1111.)

Sect. 6.

POUND-BREACH AND RESCUE OF DISTRESS.

Common Law.

Pound-breach is a misdemeanor indictable at common law. It consists in the forcible release of cattle, etc., lawfully placed in a proper pound (*Green* v. *Duckett*, 11 *Q. B. D.* 275; 52 *L. J.* (*Q. B.*) 435), or in forcibly damaging or destroying the pound with that object. 1 *Co. Inst.* 47; 1 *Russ, Cr.* (6th ed.) 822; 2 *Chit. Cr. L.* 205; *Steph. Dig. Cr. Law* (6th ed.), 121; *Bullen on Distress* (2nd ed.), 248: *R.* v. *Bradshaw*, 7 *C. & P.* 233: *R.* v. *Butterfield*, 17 *Cox*, 598. For precedents of indictments, *see Cro. Circ. Comp.* 199; 2 *Chit. Cr. L.* 205; 4 *Went.* 314. The offence is also summarily punishable under 6 & 7 *Vict. c.* 30. Rescue of a distress for rent seems also to be an indictable misdemeanor at common law. *R.* v. *Nicholson*, 65 *J. P.* 298; *and see R.* v. *Noonan, Ir. Rep.* 10 *C. L.* 505; 10 *Cox*, 302 (*C. C. R. Ir.*): *R.* v. *Walsh, Ir. Rep.* 10 *C. L.* 511. For precedent of indictment, *see Cro. Circ. Comp.* 198. It consists in forcibly taking away things legally distrained from the distrainor before they are impounded. *Bullen on Distress* (2nd ed.), 244. But it is usual to resort to the civil remedy by treble damages under 2 *W. & M. c.* 5, *s.* 3, and 11 *G.* 2, *c.* 19, *s.* 10: *Kemp* v. *Christmas* [1898] 79 *L. T.* (*N. S.*) 233; 14 *T. L. R.* 572. Rescue of a distress for rates appears also to be indictable. *R.* v. *Brenan*, 6 *Cox*, 381 (*Ir.*); 6 *Ir. Jur.* (*O. S.*) 307: *R.* v. *Westropp*, 2 *Ir. C. L. Rep.* 213. It is not necessary in such a case to prove the making of the rate, or that anything is due; and it is sufficient to prove a warrant in proper form. *Id.* If the distress warrant is bad, the rescue is justifiable. *R.* v. *Boyle*, 6 *Ir. C. L. Rep.* 598; 7 *Cox*, 428 (*C. C. R. Ir.*): *and cf. R.* v. *Pigott*, 1 *Ir. C. L. Rep.* 471.

Sect. 7.

CHALLENGE TO FIGHT.

Indictment for sending a Challenge. (*Common Law.*)

Kent, to wit:—The jurors for our lord the King upon their oath present, that J. S., being a person of a turbulent and quarrelsome temper and disposition, and contriving and intending not only to vex, injure, and disquiet one J. N., and do the said J. N. some grievous bodily harm, but also to provoke, instigate, and excite the said J. N. to break the peace, and to fight a duel with and against him the said J. S., on the first day of June, in the year of our Lord ——,* wickedly, wilfully, and maliciously did write, send, and deliver, and cause and procure to be written, sent, and delivered unto him the said J. N. a certain letter and paper writing containing a challenge to fight a duel with and against him the said J. S., and which said letter and paper writing is as follows, that is to say [*here set out the letter, with such innuendoes as may be necessary*]: to the great damage, scandal, and disgrace of the said J. N., in contempt of our lord the King and his laws, and against the peace of our lord the King, his crown and dignity. (*2nd Count.*)—And the jurors aforesaid, upon their

oath aforesaid, do further present, that the said J. S., contriving and intending as aforesaid, afterwards, to wit, on the day and year aforesaid, wickedly, wilfully, and maliciously did provoke, instigate, excite, and challenge the said J. N. to fight a duel with and against him the said J. S.; to the great damage, *etc.* (*as in the first count*).

Misdemeanor: fine or imprisonment, without hard labour, or both. See ante, pp. 238, 240. *See* 1 *Hawk. c.* 63, *s.* 3; *Steph. Dig. Cr. L.* (6th ed.) 54: *R.* v. *Philipps*, 6 *East*, 464: *R.* v. *O'Brien, Smith and Batty* (*K. B. Ir.*), 79; *and the precedents, Cro. Circ. Comp.* 102–104; 4 *Went.* 315; 6 *Went.* 385–461; 3 *Chit. Cr. L.* 848. *From the above precedent an indictment may readily be framed against the person who delivered the challenge.*

Evidence.

Give the letter in evidence, and prove the handwriting. Prove also the delivery of it to J. N. Where the letter containing the challenge was put into the post-office in the county of Middlesex, to be delivered to the prosecutor in another county, Lord *Ellenborough* held, that the party might be indicted in Middlesex: for *sending* the challenge is the offence; whether it reach the person to whom it is sent or not is immaterial. *R.* v. *Williams*, 2 *Camp.* 506.

Provocation, however great, is no excuse or justification on the part of the defendant (*R.* v. *Rice*, 3 *East*, 581; 7 *R. R.* 523), however it may weigh with the court in apportioning the punishment.

Indictment for provoking a Man to send a Challenge. (*Common Law.*)

Proceed as in the last precedent to the, and then thus:*]—wickedly, wilfully, and maliciously did utter, pronounce, declare, and say to and in the presence and hearing of the said J. N., these words following, that is to say:—"You are a scoundrel and a liar, and I shall take care to let the world know that you are so;" with intent to instigate, excite, and provoke the said J. N. to challenge him the said J. S. to fight a duel with and against the said J. N.; to the great damage, *etc.* (*as ante*, p. 1114). *If there be any doubt as to the words, lay them differently in different counts; and add a general count, not setting out the words, but merely charging the defendant with having used threats and opprobrious language to the prosecutor, with intent, etc.*

Misdemeanor: fine or imprisonment, without hard labour, or both. See ante, pp. 238, 240. *And see R.* v. *Philipps*, 6 *East*, 464.

Evidence.

Prove the words. (*See ante*, p. 302.) And give evidence of circumstances from which the jury may infer the defendant's intent, if such intent do not sufficiently appear from the words proved. *See R.* v. *Philipps*, 6 *East*, 464.

SECT. 8.

SENDING LETTERS CONTAINING THREATS TO MURDER OR TO INJURE PROPERTY.

Statutes.

6 & 7 *Vict. c.* 96 (*Libel Act*, 1843), *s.* 3—*Threatening to publish or abstain from publishing a libel.*]—*Ante*, p. 523.

24 & 25 *Vict. c.* 96 (*Larceny Act*), *ss.* 46–49—*Letters threatening to accuse of crime.*]—*Ante*, pp. 521, 522.

Sect. 44—*Letters demanding property by menaces.*]—*Ante*, p. 521.

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 50—*Sending letters threatening to burn or destroy houses, etc., etc.*]—Whosoever shall send, deliver, or utter, *or directly or indirectly cause to be received, knowing the contents thereof*, any letter or writing, threatening to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, *or any grain, hay, or straw, or other agricultural produce in or under any building*, or any ship or vessel, *or to kill, maim, or wound any cattle*, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years . . . or to be imprisoned, . . . and, if a male under the age of sixteen years, with or without whipping. [*Framed from* 4 *G.* 4, *c.* 54, *s.* 3, *and* 10 & 11 *Vict. c.* 66, *s.* 1, *with the additions italicized. See note to next enactment.*]

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 16—*Sending letters threatening to murder.*]—Whosoever shall *maliciously* send, deliver, or utter, *or directly or indirectly cause to be received, knowing the contents thereof*, any letter or writing threatening to kill or murder any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years . . . or to be imprisoned, . . . and, if a male under the age of sixteen years, with or without whipping.

[*This section was framed from* 4 *G.* 4, *c.* 54, *s.* 3; *and* 10 & 11 *Vict. c.* 66, *s.* 1. *The words secondly italicized were inserted to get rid of R.* v. *Paddle*, *R.* & *R.* 484: *R.* v. *Burridge*, 2 *M.* & *Rob.* 296: *R.* v. *Jones*, 1 *Den.* 218; 2 *C.* & *K.* 398: *and R.* v. *Grimwade*, 1 *Den.* 30; 1 *C.* & *K.* 592, *except so far as they decide that the letter must be sent to the party threatened, or put in a place where it is likely to be found and conveyed to him. Greaves, Crim. Law Cons. Acts* (2nd ed.), 50. *As to the word* "maliciously," *see Greaves, l. c., and post*, p. 1117.]

Indictment under 24 & 25 *Vict. c.* 97, *s.* 50.

Commencement as ante, p. 433]—feloniously did send ("*send, deliver, or utter, or directly or indirectly cause to be received*") to one J. N. a certain letter ("*letter or writing*") directed to the said J. N., by the name and description of Mr. J. N., threatening to kill and murder the said J. N. ("*any person*") [*or* "threatening to burn and destroy a certain dwelling-house ('*any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, or any grain, hay, or straw, or other*

agricultural produce in or under any building, or any ship or vessel'), the property of the said J. N., *or* of one E. N."], [*or* "threatening to kill (*or* 'maim' *or* 'wound') a horse of and belonging to him the said J. N."], he the said J. S. then well knowing the contents of the said letter, which said letter is as follows, that is to say [*here set out the letter verbatim. R.* v. *Lloyd*, 2 *East, P. C.* 1122 (*ante*, p. 75)]; against the form [*as ante*, p. 465]. (2*nd Count.*)—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., on the day and in the year aforesaid, feloniously did utter a certain writing threatening to kill and murder [*etc., as in the first count, substituting "writing" for "letter"*]. *The word* "maliciously" *inserted in the precedent in the* 21*st edition* (p. 972) *is not in* 24 *&* 25 *Vict. c.* 97, *s.* 50, *and has been omitted as unnecessary. It is, however, in* 24 *&* 25 *Vict. c.* 100, *s.* 16, *supra, and should be inserted in indictments under that section. As to the second count, see the observations immediately following the second count of the indictment, ante*, p. 532. *Where an indictment charged the prisoner in three several counts with three felonies in sending three separate threatening letters, Byles, J., compelled the prosecution to elect on which count they would proceed. R.* v. *Ward*, 10 *Cox*, 42. *Where the threat is obvious from the terms of the letter, no prefatory averments or innuendoes need be inserted. R.* v. *Boucher*, 4 *C. & P.* 562.

Felony: penal servitude for not more than ten and not less than three years, or imprisonment not exceeding two years, with or without hard labour, and, if a male under sixteen years, with or without whipping. 24 *&* 25 *Vict. c.* 97, *s.* 50; *c.* 100, *s.* 16; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace*, 24 *&* 25 *Vict. c.* 97, *s.* 73 (*ante*, p. 650); *c.* 100, *s.* 71 (*ante*, p. 778).

Evidence.

Prove that the defendant sent or delivered the letter to J. N. as directed, *ante*, p. 532.

Sending a letter to A. B. threatening to burn a house of which he was owner, but let by him to and occupied by a tenant, was held not to be an offence within 4 *G.* 4, *c.* 54 (*rep.*), the words of which were "his or their houses," etc. *R.* v. *Burridge*, 2 *M. & Rob.* 296; *sed quære; see R.* v. *Grimwade*, 1 *Den.* 30; 1 *C. & K.* 592. And now the threat to burn any house, barn, etc., etc., is sufficient to satisfy 24 *&* 25 *Vict. c.* 97, *s.* 50.

A material variance between the letter set out and that produced in evidence will be fatal, unless amended. (*See ante*, pp. 297, 302).

Where the threat charged is to kill or murder, it is for the jury to say whether the letter amounts to a threat to kill or murder. *R.* v. *Girdwood*, 2 *East, P. C.* 1120, 1121; 1 *Leach*, 142: *R.* v. *Boucher*, 4 *C. & P.* 562: *R.* v. *Tyler*, 1 *Mood. C. C.* 428.

Upon an indictment on 9 *G.* 1, *c.* 22 (*rep.*), the words of which were "to burn the dwelling-house, outhouses," etc., where the writer of the letter threatened to *burn* the prosecutor's mill, and to do *all the injury he was able* to his farms, and the prosecutor proved that he had no mill at the time, but that he had farms, and buildings upon them: the judges held clearly that, as to the mill, the letter was not within the statute; and the majority of the judges held that, even as to the farms, as the letter did not necessarily imply that the injury to them was to be effected by fire, it was not within the Act. *R.* v. *Jepson*, 2 *East, P. C.* 1115. Neither would this threat as to the farms satisfy the term "destroy" in the present statute. Compare the cases under 24 *&* 25 *Vict. c.* 96, *s.* 44 (*ante*, p. 532).

Sect. 9.

DEFAMATORY LIBEL.

NOTE.—*For seditious libel, see ante*, p. 986; *for blasphemous libel, see ante*, p. 1019; *for libel affecting the administration of justice, see ante*, p. 1094; *for obscene libel, see post*, p. 1190.

Statutes.

32 *G.* 3, *c.* 60 (*Libel Act*, 1792 (*Fox's Act*)), *s.* 1.]—Whereas doubts have arisen whether on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the King and the defendant or defendants, on the plea of not guilty pleaded, it be competent to the jury impannelled to try the same to give their verdict on the whole matter in issue: be it therefore declared and enacted, *etc.* that on every such trial the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the court or judge, before whom such indictment or information shall be tried, to find the defendant or defendants guilty merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information. [*This Act is said to be declaratory of the common law. Capital and Counties Bank* v. *Henty*, 5 *C. P. D.* 589, *Brett*, L.J. *But it was passed in consequence of rulings to the effect that the question of libel or no libel was for the judge alone and not for the jury.*]

Sect. 2.]—Provided always, that on every such trial the court or judge before whom such indictment or information shall be tried shall, according to their or his discretion, give their or his opinion and direction to the jury on the matter in issue between the King and the defendant or defendants, in like manner as in other criminal cases.

Sect. 3.]—Provided also, that nothing herein contained shall be construed to extend to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases.

Sect. 4.]—Provided also, that in case the jury shall find the defendant or defendants guilty it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of this Act, anything herein contained to the contrary notwithstanding.

6 & 7 *Vict.* *c.* 96 (*Libel Act*, 1843), *s.* 3—*Publication or suppression of libel with intent to extort money, etc.*]—*Ante*, p. 523.

Sect. 4—*Punishment for knowingly publishing a false defamatory libel.*] —If any person shall maliciously publish any defamatory libel, knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such fine as the court shall award. [*This section does not create or define a new offence, but merely prescribes the punishment for a common law offence. R.* v. *Munslow* [1895] 1 *Q. B.* 758; 64 *L. J.* (*M. C.*) 138.]

Sect. 5—*Punishment for defamatory libel.*]—If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year. (*See ante*, pp. 238, 240). [*See R.* v. *Mabin* [1901] 20 *N. Z. L. R.* 451, *discussing R.* v. *Munslow, ubi supra, and Boaler* v. *R.*, 21 *Q. B. D.* 284.]

Sect. 6—*Plea of justification, etc.*]—On the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published; to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and if after such plea the defendant shall be convicted on such indictment or information, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same:

Provided always, that the truth of the matter charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification:

Provided also, that in addition to such plea it shall be competent to the defendant also to plead a plea of not guilty:

Provided also, that nothing in this Act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment, or information for defamatory words or libel. [*As to the law prior to this enactment, see notes to Wyatt* v. *Gore, Holt* (*N. P.*), 299, *at* p. 306. *Until s.* 6 *was passed, the plea of not guilty was the only plea in bar allowed, and it was held that the basis of the proceeding was the actual or possible injury to the public peace.*]

Sect. 7—*Evidence to rebut primâ facie case of publication by agent.*]—Whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part. [*This section would seem not to be restricted to defamatory libel.*]

Sect. 8—*Costs.*]—In the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and upon a special plea of justification to such indictment or information, if the issue be found for the

prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea; such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the court before which the said indictment or information is tried. [*See also Crown Office Rules*, 1886, *rule* 50, *to the same effect, as to indictments, etc., tried in the King's Bench Division. And see ante*, pp. 259, 260, *and post*, p. 1134.]

44 & 45 *Vict.* c. 60 (*Newspaper Libel and Registration Act*, 1881), *s.* 1—*Interpretation of "newspaper"—"Proprietor."*]—In the construction of this Act, unless there is anything in the subject or context repugnant thereto, the several words and phrases hereinafter mentioned shall have and include the meanings following; (that is to say), . . .

The word "newspaper" shall mean any paper containing public news, intelligence, or occurrences, or any remarks or observations therein printed for sale, and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers, parts, or numbers. (*See Att.-Gen.* v. *Bradbury and Evans*, 7 *Ex.* 97; 21 *L. J.* (*Ex.*) 12.) Also any paper printed in order to be dispersed, and made public weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements.

The word "proprietor" shall mean and include as well the sole proprietor of any newspaper, as also in the case of a divided proprietorship the persons who, as partners or otherwise, represent and are responsible for any share or interest in the newspaper as between themselves and the persons in like manner representing or responsible for the other shares or interests therein, and no other person.

Sect. 4—*Inquiry by court of summary jurisdiction as to newspaper libel being for public benefit or being true.*]—A court of summary jurisdiction, upon the hearing of a charge against a proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for a libel published therein, may receive evidence as to the publication being for the public benefit, and as to the matters charged in the libel being true, and as to the report being fair and accurate, and published without malice, and as to any matter which under this or any other Act, or otherwise, might be given in evidence by way of defence by the person charged on his trial on indictment, and the court, if of opinion after hearing such evidence that there is a strong or probable presumption that the jury on the trial would acquit the person charged, may dismiss the case. [*In R.* v. *Carden*, 5 *Q. B. D.* 1; 49 *L. J.* (*M. C.*) 1; 14 *Cox*, 359, *it was held that a magistrate has no jurisdiction to receive evidence of the truth of the libel where the defendant is charged before him under* 6 & 7 *Vict.* c. 96, *s.* 5 (*ante*, p. 1119), *with maliciously publishing a defamatory libel. The above enactment overrules that case as to newspaper libels. It seems that when the charge is under* 6 & 7 *Vict.* c. 96, *s.* 4 (*ante*, p. 1118), *the truth can be inquired of by the justice. See R.* v. *Carden*, 5 *Q. B. D.*, *at* pp. 11, 13, *Lush*, J.]

Sect. 5—*Provision as to summary conviction for newspaper libel.*]—If a court of summary jurisdiction upon the hearing of a charge against a proprietor, publisher, editor, or any person responsible for the publication of a newspaper for a libel published therein is of opinion that though the person charged is shown to have been guilty the libel was of a trivial character, and that the offence may be adequately punished by virtue of the powers of this section, the court shall cause the charge to be reduced

into writing and read to the person charged, and then address a question to him to the following effect: "Do you desire to be tried by a jury, or do you consent to the case being dealt with summarily?" And, if such person assents to the case being dealt with summarily, the court may summarily convict him and adjudge him to pay a fine not exceeding fifty pounds. *Sect.* 27 *of the Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), shall, so far as is consistent with the tenor thereof, apply to every such proceeding as if it were herein enacted and extended to Ireland, as if the *Summary Jurisdiction Acts* were therein referred to instead of the *Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43).

Sect. 6—*Application of Vexatious Indictments Act*, 1859 (22 & 23 *Vict. c.* 17), *to libels generally.*]—Every libel or alleged libel, and every offence under this Act, shall be deemed to be an offence within and subject to the provisions of the *Vexatious Indictments Act*, 1859 (22 & 23 *Vict. c.* 17, *ante*, p. 7).

Sect. 15—*Copies of entries in and extracts from register of newspaper proprietors, to be evidence.*]—Every copy of an entry in or extract from the register of newspaper proprietors, purporting to be certified by the registrar or his deputy for the time being, or under the official seal of the registrar, shall be received as conclusive evidence of the contents of the said register of newspaper proprietors, so far as the same appear in such copy or extract without proof of the signature thereto or of the seal of office affixed thereto, and every such certified copy or extract shall in all proceedings, civil or criminal, be accepted as sufficient *primâ facie* evidence of all the matters and things thereby appearing, unless and until the contrary thereof be shown.

Sect. 18.]—The provisions as to the registration of newspaper proprietors contained in this Act shall not apply to the case of any newspaper which belongs to a joint-stock company duly incorporated under and subject to the provisions of the *Companies Acts*, 1862 to 1879.

51 & 52 *Vict. c.* 64 (*Law of Libel Amendment Act*, 1888), *s.* 1—*Meaning of "newspaper."*]—In the construction of this Act the word "newspaper" shall have the same meaning as in the *Newspaper Libel and Registration Act*, 1881. (*Ante*, p. 1120.)

Sect. 3—*Newspaper reports of proceedings in court privileged.*]—A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter. [*See Kimber* v. *Press Association* [1893] 1 *Q. B.* 65; *and ante*, p. 996.]

Sect. 4—*Newspaper reports of proceedings of public meetings and of certain bodies and persons privileged.*]—A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorized to act by letters patent, Act of Parliament, warrant under the royal sign manual,

or other lawful warrant or authority, select committees of either house of parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any government office or department, officer of state, commissioner of police, or chief constable of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously: Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter: Provided also, that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same: Provided further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit.

For the purposes of this section "public meeting" shall mean any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto shall be general or restricted.

Sect. 7—*Indictment for obscene libel.*]—*Post*, p. 1192.

Sect. 8—*Order of judge required for prosecution of newspaper proprietor, etc.*]— . . . No criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein without the order of a judge at chambers being first had and obtained.

Such application shall be made on notice to the person accused, who shall have an opportunity of being heard against such application. [*The omitted words of this section repealed* 44 & 45 *Vict. c.* 60, *s.* 3, *as to which see ante*, p. 150. *This section appears to apply to newspapers published by joint-stock companies as well as to newspapers registered under* 44 & 45 *Vict. c.* 60. *See s.* 18 *of that Act, ante*, p. 1121.]

Sect. 9—*Person proceeded against criminally for libel a competent witness.*]—Every person charged with the offence of libel before any court of criminal jurisdiction, and the husband or wife of the person so charged, shall be competent, but not compellable, witnesses on every hearing at every stage of such charge. [*This enactment is virtually superseded by the Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *q.v. ante*, p. 392, *et seq.*]

Indictment for a False Defamatory Libel. (6 & 7 *Vict. c.* 96, *s.* 4, *ante*, p. 1118.)

Kent, to wit:—The jurors for our lord the King upon their oath present, that J. S. [contriving, and unlawfully, wickedly, and maliciously intending to injury, vilify, and prejudice one J. N., and to deprive him of his good name, fame, credit and reputation, and to bring him into public contempt, scandal, infamy and disgrace], on the first day of June, in the

year of our Lord ——, unlawfully, [wickedly and maliciously] did write and publish, and cause and procure to be written and published, a false, (*a*) scandalous, malicious and defamatory libel, in the form of a letter directed to the said J. N. [*or, if the publication were in any other manner, omit the words* "in the form, etc," *and insert* "according to the tenor and effect following"] containing divers false, scandalous, malicious and defamatory matters and things of and concerning the said J. N., and of and concerning the said J. N. in his capacity of, etc., according to the tenor and effect following, that is to say [*here set out the libel, and if its meaning and reference to* J. N. *be not perfectly clear, add such innuendoes as may be necessary to show its meaning, and that it is defamatory of* J. N.]; * he the said J. S. then well knowing the said defamatory libel to be false,* against the form of the statute in that case made and provided, to the great damage, scandal and disgrace of the said J. N., to the evil example of all others in the like case offending; against the peace of our lord the King, his crown and dignity. *The words* "contriving," etc., *and* "wickedly and maliciously" *are usual, but not essential. Haire* v. *Wilson*, 9 *B. & C.* 643: *R.* v. *Munslow* [1895] 1 *Q. B.* 758, 764; 64 *L. J.* (*M. C.*) 138; 18 *Cox*, 112, *Pollock*, B. *Omission of the word* "maliciously" *will not vitiate the indictment. R.* v. *Harvey*, 2 *St. Tr., N. S.* 1; 2 *B. & C.* 257: *Bromage* v. *Prosser*, 4 *B. & C.* 247. *The word* "unlawfully" *is sufficient to exclude cases of publication on a privileged occasion. R.* v. *Munslow, Id., Wills*, J. *The libel should be correctly set out* (*see ante*, p. 991).

Misdemeanor: imprisonment not exceeding two years, without hard labour, and fine. 6 *&* 7 *Vict. c.* 96, *s.* 4. *If the prosecutor fail to prove the scienter, the defendant may nevertheless be convicted of publishing a defamatory libel* (*Boaler* v. *R.*, 21 *Q. B. D.* 284; 57 *L. J.* (*M. C.*) 85), *and punished by fine, or imprisonment not exceeding one year, without hard labour, or both. Id. s.* 5 (*see ante*, p. 1119).

A precedent of an indictment under 6 *&* 7 *Vict. c.* 96, *s.* 5, *can be framed from the above by omitting the words between* * *, *and the words "against the form, etc." The word "false" can also be omitted as unnecessary either at common law or under* 6 *&* 7 *Vict. c.* 96, *s.* 5. *Boaler* v. *R., ubi supra: R.* v. *Munslow, ubi supra. Where the only publication is to the person defamed, the libel should be described as calculated or as having a tendency to cause a breach of the peace. This does not seem absolutely essential. See R.* v. *Adams*, 22 *Q. B. D.* 66; 58 *L. J.* (*M. C.*) 1: *R.* v. *Ensor*, 3 *T. L. R.* 366, *Stephen*, J.; *Odgers on Libel* (3rd ed.), 628, 713. *But there are decisions to the contrary. See R.* v. *Wegener*, 2 *Stark.* (*N. P.*) 245; 19 *R. R.* 712: *R.* v. *Brooke*, 7 *Cox*, 251.

No criminal prosecution can be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper as defined by 44 *&* 45 *Vict. c.* 60, *s.* 1, *and* 51 *&* 52 *Vict. c.* 64, *s.* 1 (*ante*, pp. 1120, 1121), *for any libel published therein, without the order of a judge at chambers, the application for which shall be made on notice to the person accused, who shall have an opportunity of being heard against it.* 51 *&* 52 *Vict. c.* 64, *s.* 8 (*ante*, p. 1122). *No appeal lies from the judge's decision. Ex parte Pulbrook* [1892] 1 *Q. B.* 86; 61 *L. J.* (*M. C.*) 91.

No indictment can be preferred for libel unless one or other of the

(*a*) According to Mr. Holt in the notes to *Wyatt* v. *Gore* [1816] *Holt* (*N. P.*) at 311, "the epithet 'false' is not applied to the propositions contained in the libel, but to the aggregate criminal result. The libel '*Falsus libellus*' is used in the description of the libel as *falsus proditor* in high treason; that is to say, wickedly, without cause or justification. In point of substance the alteration in the description would hardly be noticeable if the epithet were *verus* instead of *falsus*." This was before 6 *&* 7 *Vict. c.* 96, *s.* 6. The word also occurs in old precedents for obscene libel.

preliminary steps required by 22 & 23 *Vict. c.* 17, *s.* 1 (*ante*, p. 7), *has been taken.* 44 & 45 *Vict. c.* 60, *s.* 6 (*ante*, p. 1121).

Defamatory libel is not triable at quarter sessions. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

As to costs, see post, p. 1134.

Indictment for Libel on a Solicitor. (*Common Law.*)

Surrey, to wit:—The jurors for our lord the King upon their oath present, that J. N., gentleman, at the time of publishing the false, scandalous, malicious, and defamatory libel hereinafter charged and stated was, and long before and from thence hitherto had been, and still is, a solicitor of the Supreme Court of Judicature in England, and in the office, practice, and business of a solicitor hath been, during all that time, retained and employed by divers subjects of this realm, to prosecute and defend for them, as their agent and solicitor, divers suits and businesses in the said court, and in other his Majesty's courts in England, and also to do and negotiate other affairs and businesses as such solicitor; and the said J. N., during all that time, hath acted in the most fair and honourable manner in the exercise of his said profession. And that also, before the publishing of the said false, scandalous, malicious, and defamatory libel hereinafter mentioned, to wit, on the first day of March, in the year of our Lord ——, the said J. N. was, in his business and profession of a solicitor, employed and retained by one A. C. to commence and prosecute a certain action upon the behalf of the said A. C. against one J. S., for the recovery of a certain sum of money then and long before due and owing to the said A. C. from and by the said J. S., and then remaining unpaid; and the said J. N., in pursuance of the instructions he then received from the said A. C. in that behalf, and of his retainer as aforesaid, did then commence and prosecute the said action against the said J. S., as in duty he was bound to do; but the said J. N., in the prosecution of the said action, so far from acting with any unnecessary severity towards the said J. S., on the contrary thereof, acted towards him the said J. S. in as lenient a manner as was consistent with his duty as solicitor to the said A. C. as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., well knowing the premises, but contriving and unlawfully, wickedly, and maliciously intending to aggrieve and vilify the said J. N., and to injure him in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his clients and neighbours, and other good and worthy subjects of this kingdom, and also to injure the said J. N. in his said business and profession of a solicitor, and to cause him to be esteemed and taken to be a negligent and corrupt practiser in his said profession, and to be a person not fit to be entrusted and employed therein, afterwards, to wit, on the first day of June, in the year last aforesaid, unlawfully, falsely, wickedly, and maliciously did write and publish, and cause and procure to be written and published, in the form of a letter directed to the said A. C., a certain false, wicked, malicious, scandalous, and defamatory libel, of and concerning the said J. N., and of and concerning his conduct in his business and profession of solicitor, and of and concerning the said action so commenced and prosecuted against the said J. S. by the said J. N., for and as the solicitor of the said A. C. as aforesaid, and of and concerning the conduct of the said J. N. as solicitor in the said action, according to

the tenor and effect following, that is to say [*here set out the libel, with such innuendoes as may be necessary* (*see ante*, p. 1123)]; to the great scandal, infamy, and disgrace of the said J. N., to the evil example of all others in like case offending, and against the peace of our lord the King, his crown and dignity.

This old form, which has been slightly modernized, is retained as an example of an indictment containing prefatory averments: and because it can be adapted to an indictment under 6 *&* 7 *Vict. c.* 96, *s.* 5, *subject to the note ante*, p. 1123.

As to the evidence, see post, pp. 1130-1134.

Indictment for hanging a Man in Effigy. (*Common Law.*)

Commencement as ante, p. 1122]—unlawfully, wickedly, and maliciously did make, and cause and procure to be made, a certain gibbet and gallows, and also a certain effigy or figure intended to represent the said J. N., and then unlawfully, wickedly, and maliciously did erect, set up, and fix, and cause and procure to be erected, set up, and fixed, the said gibbet and gallows, in a certain yard and place near unto a certain common highway, called ——, and near to a certain ferry called "The Horse Ferry," where the said J. N. was used and accustomed to ply in the way of his trade and business of a waterman; and then unlawfully, wickedly, and maliciously did hang up and suspend, and cause and procure to be hung up and suspended, the said effigy and figure to and upon the said gibbet and gallows, with the name of the said J. N. inscribed on a piece of wood and affixed to the said effigy and figure, together with divers scandalous inscriptions and devices affixed upon and about the same, reflecting on the character of the said J. N.; and did then keep and continue, and cause and procure to be kept and continued, the said gibbet and gallows, so erected and set up as aforesaid, with the said effigy and figure hung up and suspended to and from the same as aforesaid, together with the several inscriptions and devices aforesaid, so affixed as aforesaid, for a long space of time, to wit, for the space of four days then next following, and during all that time unlawfully, wickedly, and maliciously did then publish and expose the said gibbet and gallows, with the said effigy and figure thereon, to the sight and view of divers good and worthy subjects of our said lord the King, passing and repassing in and along the highway aforesaid; to the great scandal, infamy, and disgrace of the said J. N., to the evil example of all others in the like case offending, and against the peace, etc.

Pleas and Replications.

General issue.]—The defendant was at common law entitled only to plead the general issue "not guilty." *See ante*, p. 179. If the prosecution is by information in the High Court, or the indictment is removed into the High Court, the plea of "not guilty" is in writing and signed by counsel or solicitor or the defendant in person.

Justification.]—Under 6 *&* 7 *Vict. c.* 96, *s.* 6 (*ante*, p. 1119), the defendant, in addition to the plea of not guilty, may plead that the matters charged were true, and that it was for the public benefit that they should be published, setting forth the particular facts by reason of which the publication was for the public benefit (*see* the plea, *infra*); and if, after

such plea, the defendant be convicted, the court may take the plea, and evidence in support of it, into consideration, in aggravation, or in mitigation.

The following form, taken from *form* 81, scheduled to the *Crown Office Rules*, 1886, will serve as a precedent of pleas of not guilty and justification and of a replication:—

[In the High Court of Justice,
King's Bench Division
(Middlesex).
THE KING *against* A. B.]

And now, that is to say, on the —— day of ——, 1905, before our said lord the King, in the King's Bench Division of his Majesty's High Court of Justice, at the Royal Courts of Justice, London, comes the said A. B. by ——, his solicitor [*or* in his own proper person], and having heard the said indictment read, he says that he is not guilty thereof, and hereupon he puts himself upon the country. [And James Robert Mellor, Esquire, coroner and attorney of our said lord the King, before the King himself, who for our said lord the King in this behalf prosecutes, does the like. *These words seem to have been taken from a copy of a complete record made up from error, and are not part of the plea.*]

And for a further plea the said A. B. pursuant to the statute in that behalf, says that our said lord the King ought not further to prosecute the said indictment [*or* information] against him, because he says that it is true that [*here allege the truth of every libellous part of the publication set out in the indictment*].

And the said A. B. further says, that before and at the time of the publication in the said indictment [*or* information] mentioned [*here state facts which rendered the publication of benefit to the public*]; by reason whereof it was for the public benefit that the said matters so charged in the said indictment [*or* information] should be published, and this he, the said A. B., is ready to verify. Wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment [*or* information] above specified.

[*In the precedent in Odgers on Libel* (3rd ed.), p. 705, *apparently taken from R. v. Newman*, 1 *E. & B.* 268, 558, *the plea of justification contains the words "and so the said* J. S. *says, that the said alleged libel consists of allegations true in substance and in fact, and of fair and reasonable comments thereon." It is submitted by the present editors that the defence of fair comment arises under the plea of "not guilty."*]

Demurrer.]—As to form and effect of demurrers, *see ante*, pp. 164–167. The prosecutor cannot at the same time demur to a plea and reply.

Replication.]—The replication may be in the following form:—

[In the High Court of Justice,
King's Bench Division
(Middlesex).
THE KING *against* J. S.]

The said James Robert Mellor, Esquire, coroner and attorney of our said lord the King, before the King himself, who for our said lord the King in that behalf prosecutes [*or* if the case is tried at the Central Criminal Court or in a court of assize, the said H. K. A. (the clerk of arraigns or clerk of assize)], as to the plea of the said J. S. by him first above pleaded, puts himself upon the country. And to the plea of the

said J. S. by him secondly above pleaded, the said J. R. M. (or H. K. A.) says that by reason of anything in the said second plea alleged, our said lord the King ought not to be precluded from further prosecuting the said indictment against the said J. S., because he says that he denies the said several matters in the said second plea alleged, and says that the same are not, nor are nor is any or either of them true. And this he the said J. R. M. (or H. K. A.) prays may be inquired of by the country, and the said J. S. doth the like. Therefore let a jury come. [*This precedent is framed from form* 83, *scheduled to the Crown Office Rules*, 1886.]

Definition of defamatory libel.]—In previous editions of this work (*see* 21st ed., p. 980) a classification was made of cases in which an action would lie for defamation without proof of special damage. This is now abbreviated, because of the general rule that an action lies for any words written and published which are of a defamatory character, irrespective of proof of special damage.

A defamatory libel consists in the writing and publishing of defamatory words of any living person, or words calculated or intended to provoke him to wrath or to expose him to public hatred, contempt, or ridicule, or to damage his reputation, or in the exhibition of a picture or effigy, defamatory of him; *Monson* v. *Tussauds, Ltd.* [1894] 1 *Q. B.* 671; 63 *L. J.* (*Q. B.*) 454; and such a libel is an indictable misdemeanor if the publication or exhibition is calculated to cause a breach of the peace; *Odgers on Libel* (3rd ed.) 443, and authorities there cited. As a general rule, to be indictable the libel must also be actionable. The exceptions to this rule are stated *post*, p. 1128, under *heads* 5, 6, 7, *and* 8. The law implies malice from the publication; but the allegation of malice is not essential in the indictment. *R.* v. *Munslow* [1895] 1 *Q. B.* 758, 762.

An indictment will not lie for a libel by husband on his wife. *R.* v. *Lord Mayor of London*, 16 *Q. B. D.* 772; 55 *L. J.* (*M. C.*) 118. An indictment may be maintained for words written, for which an action could not be maintained if they were merely spoken. *Thorley* v. *Lord Kerry*, 4 *Taunt.* 355; 13 *R. R.* 626. As, for instance, if a man write or print, and publish, of another, that he is a swindler (*l'Anson* v. *Stuart*, 1 *T. R.* 748; 1 *R. R.* 392) or villain (*Bell* v. *Stone*, 1 *B. & P.* 331; 4 *R. R.* 820), it is libel, and punishable as such; although, if this were merely spoken, it would not be actionable without special damage. *Savile* v. *Jardine*, 2 *H. Bl.* 531. But no indictment will lie for words spoken and not reduced into writing, even if an action would lie upon the speaking without proof of special damage (*R.* v. *Bear*, 2 *Salk.* 417: *R.* v. *Langley*, 6 *Mod.* 125), unless they be seditious (*see ante*, p. 986), blasphemous (*ante*, p. 1019), grossly immoral or obscene (*post*, p. 1190), or uttered to a magistrate in the execution of his office (*ante*, p. 1097), or uttered as a challenge to fight a duel, or with an intention to provoke the other party to send a challenge (*ante*, p. 1114).

1. Words written and published are defamatory if they impute to the person of whom they are published the commission of any offence, whether indictable or summarily punishable. *Webb* v. *Beavan*, 11 *Q. B. D.* 609: *Leyman* v. *Latimer*, 3 *Ex. D.* 15: *Monson* v. *Tussauds, Ltd.* [1894] 1 *Q. B.* 671.

2. Such words are also defamatory if they impute fraud (short of crime), dishonesty, immorality, vice, or dishonourable conduct, or affliction by an infectious disorder, or anything calculated to exclude from society the person defamed; *R.* v. *Leng*, 34 *J. P.* 309, *Blackburn*, J.: *Com. Dig., Action on Case for Defamation* (*D.* 28, 29); or if they clearly tend to injure the person of whom they are published in his profession, calling, or trade.

3. Such words are also defamatory if they hold the person to whom they refer up to hatred, *R.* v. *Cooper*, 8 *Q. B.* 533; 15 *L. J.* (*Q. B.*) 206; ridicule, *R.* v. *Rosenberg* [1879] *cited in Odgers on Libel* (3rd ed.), 21; or contempt, *Parmiter* v. *Coupland*, 6 *M. & W.* 105. But it has been ruled not to be a criminal libel to publish a placard merely stating that a man owes money. *R.* v. *Coghlan*, 4 *F. & F.* 316, *Bramwell*, B. If, however, the placard asserted or implied his inability to pay it, it would seem that it would be libellous. *Id.*

4. Writings vilifying the character of persons in a public position in England, except where the writing amounts to sedition or contempt of court, appear to be in the same position as other defamatory libels on private persons, except that in a gross case an *ex-officio* information or information by the Master of the Crown Office might be filed (*ante*, p. 145). The repeal of the Acts, *de scandalis magnatum*, by 50 & 51 *Vict. c.* 59, appears to mark the abolition of any distinction for this purpose between the character of public and private persons. *See Short and Mellor, Crown Off. Pr.* 257, 276.

5. Writings vilifying the characters of persons deceased are libels, and may be made the subject of an indictment; the case *de libellis famosis*, 5 *Co. Rep.* 125 *a*; 1 *Hawk. c.* 73, *s.* 1; 3 *Chit. Cr. L.* 868; but it would seem that the indictment in such a case must charge the libel to have been published with a design to bring contempt on the family of the deceased, or to stir up the hatred of the King's subjects against them, or to excite to a breach of the peace; *R.* v. *Topham*, 4 *T. R.* 126; otherwise it cannot be maintained. *See R.* v. *Ensor, Cardiff Assizes* [1877] *Steph. Dig. Cr. Law* (6th ed.), 227, *n.*; 3 *Times L. R.* 366. But *cf. ante*, p. 1123. Where an application for a criminal information for a libel upon a deceased person was made by his representative, the court refused in its discretion to grant it, and Lord *Coleridge*, C.J., in pronouncing judgment, said: "It must be, I think, some very unusual publication to justify an *indictment or information* for aspersing the character of the dead. If such a case should ever arise it must stand upon its own foot." *R.* v. *Labouchere*, 12 *Q. B. D.* 320; 53 *L. J.* (*Q. B.*) 362.

6. It is said that writings which tend to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be proceeded upon here as libels, and the writers, publishers, etc., punished; particularly when such writings have a tendency to interrupt the pacific relations between the two countries. *R.* v. *Peltier*, 28 *St. Tr.* 529, where an information was filed against Peltier for a libel on Napoleon Buonaparte, then first consul of the French Republic; and the defendant was convicted; *and see R.* v. *Vint*, 27 *St. Tr.* 627; *Holt on Libel*, 78. In *R.* v. *Most*, 7 *Q. B. D.* 244, an indictment was preferred for a similar offence, and the accused convicted; but on a case reserved the court refrained from deciding whether the indictment charged any offence against English law. In *R.* v. *Bourtzeff*, 127 *Cent. Cr. Ct. Sess. Pap.* 284 (February, 1898), a similar indictment was preferred and found, but not proceeded with. *See also R.* v. *D'Eon*, 1 *W. Bl.* 510; 3 *Burr.* 1513.

7. And not only are libels upon individuals punishable by indictment, but writings also reflecting upon bodies of men, without mentioning any one in particular, are likewise punishable as libels, if they tend to stir up the hatred of the King's subjects against the members of the body generally, or to excite the individuals composing the body to a breach of the peace. *R.* v. *Osborn*, 2 *Barnard.* 138, 166: *R.* v. *Gathercole*, 2 *Lewin*, 237: *R.* v. *Fergus O'Connor*, 3 *St. Tr., N. S.* 1299; *and see ante*, p. 990.

8. Documents containing defamatory matter, even if published only to

the person defamed, may be made the subject of indictment, though such publication would not give a cause of action. But in such case it is prudent to insert in the indictment the words "with intent to provoke the prosecutor and incite him to a breach of the peace" (*R.* v. *Wegener*, 2 *Stark.* (*N. P.*) 245; 19 *R. R.* 712; *but see R.* v. *Brooke*, 7 *Cox*, 251: *R.* v. *Price* [1881] *cited in Odgers on Libel* (3rd ed.), 628, *and ante*, p. 1123); and the document must reasonably tend or be calculated to provoke a breach of the peace. *Odgers on Libel* (3rd ed.), 455. A letter written and sent by a man to a young woman containing a proposal in plain terms that she should surrender her chastity to him for a sum of money is a defamatory libel, because it reasonably or probably tends to provoke a breach of the peace on her part or on the part of those connected with her. *R.* v. *Adams*, 22 *Q. B. D.* 66; 58 *L. J.* (*M. C.*) 1; 16 *Cox*, 544.

Form of imputation.]—It is immaterial whether the libel impute crime, etc., to the prosecutor, in a direct manner, or indirectly, by such hints or modes of expression as are likely to convey the intended meaning to the person to whom the libel was published; taking the words in the same sense in which the rest of mankind would ordinarily understand them, it is for the jury to say whether, in their minds, they convey the idea imputed. *R.* v. *Watson*, 2 *T. R.* 199, 206, *Buller*, J. Therefore, where one man said of another that "his character was infamous; that delicacy forbade him from bringing a direct charge, but it was a male child who complained to him," such words were understood to mean a charge of unnatural practices, and to be sufficiently certain in themselves, without the aid of an innuendo. *Woolnoth* v. *Meadows*, 5 *East*, 463; 7 *R. R.* 742. So, if a man were to write or say of J. N., "There is a vast difference between my character and his; I never robbed my master," or the like: it would be the same as if he had directly charged J. N. with having robbed his master. *See Snell* v. *Webling*, 2 *Lev.* 150; 1 *Vent.* 276; *Com. Dig., Action on the Case for Defamation* (*E.* 8). And the same where the imputation is conveyed obliquely, *Id.* (*E.* 1), or indirectly, *Id.* (*E* 7), or by way of question, *Id.* (*E.* 2), conjecture, *Id.* (*E.* 3), or exclamation, *Id.* (*E.* 6), or by irony, 1 *Hawk. c.* 73, *s.* 4, or the like. So a defamatory writing, expressing one or two letters only of a name, is as much a libel, and punishable as such, as if it expressed the name in full, if it appear evident upon the face of the libel, from the context, etc., what name was meant (1 *Hawk. c.* 73, *s.* 5), or if it appear from the evidence of persons acquainted with the parties what person was meant by such initials or letters.

In some cases it is necessary to insert prefatory averments to explain the innuendoes. Thus, for instance, in an action on the case against a man for saying of another, "*He has burnt my barn*," the plaintiff cannot by way of innuendo, say "*meaning my barn full of corn*;" *Barham's case*, 4 *Co. Rep.* 20 *a*; because this is not an explanation derived from anything which preceded it on the record, but from the statement of an extrinsic fact which had not previously been stated. But if, in the introductory part of the declaration, it had been averred that the defendant had a barn full of corn, and that in a discourse about that barn he had spoken the above words of the plaintiff, an innuendo of its being a barn full of corn would have been good; for, by coupling the innuendo with the introductory averment, it would have made it complete. So, in an action for the words "*He is a thief*," you cannot explain the defendant's meaning in the use of the word "*he*," by an innuendo "*meaning the prosecutor*," or the like, unless something appear previously upon the record to ground that explanation; but if you had previously charged the words to have been

spoken of and concerning the prosecutor, then such an innuendo would be correct; for, when it is alleged that the defendant said of the prosecutor, "*He is a thief*," this is an evident ground for the explanation given by the innuendo, that the prosecutor was referred to by the word "*he*." *See* 1 *Rolle Abr.* 83, *pl.* 7, 85, *pl.* 7; *Cro. Jac.* 39, 126; 1 *Sid.* 52; 2 *Str.* 934; 1 *Wms. Saund.* (6th ed.) 212 (*b*), *n* 3: *Goldstein* v. *Foss*, 9 *D. & R.* 197; 6 *B. & C.* 154: *Clement* v. *Fisher*, 1 *Man. & Ryl.* 281; 7 *B. & C.* 459: *Alexander* v. *Angle*, 1 *Cr. & J.* 143: *Tomlinson* v. *Brittlebank*, 4 *B. & Ad.* 630; 1 *Nev. & M.* 455: *Sweetapple* v. *Jesse*, 5 *B. & Ad.* 27; 2 *Nev. & M.* 36: *Curtis* v. *Curtis*, 10 *Bing*, 477; 4 *Moore & Scott*, 377: *Slowman* v. *Dutton*, 10 *Bing.* 402; 4 *Moore & Scott*, 174: *Day* v. *Robinson*, 1 *A. & E.* 554; 4 *Nev. & M.* 884. But where the words or libel are in the second person, and the libel is directed to the party slandered or libelled, and it is so alleged in the indictment—as, where a declaration charges that the defendant, in a discourse with the prosecutor, said to him, "*You are a thief*," it is unnecessary to aver that they were spoken or written of and concerning the prosecutor; nor is there any need of an innuendo, for it is plain enough without it that "*you*" means the prosecutor. *Scutt* v. *Hawkins*, 2 *Rolle Rep.* 243, 244; *and see* 1 *Rolle Abr.* 85, *pl.* 8. An indictment which charged that the defendant published a libel concerning A., the prosecutor, according to the tenor and effect following, viz., "A. (meaning the said A.), game and rabbit destroyer, and his wife (meaning C., the wife of the said A.), the seller of the same in country and town," was held bad, the words used not being *primâ facie* libellous, and there being no innuendoes or averments showing that such words were intended to charge the prosecutor with an indictable offence or with any improper conduct. *R.* v. *Yates*, 12 *Cox*, 233, *Quain*, J.

Evidence for the Prosecution.

The evidence for the prosecution is in substance the same as in an action for libel.

1. *Publication.*]—The prosecutor must prove the publication of the libel. As stated *ante*, pp. 1123, 1129, the publication proved may be to the prosecutor only or to third persons (*see ante*, pp. 1126, 1127). Mere possession of a libel is not publication, and to constitute a publication there must be a sending or delivery or showing to another person by a person having knowledge of the contents of the libel. *See Vizetelly* v. *Mudies, Ltd.* [1900] 2 *Q. B.* 170 (*C. A.*): *Emmens* v. *Pottle*, 16 *Q. B. D.* 354: *R.* v. *Topham*, 4 *T. R.* 126: *R.* v. *Harvey*, 2 *St. Tr., N. S.* 1; 2 *B. & C.* 257: *R.* v. *Holt*, 5 *T. R.* 436. Where the publication is by an innocent agent, the person who procures it is liable as principal. (*See ante*, p. 12.) Where the person charged with publication is not the printer nor the first or main publisher, but has taken a subordinate part in the dissemination of the libel, to determine whether he is liable for publication it is necessary to consider the particular circumstances under which he disseminated the alleged libel. *Vizetelly* v. *Mudies, Ltd.* [1900] 1 *Q. B.* 170, 180, *Romer*, L.J.; 69 *L. J.* (*Q. B.*) 645. But the burden of proof is on the defendant in such a case. The posting of a sealed letter is not publication; but production of an open letter in the handwriting of the defendant, with the post-mark on it, has been held sufficient evidence of publication. And if the fact of posting is proved, it raises a presumption that the letter was received by the person to whom it was addressed. *Warren* v. *Warren*, 1 *Cr. M. & R.* 250; *and see ante*, p. 992, *and Odgers on Libel* (3rd ed.), 175. As to proof of handwriting, *see ante*, p. 382.

Publication in a newspaper is proved by production of a copy of the paper and proof of its purchase from the defendant or at his place of business. Proof should also be given of the ownership of the paper by certificate under 44 & 45 *Vict. c.* 60, *s.* 15 (*ante*, p. 1121), or by certificate of the registration of the limited company which owns it. (*See* 44 & 45 *Vict. c.* 60, *s.* 18, *ante*, p. 1121.) It is also necessary to produce the judge's order for the prosecution (*see ante*, p. 1122); but the fact that it has been obtained need not be averred in the indictment.

2. *Position of the prosecutor.*]—If the libel reflect on the character of a public officer or professional man, as such, it is not in general necessary to prove his appointment to the office, or admission to the profession, because that is almost in all cases either directly or impliedly admitted by the libel itself; *see Berryman* v. *Wise*, 4 *T. R.* 366; 2 *R. R.* 413: *Smith* v. *Taylor*, 1 *B. & P.* (*N. R.*) 196, 208: *Jones* v. *Stevens*, 11 *Price*, 235; 25 *R. R.* 714: *Pearce* v. *Whale*, 5 *B. & C.* 38; and if it be not, proof that he was in the habit of acting as such officer or professional man would in that case be sufficient (*see ante*, p. 344). But if the effect of the libel be to charge the prosecutor with having acted as such officer or professional man, without a legal appointment, as, for instance, if a man libel a physician, by calling him a quack, it seems necessary to prove the appointment or admission. *See Smith* v. *Taylor*, *ubi supra*: *Collins* v. *Carnegie*, 1 *A. & E.* 695: *Yrisarri* v. *Clement*, 3 *Bing.* 432; 11 *Moore* (*C. P.*) 308: *and see R.* v. *Sutton*, 4 *M. & Sel.* 532, 548.

3. *The libel and the innuendoes.*]—The prosecutor must prove the words as laid in the indictment (*see ante*, pp. 75, 302, 993), that they apply to the prosecutor, and the innuendoes. The question whether the words can bear the innuendoes is for the judge; whether they do bear them, for the jury. 32 *G.* 3, *c.* 60, *s.* 1 (*ante*, p. 1118).

4. *Falsity and malice.*]—The falsity of the libel is immaterial unless justification is pleaded, and need not be proved, unless a *primâ facie* case of justification is made out. Nor need the prosecutor prove that the libel was maliciously published (*R.* v. *Munslow* [1895] 1 *Q. B.* 758), unless the defendants show that the occasion was privileged, in which case evidence of express malice is necessary (*see post*, p. 1132). Evidence of the publication by the defendant of other libels, previously or subsequently to the publication of the libel charged in the indictment, is admissible to prove actual malice or deliberate publication. *Pearson* v. *Lemaitre*, 5 *M. & Gr.* 700; 6 *Scott* (*N. R.*) 607: *Macleod* v. *Wakley*, 3 *C. & P.* 311: *Plunkett* v. *Cobbett*, 5 *Esp.* 136: *Hemmings* v. *Gasson*, *E. B. & E.* 346; 27 *L. J.* (*Q. B.*) 252: *Darby* v. *Ouseley*, 1 *H. & N.* 1. It seems, however, that evidence of subsequent libels will not be admitted, unless they distinctly refer to the libel set out in the indictment, or at least refer to the same subject-matter. *Finnerty* v. *Tipper*, 2 *Camp.* 72. It has been long established that the publication of false and defamatory matter concerning any person is itself evidence of malice. *Vizetelly* v. *Mudies, Ltd.* [1900] 2 *Q. B.* 170, at 178, *Vaughan Williams*, L.J.

Evidence for the Defence.

Under the plea of not guilty the defendant may prove (1) that the words are not defamatory; or (2) that they do not bear the innuendoes alleged; or (3) that the publication was accidental (*Emmens* v. *Pottle*, 16 *Q. B. D.* 354: *R.* v. *Munslow* [1895] 1 *Q. B.* 758, 765, *Wills*, J.: *Vizetelly*

v. *Mudies, Ltd., ubi supra*); or (4) that the matters complained of are fair comment or criticism on a matter of public interest and concern, including criticism on literary or dramatic works subject to public judgment. *McQuire* v. *Western Morning News* [1903] 2 *K. B.* 100; 72 *L. J.* (*K. B.*) 612: *Parmiter* v. *Coupland*, 6 *M. & W.* 105; *and see Odgers on Libel* (3rd ed.), 82. The defence in strictness is not that the occasion is privileged, but that the words are not defamatory. *Merivale* v. *Carson*, 20 *Q. B. D.* 275. (5) Under the plea of not guilty the defence may also be raised that the publication was on an occasion absolutely or otherwise privileged (*R.* v. *Munslow* [1895] 1 *Q. B.* 758, 761, *Russell*, L.C.J.); and if the privilege was qualified, may prove that he published the libel without malice, believing it to be true: *see R.* v. *Fitch*, 61 *J. P.* 233. Qualified privilege arises when the defendant has a duty or an interest to make the communication said to be defamatory, as where a master gives what he believes to be a correct character of a servant; *Edmondson* v. *Stevenson*, *Bull.* (*N. P.*) 8; 1 *B. & P.* 527, *cit.*; 4 *R. R.* 719, *n.*: *R.* v. *Hart*, 1 *W. Bl.* 386: *Hargrave* v. *Le Breton*, 4 *Burr.* 2422, 2425: *Weatherston* v. *Hawkins*, 1 *T. R.* 110: *Taylor* v. *Hawkins*, 16 *Q. B.* 308: *Manby* v. *Witt*, 18 *C. B.* 544; where a neighbour gives what he conceives to be a correct character of the credit and solvency of a tradesman; *Bull.* (*N. P.*) 8; or where a client makes a confidential representation injurious to a solicitor's professional character in the management of certain concerns, to other persons who are jointly interested in them with the client (1 *Camp.* 247), or the like. Also, if a writing, although injurious to another's character, be published, not maliciously or with intent to injure his character, but *bonâ fide* for the purpose of investigating a fact in which the person making it is interested, or, as it seems, in which the person to whom it is made is interested, or in the performance of a duty, it is privileged. *See Brown* v. *Croome*, 2 *Stark.* (*N. P.*) 297: *R.* v. *Bailey*, *Andr.* 229, *cit.*: *Fairman* v. *Ives*, 5 *B. & Ald.* 642; 24 *R. R.* 514: *Harrison* v. *Bush*, 5 *E. & B.* 344; 25 *L. J.* (*Q. B.*) 25: *Coxhead* v. *Richards*, 2 *C. B.* 569: *Beatson* v. *Skene*, 5 *H. & N.* 838: *Dickeson* v. *Hilliard*, 43 *L. J.* (*Ex.*) 37: *Waller* v. *Loch*, 7 *Q. B. D.* 619; 51 *L. J.* (*Q. B.*) 274: *Laughton* v. *Bishop of Sodor and Man*, 42 *L. J.* (*P. C.*) 11; *L. R.* 4 *P. C.* 495: *Hart* v. *Gumpach*, *L. R.* 4 *P. C.* 439: *Jenoure* v. *Delmege* [1891] *App. Cas.* 73: *Stuart* v. *Bell* [1891] 2 *Q. B.* 341; 60 *L. J.* (*Q. B.*) 577: *Hebditch* v. *M'Ilwaine* [1894] 2 *Q. B.* 54; *and Odgers on Libel* (3rd ed.), *ch. ix.* In an action for libel where the occasion is privileged, it is for the plaintiff to establish that the statements complained of were made from an indirect motive, such as anger, or with a knowledge that they were untrue, or without caring whether they were true or false, and not for the reason which would otherwise render them privileged; and if the defendant made the statements believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable grounds for his belief. *Clark* v. *Molyneux*, 3 *Q. B. D.* 237: *Pittard* v. *Oliver* [1891] 1 *Q. B.* 474; 60 *L. J.* (*Q. B.*) 219. The rule is the same in the case of an indictment; *i.e.*, where the defendant can show the occasion to be privileged the prosecution must give evidence of express malice.

Judicial proceedings.]—Defamatory statements made in the course of judicial proceedings are absolutely privileged, whether made by judge, party witness, or counsel. *R.* v. *Skinner*, *Lofft*, 53: *Dawkins* v. *Lord Rokeby*, *L. R.* 7 *H. L.* 744; 45 *L. J.* (*Q. B.*) 81: *McCabe* v. *Joynt* [1901] 2 *Ir. Rep.* 115, 127, *Palles*, C.B.

Fair report of judicial proceedings.]—The defence of fair and accurate

report of judicial proceedings is now available even if the proceedings were *ex parte*. *Kimber* v. *Press Association* [1893] 1 *Q. B.* 65; 62 *L. J.* (*Q. B.*) 152. It is not necessary to prove that all the evidence is published if its effect is fairly stated; *Milissich* v. *Lloyds*, 46 *L. J.* (*C. P.*) 404; 13 *Cox*, 575; and a fair and accurate report of the judgment without the evidence is protected. *Macdougall* v. *Knight*, 17 *Q. B. D.* 636; 55 *L. J.* (*Q. B.*) 464, discussed and approved in *Macdougall* v. *Knight*, 25 *Q. B. D.* 1; 59 *L. J.* (*Q. B.*) 517. But it would seem that such report cannot be deemed fair or accurate if the judgment or summing-up did not give the reader reasonable opportunity of forming his own opinion as to the conclusion to be drawn from the evidence. *Macdougall* v. *Knight*, 14 *App. Cas.* 194; 58 *L. J.* (*Q. B.*) 537; *and see ante*, p. 996. To be entitled to this privilege the report must be published contemporaneously; 51 *& 52 Vict. c.* 64, *s.* 3 (*ante*, p. 1121); and if the publication is in such a form as to be calculated to interfere with the trial on the merits, criminal liability may be incurred. *See R.* v. *Parke* [1903] 2 *K. B.* 432, 438.

Libels in newspapers.]—Formerly the proprietor of a newspaper was answerable, criminally as well as civilly, for the acts of his servants, in the publication of a libel, although it could be shown that such publication was without the privity of the proprietor. *R.* v. *Walker*, 3 *Esp.* 21: *R.* v. *Gutch*, *M. & M.* 433; 31 *R. R.* 744. This rule has, however, been very materially altered by 6 *& 7 Vict. c.* 96, *s.* 7 (*ante*, p. 1119). Under this section it has been held that the defendants, the proprietors of a newspaper, who have appointed a competent editor to conduct it, are not criminally responsible for the publication of a libel inserted by the editor in the newspaper, upon proof by them that the publication of the libel was made without their actual authority, consent, or knowledge, and did not arise from want of due care or caution on their part. *R.* v. *Holbrook*, 3 *Q. B. D.* 60; 47 *L. J.* (*Q. B.*) 35: *R.* v. *Holbrook*, 4 *Q. B. D.* 42; 48 *L. J.* (*Q. B.*) 113: *and see R.* v. *Bradlaugh*, 15 *Cox*, 217: *R.* v. *Ramsay and Foote*, 15 *Cox*, 231: *R.* v. *Allison*, 16 *Cox*, 559; 37 *W. R.* 143 (*C. C. R.*). As to the qualified protection now afforded to reports published in newspapers of judicial proceedings, *see* 51 *& 52 Vict. c.* 64, *s.* 3 (*ante*, p. 1121); and as to the qualified protection now afforded to newspaper reports of the proceedings of public meetings, and of certain bodies and persons, and notices and reports issued by certain public officers and published in newspapers, *see* 51 *& 52 Vict. c.* 64, *s.* 4 (*ante*, p. 1121).

Evidence of the truth of the libel may be given only if a plea of justification is pleaded (*see ante*, p. 1125).

Evidence that the identical charges contained in a libel had, before the time of composing and publishing the libel which is the subject of the indictment, appeared in another publication which was brought to the prosecutor's knowledge, and against the publisher of which he took no legal proceedings, is not admissible under 6 *& 7 Vict. c.* 96, *s.* 6 (*ante*, p. 1119). *R.* v. *Newman*, *Dears.* 85; 1 *E. & B.* 268. Where the plea contains several charges, and the defendant fails in proof of any of the matters alleged in it, the jury must of necessity find a verdict for the crown, and the court, in giving judgment, is bound to consider whether the guilt of the defendant is aggravated or mitigated by the plea, and by the evidence given to prove or disprove it, and to form its own conclusion on the whole case. *Id.*; 1 *E. & B.* 558. In that case the libel contained a number of specific charges, and it was therefore necessary, in order to support the plea of justification, to prove the truth of all the charges. Where the libel is general, it is sufficient to prove so much of the plea as

would justify the libel. *R.* v. *Labouchere*, 14 *Cox*, 419, *Cockburn*, C.J. Thus where the libel alleged generally that the prosecutor cheated at cards, without stating any specific instances of his doing so, and the plea of justification stated specific instances of the prosecutor's cheating at cards, the plea was held to be sufficiently proved by proof that in two of such instances the prosecutor did cheat at cards, although other instances alleged in the plea of his so cheating were not proved. *Id.*

Costs.

In the case of an indictment or information for libel by a private prosecutor, the defendant is entitled to costs if judgment be given for him; and if the issue on a special plea of justification be found for the prosecutor, he is entitled to the costs sustained by him by reason of such plea. 6 *&* 7 *Vict. c.* 96, *s.* 8 (*ante*, p. 1119). (*See also Crown Office Rules*, 1886, *rule* 50, *to the same effect.*) On a criminal information for a libel, the defendant having recovered a verdict and judgment, was held entitled to costs under this section, though the only plea on the record was "not guilty," and though the judge had certified, under 4 *&* 5 *W. & M. c.* 18, *s.* 2 (*rep.*), that there was reasonable cause for exhibiting the information. *R.* v. *Latimer*, 15 *Q. B.* 1077; 20 *L. J.* (*Q. B.*) 129 (*see ante*, p. 151). And on the trial of such an information, where judgment is given for the defendant, he is entitled, under *s.* 8 (*ante*, p. 1119), to recover from the prosecutor not only costs incurred subsequently to filing the information, but also costs incurred previously to filing the information. *R.* v. *Steel*, 1 *Q. B. D.* 482; 45 *L. J.* (*Q. B.*) 391. No appeal lies to the Court of Appeal from the decision of the K. B. D. as to such costs. *R.* v. *Steel*, 2 *Q. B. D.* 37; 46 *L. J.* (*M. C.*) 1. Prior to the *Judicature Acts* the taxation, by the clerk of assize, of the costs of an indictment for libel tried on the crown side at the assizes, was not reviewable in the Court of King's Bench. *R.* v. *Newhouse*, 22 *L. J.* (*Q. B.*) 127; 1 *Bail Court C.* 129. The Central Criminal Court and circuit courts of oyer and terminer and gaol delivery are now part of the High Court. *R.* v. *Dudley*, 14 *Q. B. D.* 273, 560: *R.* v. *Parke* [1903] 2 *K. B.* 432. An action lies to recover the costs on an indictment for libel given by 6 *&* 7 *Vict. c.* 96, *s.* 8. *Richardson* v. *Willis* (*No.* 2), 42 *L. J.* (*Ex.*) 68; *L. R.* 8 *Ex.* 69; *and see ante*, pp. 259, 260.

CHAPTER V.

OFFENCES AGAINST PUBLIC TRADE.

SECT. 1. *Offences against Bankruptcy Law, and Frauds on Creditors*, p. 1135.
2. *Counterfeiting Trade Marks, or using False Trade Descriptions*, p. 1151.
3. *Offences arising out of Relation between Employers and Workmen*, p. 1158.
4. *Offences as to the Sale of Food and Drugs*, p. 1163.

SECT. 1.—OFFENCES AGAINST BANKRUPTCY LAW, AND FRAUDS ON CREDITORS.

OFFENCES AGAINST BANKRUPTCY LAW.

Statutes.

32 & 33 *Vict. c.* 62 (*Debtors Act*, 1869), *Part* 2, *s.* 11—*Punishment of fraudulent debtors.* (*a*)]—Any person adjudged bankrupt [or in respect of whose estate a receiving order has been made] . . . shall, in each of the cases following, be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding two years, with or without hard labour; that is to say:—

(1) *Non-discovery of estate to trustee.*]—If he does not, to the best of his knowledge and belief, fully and truly discover to the trustee administering his estate for the benefit of his creditors all his property, real and personal, and how, and to whom, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any), or laid out in the ordinary expense of his family, unless the jury is satisfied that he had no intent to defraud: [*For indictment under this sub-section, see post*, p. 1140.]

(2) *Non-delivery of estate to trustee.*]—If he does not deliver up to such trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless the jury is satisfied that he had no intent to defraud:

(3) *Non-delivery of books, documents, etc.*]—If he does not deliver up to such trustee, or as he directs, all books, documents, papers, and writings in his custody or under his control relating to his property or affairs, unless the jury is satisfied that he had no intent to defraud:

(*a*) This section and *s.* 12 are now printed as amended by *s.* 163 of 46 & 47 *Vict. c.* 52 (*post*, p. 1138), and *s.* 26 of 53 & 54 *Vict. c.* 71 (*post*, p. 1137). It originally included cases where the debtor liquidated his affairs by arrangement. That form of liquidation was abolished in 1883, and the portions of the section were repealed by the *Statute Law Revision Act*, 1893 (56 & 57 *Vict. c.* 54).

(4) *Concealment of property.* (*a*)]—If after the presentation of a bankruptcy petition by or against him . . . or within four months next before such presentation . . . [or in case of a receiving order made under *s.* 103 of the *Bankruptcy Act*, 1883, (*b*)] before the date of the order, he conceals any part of his property to the value of ten pounds and upwards, or conceals any debt due to or from him, unless the jury is satisfied that he had no intent to defraud: [*For indictment under this and the next subsection, see post*, p. 1146: *and cf. s.* 13, *sub-s.* 3, *post*, p. 1150.]

(5) *Fraudulent removal of property.* (*a*)]—If after the presentation of a bankruptcy petition by or against him . . . or within four months next before such presentation . . . [or in case of a receiving order made under *s.* 103 of the *Bankruptcy Act*, 1883, (*b*)] he fraudulently removes any part of his property of the value of ten pounds or upwards (*see post*, p. 1140):

(6) *Material omissions in statement of affairs.*]—If he makes any material omission in any statement relating to his affairs, unless the jury is satisfied that he had no intent to defraud:

(7) *Failure to inform trustee of false claims on estate.*]—If, knowing or believing that a false debt has been proved by any person under the bankruptcy . . . he fail for the period of a month to inform such trustee as aforesaid thereof:

(8) *Preventing production of books, etc.* (*a*)]—If after the presentation of a bankruptcy petition by or against him . . . he prevents the production of any book, document, paper, or writing affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law:

(9) *Destruction or concealment of books, etc.* (*a*)]—If after the presentation of a bankruptcy petition by or against him . . . or within four months next before such presentation . . . [or in case of a receiving order made under *s.* 103 of the *Bankruptcy Act*, 1883, (*b*)] before the date of the order, he conceals, destroys, mutilates, or falsifies, or is privy to the concealment, destruction, mutilation, or falsification of any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law:

(10) *Making, etc., false entries in books.* (*a*)]—If after the presentation of a bankruptcy petition by or against him . . . or within four months next before such presentation . . . [or in case of a receiving order made under *s.* 103 of the *Bankruptcy Act*, 1883, (*b*)] before the date of this order, he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless the jury is satisfied that he had no intent to conceal the state of his affairs or to defeat the law: [*As to the meaning of "affairs," cf.* "conduct and affairs," *see* 53 *&* 54 *Vict. c.* 71 (*Bankruptcy Act*, 1890), *s.* 8, *and In re Barker*, 25 *Q. B. D.* 285 *at* p. 294. *Instead of "to defeat the law," the corresponding provision in* 24 *&* 25 *Vict. c.* 134, *s.* 221 (*rep.*), *contained the words "to defeat the objects of the law of bankruptcy.*"]

(11) *Fraudulently altering, etc., documents.* (*a*)]—If after the presentation of a bankruptcy petition by or against him . . . or within four months next before such presentation . . . or in case of a receiving order made under *s.* 103 of the *Bankruptcy Act*, 1883, before the date of the order, he fraudulently, parts with, alters, or makes any omission, or is privy to the fraudulently parting with, altering, or making any omission in any document affecting or relating to his property or affairs:

(*a*) See note, *ante*, p. 1136.

(*b*) In the note to *s.* 11 in the *Statutes Revised* (*vol.* 11, p. 544) it is assumed that the effect of 53 *&* 54 *Vict. c.* 71, *s.* 26, is to add the words in square brackets to *sub-ss.* 13, 14, and 15 only of *s.* 11. *Sed quære.*

(12) *Fictitious accounts of losses, etc. (a)*]—If after the presentation of a bankruptcy petition by or against him . . . or at any meeting of his creditors within four months next before such presentation . . . or in case of a receiving order made under *s.* 103 of the *Bankruptcy Act*, 1883, before the date of the order he attempts to account for any part of his property by fictitious losses or expenses:

(13) *Obtaining property on credit by fraud. (a)*]—If within four months next before the presentation of a bankruptcy petition by or against him . . . or in case of a receiving order made under *s.* 103 of the *Bankruptcy Act*, 1883, before the date of the order, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same: [*See post*, p. 1147; *and as to cases within s.* 13 (1) *and* 46 *&* 47 *Vict. c.* 52, *s.* 31, *see post*, pp. 1147, 1148.]

(14) *Traders obtaining goods by fraud. (a)*]—If within four months next before the presentation of a bankruptcy petition by or against him . . . or in case of a receiving order made under *s.* 103 of the *Bankruptcy Act*, 1883, before the date of the order, he, being a trader, obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless the jury is satisfied that he had no intent to defraud:

(15) *Disposing of goods otherwise than in course of trade. (a)*]—If within four months next before the presentation of a bankruptcy petition by or against him . . . or in case of a receiving order made under *s.* 103 of the *Bankruptcy Act*, 1883, before the date of the order, he, being a trader, pawns, pledges, or disposes of, otherwise than in the ordinary way of his trade, any property which he has obtained on credit, and has not paid for, unless the jury is satisfied that he had no intent to defraud: [*The words "otherwise than," etc., govern all the preceding verbs. R.* v. *Justin*, 61 *J. P.* 605, *Wright*, J.; *and see post*, p. 1142.]

(16) *False representation or fraud to obtain consent of creditors.*]—If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to any agreement with reference to his affairs or his bankruptcy or liquidation.

53 *&* 54 *Vict. c.* 71 (*Bankruptcy Act*, 1890), *s.* 26—*Amendment of s.* 11 *of Debtors Act*, 1869.]—*Sect.* 11 *of the Debtors Act*, 1869, shall have effect as if there were substituted therein for the words "if within four months next before the presentation of a bankruptcy petition against him," the words "if within four months next before the presentation of a bankruptcy petition by or against him, or in case of a receiving order made under *s.* 103 of the *Bankruptcy Act*, 1883, before the date of the order." [*This enactment is not retrospective. R.* v. *Griffiths* [1891] 2 *Q. B.* 145; 60 *L. J.* (*M. C.*) 93. *It adopts the law as laid down in R.* v. *Beck*, 16 *Cox*, 710; 61 *L. T.* (*N. S.*) 596, *decided on s.* 11, *sub-s.* 9, *of the Debtors Act*, 1869; *and overrides In re Burden, Ex parte Wood*, 21 *Q. B. D.* 24; 57 *L. J.* (*Q. B.*) 570, *in which it had been held that where a bankrupt presented his own petition under the Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 72), *he could not be prosecuted for any of the statutory misdemeanors created by s.* 11, *sub-ss.* 13, 14, *and* 15 *of the Debtors Act*, 1869 (32 *&* 33 *Vict. c.* 62).]

32 *&* 33 *Vict. c.* 62, *s.* 12—*Absconding with property. (a)*]—If any person who is adjudged a bankrupt, . . . or in respect of whose estate a receiving order has been made after the presentation of a bankruptcy petition by or against him or the commencement of the liquidation, or within four months before such presentation or commencement, quits England and takes with

(*a*) See note, *ante*, p. 1135.

him, or attempts or makes preparation for quitting England and for taking with him, any part of his property to the amount of twenty pounds or upwards, which ought by law to be divided amongst his creditors, he shall (unless the jury is satisfied that he had no intent to defraud) be guilty of felony, punishable with imprisonment for a time not exceeding two years, with or without hard labour.

46 & 47 *Vict.* c. 52 (*Bankruptcy Act*, 1883), s. 163—*Extension of penal provisions of Debtors Act*, 1869, *to debtors petitioning, etc.*]—(1) *Sects.* 11 *and* 12 *of the Debtors Act*, 1869 (*ante*, pp. 1135–1137), relating to the punishment of fraudulent debtors, and imposing a penalty for absconding with property, shall have effect as if there were substituted therein for the words "if after the presentation of a bankruptcy petition against him," the words "if after the presentation of a bankruptcy petition by or against him."

(2) The provisions of the *Debtors Act*, 1869, as to offences by bankrupts, shall apply to any person whether a trader or not in respect to whose estate a receiving order has been made as if the term "bankrupt" in that Act included a person in respect of whose estate a receiving order had been made.

32 & 33 *Vict.* c. 62, s. 13—*Fraudulently obtaining credit, etc.*]—*Post*, pp. 1148, 1150.

Sect. 14—*False claims by creditors.*]—If any creditor in any bankruptcy . . . wilfully and with intent to defraud, makes any false claim, or any proof, declaration, or statement of account which is untrue in any material particular, he shall be guilty of a misdemeanor, punishable with imprisonment not exceeding one year, with or without hard labour. [*See ante*, pp. 237–240.]

Sect. 16—*Prosecution by order of court on report of trustee.*]—Where a trustee in any bankruptcy [or the official receiver of a bankrupt's estate, *see post*, 46 & 47 *Vict.* c. 52, s. 164] reports to any court exercising jurisdiction in bankruptcy, that in his opinion a bankrupt (including a person in respect of whose estate a receiving order has been made, *see* 46 & 47 *Vict* c. 52, s. 163, *sub-s.* 2, *supra*) has been guilty of any offence under this Act [or under the *Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52, s. 164), *post*, p. 1139], or where the court is satisfied upon the representation of any creditor or member of the committee of inspection that there is ground to believe that the bankrupt has been guilty of any offence under this Act [or under the *Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52, s. 164, *post*, p. 1139)], the court shall, if it appears to the court that there is a reasonable probability that the bankrupt may be convicted, order the trustee [or the official receiver of a bankrupt's estate, 46 & 47 *Vict.* c. 52, s. 164, *post*, p. 1139] to prosecute the bankrupt for such offence. [*See Ex parte Marsden*, 2 *Ch. D.* 786. *The costs of a prosecution by the trustee without first getting an order of the court will not, as a general rule, be allowed out of the estate even where the sanction of the committee of inspection has been given. In re Howe* [1902] 2 *K. B.* 290.]

Sect. 17—*Costs of prosecutions.*]—Where the prosecution of the bankrupt under this Act is ordered by any court, then, on the production of the order of the court, the expenses of the prosecution shall be allowed, paid, and borne as expenses of prosecutions for felony are allowed, paid, and borne. [*See ante*, p. 246, *et seq.*]

Sect. 18—*Vexatious Indictments Act to apply.*]—Every misdemeanor

under the second part of this Act shall be deemed to be an offence within and subject to the provisions of the *Vexatious Indictments Act*, 1859 (22 & 23 *Vict. c.* 17, *extended by* 30 & 31 *Vict. c.* 35, *s.* 1, *see ante*, pp. 7, 8, 9); and when any person is charged with any such offence before any justice or justices, such justice or justices shall take into consideration any evidence adduced before him or them tending to show that the Act charged was not committed with a guilty intent.

Sect. 19—*Form of indictment.*]—In an indictment for an offence under this Act it shall be sufficient to set forth the substance of the offence charged, in the words of this Act specifying the offence or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any court acting under the *Bankruptcy Act*, 1869 [or *the Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52, *s.* 149, *sub-s.* 2, *infra*); *and see ante*, p. 69, *and R. v. Pierce*, 16 *Cox*, 213, *post*, p. 1149.]

Sect. 20—*Jurisdiction of quarter sessions.*]—So much of the *Quarter Sessions Act*, 1842 (5 & 6 *Vict. c.* 38, *ante*, p. 126), as excludes from the jurisdiction of justices and recorders at sessions of the peace or adjournments thereof the trial of persons for offences against any provision of the laws relating to bankrupts, is hereby repealed as from the passing of this Act; and any offence under this Act shall be deemed to be within the jurisdiction of such justices and recorders. [*See ante*, p. 126.]

Sect. 23—*Punishments under this Act cumulative.*]—Where any person is liable under any other Act of Parliament or at common law to any punishment or penalty for any offence made punishable by this Act, such person may be proceeded against under such other Act of Parliament or at common law or under this Act, so that he be not punished twice for the same offence. (*a*) [*Cf.* 52 & 53 *Vict. c.* 63, *s.* 33, *ante* p. 170.]

46 & 47 *Vict. c.* 52, *s.* 31—*Undischarged bankrupt obtaining credit to extent of* 20*l. without disclosing his position.*]—*Post*, p. 1147.

Sect. 92—*Jurisdiction in bankruptcy.*]—(1) The courts having jurisdiction in bankruptcy shall be the High Court and the county courts. [*Sub-ss.* 2–5 *deal with the exclusion of certain county courts from bankruptcy jurisdiction, and the regulation of the exercise of bankruptcy jurisdiction by those county courts which have it. Bankruptcy business in the High Court was assigned to the King's Bench Division by order of* 1*st January*, 1884, *under* 46 & 47 *Vict. c.* 52, *s.* 94. *See Stat. Rules and Orders Revised* (ed. 1904), *vol.* 1, *tit.* "*Bankruptcy.*"]

Sect. 149, *sub-s.* 2—*Construction of Acts referring to Bankruptcy Act*, 1869.]—Where by any Act or instrument reference is made to the *Bankruptcy Act*, 1869, the Act or instrument shall be construed and have effect as if reference were made therein to the corresponding provisions to this Act.

Sect. 164—*Power for court to order prosecution on report of official receiver.*]—*Sect.* 16 *of the Debtors Act*, 1869, shall be construed and have effect as if the term "a trustee in any bankruptcy" included the official receiver of a bankrupt's estate, and shall apply to offences under this Act, as well as to offences under the *Debtors Act*, 1869.

(*a*) For certain statutory regulations as to proof of proceedings in bankruptcy, *see ante*, pp. 367, 368.

Sect. 165—*Power for court to commit for trial.*]—Where there is, in the opinion of the court [*i.e.*, "*the court having jurisdiction in bankruptcy under this Act*," *see s.* 92, *ante*, p. 1139, *and s.* 168, *infra*], ground to believe that the bankrupt or any other person has been guilty of any offence which is by statute made a misdemeanor in cases of bankruptcy, the court may commit the bankrupt or such other person for trial.

(2) For the purpose of committing the bankrupt or such other person for trial the court shall have all the powers of a stipendiary magistrate as to taking depositions, binding over witnesses to appear, admitting the accused to bail, or otherwise.

Nothing in this sub-section shall be construed as derogating from the powers or jurisdiction of the High Court.

Sect. 166—*Director of public prosecutions to act in certain cases.*]—Where the court [*i.e., the court having jurisdiction in bankruptcy under this Act, s.* 168] orders the prosecution of any person for any offence under the *Debtors Act*, 1869, or Acts amending it, or for any offence arising out of or connected with any bankruptcy proceedings, it shall be the duty of the director of public prosecutions to institute and carry on the prosecution.

Sect. 167—*Criminal liability after discharge or composition.*]—Where a debtor has been guilty of any criminal offence, he shall not be exempt from being proceeded against therefor by reason that he has obtained his discharge, or that a composition or scheme of arrangement has been accepted or approved.

Sect. 168—*Definition of "court."*]—"The court" means the court having jurisdiction in bankruptcy under this Act. . . . [*See s.* 92, *ante*, p. 1139.]

53 *&* 54 *Vict. c.* 71 (*Bankruptcy Act*, 1898), *s.* 27.]—*Ante*, p. 579.

Sect. 29.]—*Ante*, p. 579.

Indictment against a Bankrupt for not discovering his Property to the Trustee, concealing part of his Property, and fraudulently removing part of his Property. (32 *&* 33 *Vict. c.* 62, *s.* 11 (1), (4), (5), *ante*, pp. 1135, 1136.)

City of Leeds, to wit:—The jurors for our lord the King upon their oath present, that heretofore, and before the committing of the offence next hereinafter charged and stated, to wit, on the —— day of ——, in the year of our Lord ——, J. S. was adjudged bankrupt; and that the said J. S. afterwards, with intent to defraud, unlawfully did not to the best of his knowledge and belief, fully and truly discover to A. B., then being the trustee administering the estate of the said J. S. for the benefit of his creditors, two hundred yards of woollen cloth and four tuns of olive oil, being part of the [personal] property of him the said J. S., and how and to whom, and for what consideration, and when he disposed of the said two hundred yards of woollen cloth and four tuns of olive oil, the said two hundred yards of woollen cloth and four tuns of olive oil not having been disposed of in the ordinary way of the trade of the said J. S., nor laid out in the ordinary expense of his family; against the form (*as ante*, p. 465). (*2nd Count.*)—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, and before the committing

of the offence next hereinafter charged and stated, to wit, on the—— day of ——, in the year of our Lord ——, a bankruptcy petition was presented against (*by or against*) the said J. S., and that the said J. S. was thereupon, to wit, on the —— day of ——, in the year of our Lord ——, adjudged bankrupt; and that the said J. S., after the presentation of the said bankruptcy petition against him ("*after the presentation of a bankruptcy petition by or against him, or within four months next before such presentation*"), to wit, on the —— day of ——, in the year of our Lord ——, unlawfully, and with intent to defraud, did † conceal a certain part of his property to the value of ten pounds and upwards, that is to say, two hundred yards of woollen cloth of the value of one hundred pounds, and four tuns of olive oil of the value of one hundred and fifty pounds; against the form (*as ante*, p. 434). (*3rd Count.*)—[*As in the 2nd count to the* †] fraudulently remove a certain part of his property of the value of ten pounds and upwards, that is to say, two hundred yards of woollen cloth of the value of one hundred pounds, and four tuns of olive oil of the value of one hundred and fifty pounds; against the form (*as ante*, p. 465). *In framing the 1st count it has been assumed that 32 & 33 Vict. c. 62, s. 11, sub-s. 1, creates only one offence, an assumption which was stated in former editions of this work to "seem to be incorrect" on the authority of Nash* v. *R.*, 4 *B. & S.* 935; 33 *L. J.* (*M. C.*) 94 (*infra*), *where this form of count was held good after verdict. It is submitted, however, by the present editors that Nash* v. *R. did not decide that the sub-section of the repealed statute creates two offences, and that a count under 32 & 33 Vict. c. 62, s. 11 (1), can safely be drawn in the form given above. In that case the count in question was framed upon 24 & 25 Vict. c. 184, s. 221 (rep.), which provided that "any bankrupt who shall do any of the acts or things following, with intent to defraud or defeat the rights of his creditors, shall be guilty of a misdemeanor." (Sub-s. 2.) "If he shall not* (upon his examination) (*these words do not appear in the present statute*) *fully and truly discover, to the best of his knowledge and belief, all his property, real and personal, inclusive of his rights and credits, and how and to whom, and for what consideration, and when he disposed of, assigned or tranferred any part thereof, except such part as has been really and* bonâ fide *before sold or disposed of in the way of his trade or business, if any, or laid out in the ordinary expense of his family, or shall not deliver up to the court, or dispose as the court directs, of all such part thereof as is in his possession, custody or power, except the necessary wearing apparel of himself, his wife and children; and deliver up to the court all books, papers and writings in his possession, custody or power, relating to his property or affairs." The count charged that the defendant, a bankrupt, upon his examination, "with intent to defraud and defeat the rights of his creditors, did not fully and truly discover, to the best of his knowledge and belief, all his property, to wit, all his personal property in money and goods; and did not, as to part of his property (not being part fully and* bonâ fide *before sold or disposed of in the way of his trade or business, and not laid out in the ordinary expense of his family), fully and truly discover to the best of his knowledge and belief as aforesaid, how, and to whom, and for what consideration, and when, he had disposed of, assigned or transferred such part thereof, to wit, 1,000l. sterling, one thousand sacks of corn, ten horses, five clocks, five boxes, and other goods and effects, being part of the property of the said S. N. as aforesaid," and it was held that, after verdict, the count was good; that the offence being charged in the words of the statute, any want of particularity was cured, after verdict, by 7 G. 4, c. 64, s. 21; and that if the count charged two offences, on which point no definite decision was given, duplicity was not ground of error. Nash* v. *R.*, 4 *B. & S.* 935; 33 *L. J.* (*M. C.*) 94.

The 2nd and 3rd counts are framed to meet the offences defined in s. 11, *sub-s.* 4, 5, *of* 32 & 33 *Vict. c.* 62. *Counts for other offences against that statute may easily be framed from a consideration of this indictment and the provisions of the statute.*

Under 12 & 13 *Vict. c.* 106 (*Bankruptcy Act*, 1849), s. 251 (*rep.*), *the indictment must have alleged an intent to defraud the creditors; it was held that those words in the statute overrode the whole section. R.* v. *Hill*, 1 *C. & K.* 168. *And* 24 & 25 *Vict. c.* 134, s. 221 (*rep.*), *also made the intent "to defraud or defeat the rights of his creditors" an ingredient in the offences thereby created. In* 32 & 33 *Vict. c.* 62, s. 11, *the words are "with intent to defraud," simply; the words "his creditors" have therefore been omitted from the precedents of an indictment under that section in the editions of this work since the 21st. The word "unlawfully," inserted in the above form according to usage, has been held to be unnecessary. R.* v. *Leatherbarrow*, 10 *Cox*, 637, *Bovill*, C.J.

By 32 & 33 *Vict. c.* 62, s. 19 (*ante*, p. 1139) (*re-enacting* 24 & 25 *Vict. c.* 134, s. 225 (*rep.*), *the effect of which was to override R.* v. *Jones*, 4 *B. & Ad.* 345; 2 *L. J.* (*M. C.*) 7: *R.* v. *Lands*, *Dears.* 567; 25 *L. J.* (*M. C.*) 14: *R.* v. *Massey*, *L. & C.* 206; 32 *L. J.* (*M. C.*) 21), *it is enacted, that "in an indictment for an offence under this Act it shall be sufficient to set forth the substance of the offence charged, in the words of this Act, specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading adjudication, or any proceedings in, or order, warrant or document of any court acting under the Bankruptcy Act*, 1869," *or the Bankruptcy Acts*, 1883 *and* 1890. *See* 46 & 47 *Vict. c.* 52, s. 149, *sub-s.* 2, *ante*, p. 1139.

An indictment under s. 11, *sub-s.* 13, *of the Debtors Act*, 1869, *which did not set out the false representations, was held to be good* after verdict, *upon objection taken in arrest of judgment. R.* v. *Watkinson*, 12 *Cox*, 271 (*C. C. R.*). *But it would seem that an indictment so framed would be held to be good even upon motion to quash, by reason of* s. 19 *of that statute. See R.* v. *Pierce*, 16 *Cox*, 213 (*C. C. R.*) *post*, p. 1149, *where the indictment was under* s. 13, *sub-s.* 1.

An indictment intended to be framed upon s. 11 (15) *of* 32 & 33 *Vict. c.* 62, *stated that heretofore* and before the committing of the offence next hereinafter mentioned, *to wit, on, etc., A. was adjudicated bankrupt, and that the said A.* afterwards, *with intent to defraud his creditors, unlawfully, within four months next before the presentation of a bankruptcy petition against him, he being a trader, did pawn, pledge, and dispose of, otherwise than in the ordinary way of his trade, certain property which he had obtained upon credit, and had not paid for. It was held, on objection after verdict, that the indictment did not show substantially an offence under the above enactment, and that an amendment could not then be made. R.* v. *Oliver*, 13 *Cox*, 588 (*C. C. R.*).

An indictment framed upon 32 & 33 *Vict. c.* 62, s. 11 (14), *which charged that the defendant, a trader, "did within four months next* before the commencement *of the liquidation by arrangement of his affairs, obtain from W. goods upon credit under the false pretence, etc., with intent to defraud," but which did not expressly state that the liquidation had ever actually commenced, was, after verdict, held good as sufficiently averring that the defendant was a person whose affairs were liquidated by arrangement within the meaning of* s. 11. *R.* v. *Knight*, 14 *Cox*, 31 (*C. C. R.*).

As to the form of an indictment for a conspiracy to commit offences against s. 11 *of* 32 & 33 *Vict. c.* 62 (*Debtors Act*, 1869), *see Heymann* v. *R.*, *L. R.* 8 *Q. B.* 102; *and post, Book II. Part III.* s. 1.

Misdemeanor: imprisonment not exceeding two years, with or without hard labour. 32 & 33 *Vict. c.* 62, s. 11 (*ante*, p. 1137).

Offences under 32 & 33 *Vict. c.* 62, *as amended by* 46 & 47 *Vict. c.* 52, *and* 53 & 54 *Vict. c.* 71, *are triable at quarter sessions.* 32 & 33 *Vict. c.* 62, *s.* 20 (*ante*, pp. 126, 1139).

No indictment can be preferred for any misdemeanor under the second part of 32 & 33 *Vict. c.* 62, *except on compliance with the provisions of* 22 & 23 *Vict. c.* 17, *s.* 1, *as extended by* 30 & 31 *Vict. c.* 35, *s.* 1 (*ante*, pp. 7, 8). *See* 32 & 33 *Vict. c.* 62, *s.* 18 (*ante*, p. 1138). *R. v. Bell*, 12 *Cox*, 37, *per Montague Smith*, J. *The court before which the indictment is tried has no power to order payment of the costs of the prosecution where the prosecution has not been ordered by any court. R. v. Thomas*, 11 *Cox*, 535. *See* 32 & 33 *Vict. c.* 62, *s.* 17 (*ante*, pp. 246, *et seq*, 1138).

Evidence.

Petition.]—Prove the bankruptcy petition by producing the petition itself, or a copy thereof, verified as required by 46 & 47 *Vict. c.* 52, *s.* 134, (*ante*, p. 367).

Adjudication.]—Prove also the adjudication of bankruptcy by producing the adjudication under the seal of the court (*R. v. Thomas*, 11 *Cox*, 535, *Lush*, J.), or a copy thereof verified as required by 46 & 47 *Vict. c.* 52, *s.* 134 (*ante*, p. 367), or a copy of the London Gazette containing notice of the order of adjudication, which is conclusive evidence of the order having been made. *Cf. R. v. Levi, L. & C.* 597; 34 *L. J.* (*M. C.*) 174. *Id.*, *s.* 132, *sub-s.* 2 (*ante*, p. 367).

Trading.]—It is now not necessary, on the trial of an indictment framed under 32 & 33 *Vict. c.* 62, *s.* 11, to prove the trading (excepting in cases falling within sub-sections 14 and 15 of that section, the petitioning creditor's debt, or the act of bankruptcy, as that section enacts, not that "any bankrupt" but that "any person *adjudged* bankrupt" shall, in the cases mentioned in the section, be guilty of a misdemeanor, and therefore the prosecutor need not prove the trading (except in the cases above mentioned), petitioning creditor's debt, or act of bankruptcy, but merely that the defendant was adjudged bankrupt. *R. v. Thomas*, 11 *Cox*, 535, 538, *Lush*, J. *See also ante*, p. 367.

It was formerly otherwise (*see R. v. Jones*, 4 *B. & Ad.* 345; 2 *L. J.* (*M. C.*) 7; *and ante*, p. 1142).

Appointment of trustee.]—Prove also the appointment of A. B. as trustee, which is done by putting in the certificate of the Board of Trade of his appointment. 46 & 47 *Vict. c.* 52, *ss.* 138, 140 (*ante*, p. 368). Under certain circumstances the official receiver is trustee (*s.* 70).

Non-discovery to trustee.]—Prove also that the defendant did not fully and truly discover to the trustee the property, or some part thereof, and how he disposed of the property, and that it was not disposed of in the ordinary way of his trade, nor laid out in the ordinary expense of his family. The discovery mentioned in 32 & 33 *Vict. c.* 62, *s.* 11, *sub-s.* 1, is not restricted to property in possession of the bankrupt at the time of his bankruptcy, but refers also to property which may have been disposed of by him previous to his bankruptcy, unless it has been disposed of in the ordinary way of his trade, or laid out in the ordinary expense of his family. *R. v. Michell*, 50 *L. J.* (*M. C.*) 76; 14 *Cox*, 490. The second sub-section of *s.* 221 of 24 & 25 *Vict. c.* 134 (*rep.*), to which the first sub-section of *s.* 11 of 32 & 33 *Vict. c.* 62 (*ante*, p. 1137), is analogous,

enacted, that if the bankrupt should not, "upon his examination," fully and truly discover, etc., and it was therefore necessary, on the trial of an indictment under that paragraph, to produce and prove the examination. The present statute, however, omits the words "upon his examination," and it would appear, therefore, that the bankrupt may be liable to an indictment for the offences mentioned in the first, second, and third counts of this indictment, although he has not been examined. If, however, he has been examined, the examination should be produced.

Locus pœnitentiæ.]—It had been ruled, that, up to and until his last examination, the bankrupt had a *locus pœnitentiæ*, and could not, therefore, until that were passed, be indicted for concealing property which he might, upon his last examination, give up; *R.* v. *Walters*, 5 *C. & P.* 138; but that decision was overruled by the case of *Courtivron* v. *Meunier*, 6 *Ex.* 74, in which it was held that a secreting by a bankrupt of his goods, with intent to cheat his creditors, was a concealment sufficient to avoid his certificate under 5 & 6 *Vict. c.* 122, *s.* 38 (*rep.*), although a full disclosure was made by him to the commissioners in bankruptcy before his last examination.

Intent to defraud.]—Upon proof of such non-discovery and concealment as is charged in the first and second counts the jury are to convict, unless they are satisfied that the defendant had no intent to defraud (32 & 33 *Vict. c.* 62, *s.* 11, *sub-s.* 4). This satisfaction they *may* gain from the evidence for the prosecution, but if the prosecutor merely proves the concealment without disclosing any facts which show that it was innocent, then it will be for the defendant to prove that he had no intent to defraud, the onus being on him to show that he had no such intent. *R.* v. *Thomas*, 11 *Cox*, 535; 22 *L. T.* (*N. S.*) 138, *Lush*, J.: *R.* v. *Bolus*, 23 *L. T.* (*N. S.*) 339. As to the third count, the case is different. The prosecutor to support it must prove not merely a removal, but a *fraudulent* removal (32 & 33 *Vict. c.* 62, *s.* 11, *sub-s.* 5). That the removal was fraudulent will generally be a matter of inference from the circumstances under which it took place. Evidence that the defendant called a meeting of his creditors and disclosed to them and the trustee the transaction for the concealment of which he was indicted, is admissible on his behalf, as tending to negative his intent to defraud. *R.* v. *Wiseman*, 20 *Cox*, 144; 71 *L. J.* (*K. B.*) 128; 66 *J. P.* 40.

The formal proof as to the second and third counts is the same as that on the first count. Prove also, as to the second and third counts, that the defendant, after the presentation of the petition, concealed or *fraudulently* removed the property mentioned in the indictment, or some part thereof, and that the value of the property so concealed or removed is 10*l.* Where an indictment specified various articles, without stating the value, and added "one hundred other articles of furniture, and a certain debt due from J. T. to the prisoner, of the value of 20*l.* and upwards," the judges held that the indictment was bad on the ground of the property concealed not being all specified, and no distinct value having been put upon the articles enumerated; for it did not appear that those articles were of the value required by the statute. *R.* v. *Forsyth*, *R. & R.* 274. Chattels which have been assigned by a non-registered bill of sale, and which are left in the possession of the assignor, are not the chattels of the assignor, and a fraudulent removal by him of such chattels within four months next before the commencement of the liquidation of his affairs in bankruptcy, does not therefore fall within *sub-s.* 5 of 32 & 33 *Vict. c.* 62, *s.* 11, although the bill of sale, not having

been registered, is void as against the trustee in liquidation. *R.* v. *Creese*, *L. R.* 2 *C. C. R.* 105; 43 *L. J.* (*M. C.*) 51; 12 *Cox*, 539.

Married women.]—A married woman had carried on business and been adjudicated bankrupt upon her own petition, during the temporary absence of her husband from the country. An indictment under 24 & 25 *Vict. c.* 134 (*rep.*), charged her with concealing and embezzling certain property said to be *her* property, with intent to defraud her creditors. It was held, that on the fact appearing that she was a married woman, the allegation of property was disproved, as it was and continued to be her husband's property, notwithstanding the adjudication of bankruptcy, and that therefore the indictment failed. *R.* v. *Robinson*, *L. R.* 1 *C. C. R.* 80; 36 *L. J.* (*M. C.*) 78. A married woman is entitled to have and to hold and to dispose of as her separate property all earnings, money, and property gained or acquired by her in any trade which she carries on separately from her husband, 45 & 46 *Vict. c.* 75 (*Married Women's Property Act*, 1882), *ss.* 2, 5. And by *s.* 1, *sub-s.* 5, of the same statute, "every married woman *carrying on a trade separately from her husband* shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*." The provisions of the *Married Women's Property Act*, 1882, are not affected by 46 & 47 *Vict. c.* 52 (*Bankruptcy Act*, 1883: *see s.* 152 of that statute). Before the passing of the *Married Women's Property Act*, 1882, a married woman could not be made bankrupt; *Ex parte Jones*, *Re Grissell*, 12 *Ch. D.* 484; 48 *L. J.* (*Bank.*) 109; unless she was a sole trader within the city of London; *Lavie* v. *Phillips*, 3 *Burr.* 1776; and since the passing of that Act it would appear that she can now only be made bankrupt where she *carries on a trade separately* from her husband, or in respect of debts incurred by her while carrying on such a trade. *Re Dagnall* [1896] 2 *Q. B.* 407. And this is so even where she has married after the institution of bankruptcy proceedings in respect of a debt incurred by her as a *feme sole*. *Re a Debtor* [1898] 2 *Q. B.* 576. Possession of separate estate is not enough, as a personal judgment cannot be entered against a married woman in respect of her separate estate. *Ex parte Coulson*, 20 *Q. B. D.* 249: *Re Lynes* [1893] 2 *Q. B.* 113. Nor can a married woman be made bankrupt even though trading separately from her husband, if the judgment on which the proceedings are founded is against her in the name of the firm under which she trades. *See Re Handford* [1899] 1 *Q. B.* 566; 68 *L. J.* (*Q. B.*) 386. A married woman who has obtained a judicial separation can, it would seem, be made bankrupt. *See* 20 & 21 *Vict. c.* 85, *ss.* 21, 25, 26.

Infants.]—The prisoner was convicted under *s.* 12 of the *Debtors Act*, 1869 (32 & 33 *Vict. c.* 62). At the time when he quitted England and when he was adjudged bankrupt, he was an infant. The debts proved against his estate in the bankruptcy were trade debts, contracted since the passing of the *Infants' Relief Act*, 1874 (37 & 38 *Vict. c.* 62), and therefore void, and it did not appear that any debts for necessaries supplied to him existed. It was held that the conviction could not be upheld because the prisoner had no creditors amongst whom the property which he had taken with him ought by law to have been divided. *R.* v. *Wilson*, 5 *Q. B. D.* 28; 49 *L. J.* (*M. C.*) 13: *and see Lovell* v. *Beauchamp* [1894] *App. Cas.* 607; *and ante*, p. 22.

Otherwise than in the ordinary way of trade.]—Where the defendant was indicted for an offence against 32 & 33 *Vict. c.* 62, *s.* 11, *sub-s.* 15, and

the facts proved were that he was a grocer who had obtained goods used in his trade upon credit, and that soon after receiving them and before they were paid for and within four months next before the presentation of a bankruptcy petition against him, he executed a bill of sale to a creditor in consideration of a pre-existing debt, which bill of sale included all his stock in trade and effects whatsoever, including the before-mentioned unpaid-for goods, it was held by *Lush*, J. (after conferring with *Martin*, B.), that disposing of the goods by bill of sale was not disposing of them in the "ordinary way of trade;" and, therefore, that as property which the defendant had obtained on credit, and had not paid for, had passed by the bill of sale, he came within *sub-s.* 15, unless he had no intent to defraud, but that the assigning the whole of his property to one creditor, reserving nothing for the others, showed an intent to defraud, even although it appeared that the bill of sale had been given in pursuance of a long antecedent promise to execute it when requested. *R.* v. *Thomas*, 11 *Cox*, 535; 22 *L. T.* (*N. S.*) 138. Where a trader being in insolvent circumstances purchased goods on credit and shipped them to Australia, and obtained advances by pledging the bills of lading, and within four months afterwards became bankrupt, stating in his examination that he could give no account of what had become of the purchase-money, it was held that there was no evidence that the goods were obtained (*sub-s.* 14), or disposed of (*sub-s.* 15), "otherwise than in the ordinary way of his trade." *Ex parte Brett*, 1 *Ch. D.* 151; 13 *Cox*, 128 (*C. A.*). "The thing aimed at (in the statute) was the obtaining of goods on credit, and then immediately selling them again at a loss; that is not in the ordinary course of business." *Id., per Mellish*, L.J., 1 *Ch. D., at* p. 153; *see also Ex parte Stallard, L. R.* 3 *Ch. App.* 408: *Ex parte Marsden*, 2 *Ch. D.* 786.

Any false representation or other fraud.]—The facts in *Ex parte Brett* (*ubi supra*) were there held not to constitute evidence of an offence against *sub-s.* 13. "To satisfy the words of that sub-section, I think there must be some active fraud on the part of the bankrupt similar to the making of a false representation, not simply the purchase of goods when he knows that he is not able to pay for them." *Id., per Mellish*, L.J.: *and see s.* 13, *sub-s.* 1 (*post*, p. 1148). A false representation, to be within this section, must be fraudulent, and must be proved to have been knowingly made by the defendant. *R.* v. *Cherry*, 12 *Cox*, 32, *Martin*, B. In that case the indictment was drawn on the lines of an indictment under *s.* 88 of the *Larceny Act*, 1861; *sed quære*, whether it is not sufficient to follow the words of the statute, provided that the representation be charged as "false and fraudulent," having regard to the provisions of 32 *&* 33 *Vict. c.* 62, *s.* 19, and to *R.* v. *Pierce*, 16 *Cox*, 213; and an indictment so drawn is good after verdict. *R.* v. *Watkinson*, 12 *Cox*, 271 (*C. C. R.*) (*ante*, p. 1142).

Examination of debtor.]—By 46 *&* 47 *Vict. c.* 52 (*Bankruptcy Act*, 1883), *s.* 17, *sub-s.* 8, "The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the court (*i.e., the court having jurisdiction in bankruptcy*) may put or allow to be put to him. Such notice of the examination as the court thinks proper shall be taken down in writing, and shall be read over to *or by* (53 *&* 54 *Vict. c.* 71 (*Bankruptcy Act*, 1890), *s.* 2, *sub-s.* 1), and signed by, the debtor, and may thereafter be used in evidence against him. . . ." The ordinary way of "using in evidence" the debtor's admissions on these notes is to call the shorthand writer who took the notes to prove the correctness of his transcript,

or to produce the bankruptcy file containing such transcript, and then to prove the fact that the notes were read over to or by and signed by the debtor; but if they were in fact not so read over and signed, parol evidence of the person who took them may be given. *R.* v. *Erdheim* [1896] 2 *Q. B.* 260 (*ante*, pp. 328, 329); *and see R.* v. *Pike* [1902] 1 *K. B.* 552 (*ante*, p. 579).

OBTAINING CREDIT BY BANKRUPTS.

Statutes.

32 & 33 *Vict. c.* 62, *s.* 11, *sub-s.* 13—*Bankrupts obtaining property on credit within four months next before presentation of petition by means of any false representation or other fraud.*]—*See ante*, p. 1137, *and Ex parte Stallard, L. R.* 3 *Ch. App.* 408: *Ex parte Brett*, 1 *Ch. D.* 151: *Ex parte Marsden*, 2 *Ch. D.* 786 (*ante*, p. 1146).

46 & 47 *Vict. c.* 52 (*Bankruptcy Act*, 1883), *s.* 31—*Undischarged bankrupt obtaining credit to the amount of* 20*l. and upwards without disclosing his position.*]—Where an undischarged bankrupt who has been adjudged bankrupt under this Act obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanor, and may be dealt with and punished as if he had been guilty of a misdemeanor under the *Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), and the provisions of that Act shall apply to proceedings under this section.

Indictment.

Commencement as ante, p. 1140]—that heretofore and before the commission of the offence by A. B. in this count charged and stated, to wit, on the —— day of ——, in the year of our Lord 19—, the said A. B. was adjudged bankrupt under the *Bankruptcy Act*, 1883, and that the said A. B. at the time of the committing of the said offence was an undischarged bankrupt, and that afterwards, to wit, on the —— day of ——, in the year of our Lord 19—, the said A. B., then being an undischarged bankrupt as aforesaid, unlawfully did obtain credit to the extent of twenty pounds and upwards, to wit, credit to the extent of £ , from C. D. (*and* E. F.), without informing the said C. D. (*and* E. F., *or either of them*) that he then was an undischarged bankrupt as aforesaid; against the form [*as ante*, p. 465].

In an indictment under this section it is unnecessary to allege or prove an intent to defraud. R. v. *Dyson* [1894] 2 *Q. B.* 176 (*C. C. R.*); 18 *Cox*, 1.

Misdemeanor: imprisonment with or without hard labour for not more than one year, under 32 & 33 *Vict. c.* 62, *s.* 13 (*post*, p. 1148). *R.* v. *Turner* [1904] 1 *K. B.* 181; 73 *L. J.* (*K. B*) 46; 68 *J. P.* 15.

Venue.]—*Where the defendant ordered goods by letter, he may be indicted in the county from which he wrote the letter and to which the goods were sent. R.* v. *Peters*, 16 *Q. B. D.* 636 (*C. C. R.*); *and see R.* v. *Ellis* [1899] 1 *Q. B.* 230; 68 *L. J.* (*Q. B.*) 103.

Evidence.

Prove that the defendant was adjudged bankrupt, *ante*, p. 1143, and that there is no order of discharge upon the file, and that he did not inform

the person from whom he obtained credit that he was an undischarged bankrupt. An intent to defraud is immaterial. *R.* v. *Dyson, ubi supra.*

Obtain credit.]—The prisoner, an undischarged bankrupt, living at Newcastle-on-Tyne, bought a horse from the prosecutor, a farmer in Ireland, for 22*l.*, free of expenses to the vendor, who, by the prisoner's direction, delivered the horse on board a steamer at Larne; no stipulation was made as to the time or mode of payment, and the prisoner did not disclose the fact that he was an undischarged bankrupt. He paid for the carriage of the horse on its delivery to him at Newcastle, and immediately sold it, and refused to pay the price to the prosecutor; it was held that he was guilty of "obtaining credit" within the above section. *R.* v. *Peters*, 16 *Q. B. D.* 636; 54 *L. J.* (*M. C.*) 173. So also where the prisoner having ordered goods, the price of which would not amount to 20*l.*, and the vendor in execution of the order sent to him goods, the price of which amounted to 20*l.* and upwards, and the purchaser kept them without paying for them or informing the vendor that he was an undischarged bankrupt. *R.* v. *Juby*, 16 *Cox*, 160. It is not necessary, in order to support a charge under this section, that the goods in respect of which credit is obtained should all be supplied or ordered at the same time, provided that the total amount of credit obtained is 20*l.* or upwards, as appears from *R.* v. *Juby, ubi supra.*

FRAUDS UPON CREDITORS, WHETHER COMMITTED BY BANKRUPTS OR NOT.

(a) *Obtaining Credit under False Pretences or by other Fraud.*
(b) *Fraudulent Conveyances and Transfers of Property.*

(a) *Obtaining Credit under False Pretences, etc.*

Statute.

32 & 33 *Vict. c.* 62 (*Debtors Act*, 1869), *s.* 13.]—Any person shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any term not exceeding one year, with or without hard labour; that is to say:

(1) If in incurring any debt or liability he has obtained credit under false pretences, or by means of any other fraud:

(2) *Transfer of property with intent to defraud creditors.*]—*Post*, p. 1150.

(3) *Concealment of property within two months of date of unsatisfied judgment, with like intent.*]—*Post*, p. 1150.

Indictment for obtaining Credit under False Pretences.
(32 & 33 *Vict. c.* 62, *s.* 13, *sub-s.* 1.)

Commencement as ante, p. 1140]—that A. B., on the —— day of ——, A.D. 1904, unlawfully in incurring a certain debt and liability [to one C. D.], to wit, to the amount of £ , did obtain credit, to wit, credit to the amount of the said debt and liability from [the said] C. D.,* under false pretences; against the form [*as ante*, p. 465].

It is not necessary to set out the false pretences; R. v. *Pierce*, 16 *Cox*, 213 (*C. C. R.*); 56 *L. J.* (*M. C.*) 85 (*overruling R.* v. *Bell*, 12 *Cox*, 37), *by reason of* 32 & 33 *Vict. c.* 62, *s.* 19 (*ante*, p. 1139).

"*By means of any other fraud.*"]—*A count framed under the latter part of s.* 13, *sub-s.* 1, *may be in the above form to the* *, *and it would seem should continue thus, viz., "by means of fraud other than false pretences;" and the indictment in R.* v. *Bell, which was held in R.* v. *Pierce*, 16 *Cox*, 213, *to have been wrongly quashed, was in this form. In R.* v. *Jones* [1898] 1 *Q. B.* 119; 67 *L. J.* (*Q. B.*) 41 (*C. C. R.*), *where the indictment did not contain the words "other than false pretences," this point, however, was not reserved for the consideration of the court.*

Venue.]—*The defendant, who carried on business in the county of Durham, obtained goods on credit in that county from a traveller of the prosecutors by means of false representations made by the defendant to the prosecutors in Glasgow, where they carried on business. An indictment against him for an offence under* 32 & 33 *Vict. c.* 62, *s.* 13, *sub-s.* 1, *was held to be properly triable in the county of Durham. R.* v. *Ellis* [1899] 1 *Q. B.* 230; 68 *L. J.* (*Q. B.*) 103; *and see ante*, p. 43.

Misdemeanor: imprisonment, with or without hard labour, for not more than one year. 32 & 33 *Vict. c.* 62, *s.* 13, *ubi supra.*

Evidence.

As to "obtaining credit," *see R.* v. *Peters*, 16 *Q. B. D.* 636: *R.* v. *Juby*, 16 *Cox*, 160 (*ante*, p. 1148). It is not necessary, in order to render a person liable under this section, that he should be either a bankrupt or have liquidated his affairs by arrangement. *R.* v. *Rowlands*, 8 *Q. B. D.* 530; 51 *L. J.* (*M. C.*) 51. A person without means who orders a meal in a restaurant [though he makes no verbal representation at the time as to his ability to pay for the same], is liable to be convicted of "obtaining credit by means of fraud" under the latter part of the above sub-section (*R.* v. *Jones*, *ubi supra*); but not of obtaining goods by means of false pretences under *s.* 88 of the *Larceny Act*, 1861. (*See ante*, pp. 606, 613.) Evidence of similar acts committed by the defendant at a period immediately preceding the commission of that charged in the indictment is admissible for the prosecution, in order to show system and to negative mistake. *R.* v. *Wyatt* [1904] 1 *K. B.* 88; 73 *L. J.* (*K. B.*) 15; 20 *Cox*, 462; 68 *J. P. Rep.* 31; *and see ante*, p. 311.

Where an authorized clerk in the Stock Exchange induced stock jobbers to make bargains for sale of shares for the next account, and gave the names of members of the Stock Exchange not his employers as the purchasers, it was held that credit was given to them and not to the defendant, and that he was not guilty of an offence under this section. *R.* v. *Bryant*, 63 *J. P.* 376, *per Fulton*, Common Serjeant. As to definition of credit, *see R.* v. *Peters* (*ante*, p. 1148). Obtaining a loan is obtaining credit within this section. *Ex parte Salomons*, *Q. B. D.*, 28 *L. J. Newsp.* 879. To obtain goods in exchange for a cheque which it is falsely represented will be honoured on presentation, is obtaining goods, and is not obtaining credit under this section. *R.* v. *Cosnett*, 20 *Cox*, 6; 65 *J. P.* 472.

(b) *Fraudulent Conveyances, Gifts, or Transfers of Property.*

13 *Eliz.* c. 5 (*Fraudulent Conveyances*), s. 1.]—*Feigned conveyance to defraud creditors to be void.*

Sect. 2—*Punishment of parties making them.*]— . . . "And all and every the ꝑties to such faygned covenous or fraudulent feoffement gyfte graunte alienation bargayne conveyaunce bondes suites judgementes executions and other thynges before expressed, or beinge privy and knowynge of the same or any of them, w^ch^ at any tyme after the tenthe daye of June next cōmyng, shall wittingly and willingly put in ure avowe mayntaine justefie or defend the same or any of them, as true simple and done had or made bona fide and upon good consyderation, or shall alien or assigne any the landes tenementes goodes leases or other thinges before mentioned to hym or them conveyed as is aforesaid, or anye parte thereof, shall incurre the penaltie and forfayture of one yeres value of the said landes tenementes & heredytamentes leases rentes comons or other ꝑfytes of or oute of the same, and the whole value of the said goodes and cattalls, and allso so muche monye as are or shall be conteyned in any suche covenous and fayned bonde; the one moitie whereof to be to the Queenes Ma^tie^, her heyres and successors, and thother moitye to the ptye or ꝑties greeved by suche fayned and fraudulent feoffement gyfte graunte alyenation bargayne conveyaunce bonde suites judgementes executions leases rentes cōmunes ꝑfytes charges and other thynges aforesaide; to be recovered in any of the Queenes courtes of record by action of debt byll playnt or information wherein none essoyne protection or wager of lawe shall be admitted for the defendaunt or defendauntes; and also beinge thereof lawfully convycted, shall suffer imprysoment for one halfe yere w^th^oute baile or maynepryse."

[*For a precedent of an indictment for this offence, see R.* v. *Smith*, 6 *Cox*, 31; *and see Mayne, Ind. Cr. Law* (1896), pp. 529, 533. *In R.* v. *Cox and Railton*, 15 *Cox*, 611, *the indictment contained counts for conspiracy to commit this offence.*]

32 *&* 33 *Vict.* c. 62 (*Debtors Act*, 1869), s. 13—*Fraudulent transfer or concealment of property.*]—Any person shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour; that is to say:

(1) . . . (*see ante*, p. 1148):

(2) If he has with intent to defraud his creditors, or any of them, made or caused to be made any gift, delivery, or transfer of or any charge on his property:

(3) If he has, with intent to defraud his creditors, concealed or removed any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him.

Indictment and Evidence. (32 *&* 33 *Vict.* c. 62, s. 13 (2), (3).)

It is not necessary in order to render a person liable under this section that he should be either a bankrupt or have liquidated his affairs by arrangement. *R.* v. *Rowlands*, 8 *Q. B. D.* 530; 51 *L. J.* (*M. C.*) 51; 15 *Cox*, 31 (*C. C. R.*). Where A., the defendant to an action for unliquidated damages, during the pendency of the action, but before judgment, gave a bill of sale over his furniture with intent to defeat any

judgment which B. might obtain, it was held that B. was not, at the time of the execution of such bill of sale, a "creditor" within *sub-s.* 2 of this section, and that A. could not therefore be convicted thereunder. *R.* v. *Hopkins* [1896] 1 *Q. B.* 652 (*C. C. R.*). Where an indictment framed under *sub-s.* 3 of this section charged the defendant, a judgment debtor, with removing his goods since the date of the judgment "with intent to defraud his creditors," and the evidence was that the goods were removed with the object of defeating the judgment creditor, and there was no evidence of any intent on the part of the defendant to defeat any other creditors, or indeed that he had any other creditors, it was held that the defendant could not be convicted, inasmuch as an intent to defraud *creditors* was charged, but was not proved. *R.* v. *Rowlands, ubi supra.* But it would seem that the conviction would have been good had the indictment charged an intent to defraud the judgment creditor, naming him.

Sect. 2.

COUNTERFEITING TRADE MARKS, OR USING FALSE TRADE DESCRIPTIONS.

Statutes.

50 & 51 *Vict. c.* 28 (*Merchandise Marks Act*, 1887), *s.* 2—*Offences as to trade marks and trade descriptions—Punishment of such offences.*]—(1) Every person who—

(*a*) forges any trade mark (*see post, ss.* 3, 4); or

(*b*) falsely applies to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive; or

(*c*) makes any die, block, machine, or other instrument for the purpose of forging, or of being used for forging, a trade mark; or

(*d*) applies any false trade description to goods; or

(*e*) disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark; or

(*f*) causes any of the things above in this section mentioned to be done,

shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be guilty of an offence against this Act. ["*Intent to defraud*" *in this sub-section means intent to induce the purchaser to take something which he does not know he is taking. Starey* v. *Chilworth Gunpowder Co.*, 24 *Q. B. D.* 90. *Delivery of an invoice with goods is an application of a trade description to goods within clause* (*d*) *of this sub-section. Budd* v. *Lucas* [1891] 1 *Q. B.* 408.]

(2) Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description (*see post, ss.* 3, 5) is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, as the case may be, shall, unless he proves—

(*a*) that having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(*b*) that on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or

(*c*) that otherwise he had acted innocently;

be guilty of an offence against this Act. [*A false invoice is within this sub-section, but a false oral description is not. Coppen* v. *Moore* (*No.* 1) [1898] 2 *Q. B.* 300. *As to what constitutes "application," see Langley* v. *Bombay Tea Co.* [1900] 2 *Q. B.* 460; 69 *L. J.* (*Q. B.*) 752; 19 *Cox*, 551. *An intent to defraud purchasers is not a necessary ingredient of an offence under this sub-section. Wood* v. *Burgess*, 24 *Q. B. D.* 162. *If a "false trade description" (see infra, s.* 3, *sub-s.* 3) *is knowingly applied, the defence of "acting innocently" is negatived. Kirschenboim* v. *Salmon and Gluckstein* [1898] 2 *Q. B. D.* 19. *The innocence contemplated by the Act is innocence of any intention to infringe the Act of Parliament. Christie* v. *Cooper* [1900] 2 *Q. B.* 522, 526, *Channell*, J. *The sub-section renders a master criminally liable for acts done in contravention of it by his servants within the general scope of their employment, although contrary to their master's orders, unless he can show that he acted in good faith, and did all he could to prevent the commission of offences by his servants. Coppen* v. *Moore* (*No.* 2) [1898] 2 *Q. B. D.* 306; *and see ante*, pp. 33–35.]

(3) Every person guilty of an offence against this Act shall be liable—

(i) on conviction on indictment, to imprisonment, with or without hard labour, for a term not exceeding two years, or to fine, or to both imprisonment and fine; and

(ii) on summary conviction to imprisonment, with or without hard labour, for a term not exceeding four months, or to a fine not exceeding twenty pounds, and in the case of a second or subsequent conviction to imprisonment, with or without hard labour, for a term not exceeding six months, or to a fine not exceeding fifty pounds; and

(iii) in any case, to forfeit to [his] Majesty every chattel, article, instrument, or thing by means of or in relation to which the offence has been committed.

(4) The court before whom any person is convicted under this section may order any forfeited articles to be destroyed or otherwise disposed of as the court thinks fit.

(5) If any person feels aggrieved by any conviction made by a court of summary jurisdiction, he may appeal therefrom to a court of quarter sessions.

(6) Any offence for which a person is under this Act liable to punishment on summary conviction may be prosecuted, and any articles liable to be forfeited under this Act by a court of summary jurisdiction may be forfeited, in manner provided by the *Summary Jurisdiction Acts*: Provided that a person charged with an offence under this section before a court of summary jurisdiction shall, on appearing before the court, and before the charge is gone into, be informed of his right to be tried on indictment, and if he requires, be so tried accordingly. [*Cf.* 42 *&* 43 *Vict. c.* 49, *s.* 17 (*ante*, p. 6). *The justices must inform the defendant of his right to be tried on indictment. R.* v. *Cockshott* [1898] 1 *Q. B.* 582; 67 *L. J.* (*Q. B.*) 467. *As to costs of prosecution, see* p. 246, *et seq.*: *and s.* 14 (*post*, p. 1156, *et seq.* *For precedent of indictment, see R.* v. *Phillips*, 65 *J. P.* 41. *That indictment contained an averment that the defendant elected to be tried by a jury; but such an averment is unnecessary. R.* v. *Chambers*, 18 *Cox*, 401; 65 *L. J.* (*M. C.*) 214.

Sect. 3—*Definitions of expressions used in this Act.*]—(1) For the purposes of this Act—the expression "*trade mark*" means a trade mark registered in the register of trade marks kept under the *Patents, Designs, and Trade Marks Act*, 1883 (46 *&* 47 *Vict. c.* 57), and includes any trade mark which,

either with or without registration, is protected by law in any British possession or foreign state to which the provisions of the one hundred and third section of the *Patents, Designs, and Trade Marks Act*, 1883, are, under order in council, for the time being applicable: [*These orders in council are collected in the Statutory Rules and Orders Revised* (ed. 1904), *vol.* 8, *tit.* "*Merchandise Marks.*"]

The expression "*trade description*" means any description, statement, or other indication, direct or indirect,

(*a*) as to the number, quantity, measure, gauge, or weight of any goods, or

(*b*) as to the place or country in which any goods were made or produced, or

(*c*) as to the mode of manufacturing or producing any goods, or

(*d*) as to the material of which any goods are composed, or

(*e*) as to any goods being the subject of an existing patent, privilege, or copyright,

and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act.

The expression "*false trade description*" means a trade description which is false in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect, and the fact that a trade description is a trade mark, or part of a trade mark, shall not prevent such trade description being a false trade description within the meaning of this Act.

The expression "*goods*" means anything which is the subject of trade, manufacture, or merchandise.

The expressions "*person*," "*manufacturer, dealer, or trader*," and "*proprietor*" include any body of persons corporate or unincorporate.

The expression "*name*" includes any abbreviation of a name. [*The definition of* "*trade description*" *is extended to the customs entry of imported goods by* 54 *&* 55 *Vict. c.* 15, *s.* 1 (*post*, p. 1157); *and includes a description in an invoice. Coppen* v. *Moore* (*No.* 1) [1898] 2 *Q. B.* 300: *and see Cameron* v. *Wiggins* [1901] 1 *K. B.* 1; 70 *L. J.* (*K. B.*) 15; 19 *Cox*, 580.

(2) The provisions of this Act respecting the application of a false trade description to goods shall extend to the application to goods of any such figures, words or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are.

(3) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression false name or initials means as applied to any goods, any name or initials of a person which—

(*a*) are not a trade mark, or part of a trade mark, and

(*b*) are identical with, or a colourable imitation of the name or initials of a person carrying on business in connection with goods of the same description, and not having authorized the use of such name or initials, and

(*c*) are either those of a fictitious person or of some person not *bonâ fide* carrying on business in connection with such goods.

Sect. 4—*Meaning of "forge a trade mark."*]—A person shall be deemed to forge a trade mark who either—

(*a*) without the assent of the proprietor of the trade mark makes that trade mark or a mark so nearly resembling that trade mark as to be calculated to deceive; or

(*b*) falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise;

and any trade mark or mark so made or falsified is in this Act referred to as a forged trade mark.

Provided that in any prosecution for forging a trade mark the burden of proving the assent of the proprietor shall lie on the defendant.

Sect. 5—*Meaning of the expression "apply a trade mark or mark or trade description to goods."*]—(1) A person shall be deemed to apply a trade mark or mark or trade description to goods who—

(*a*) applies it to the goods themselves; or

(*b*) applies it to any covering, label, reel, or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture; or

(*c*) places, encloses, or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied; or

(*d*) uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark or mark or trade description.

(2) The expression "*covering*" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame, or wrapper; and the expression "*label*" includes any band or ticket.

A trade mark, or mark, or trade description, shall be deemed to be applied whether it is woven, impressed, or otherwise worked into, or annexed, or affixed to the goods, or to any covering, label, reel, or other thing.

(3) A person shall be deemed to falsely apply to goods a trade mark or mark, who without the assent of the proprietor of a trade mark applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive, but in any prosecution for falsely applying a trade mark or mark to goods the burden of proving the assent of the proprietor shall lie on the defendant.

Sect. 6—*Defences to charges under the Act where the defendant did the act complained of innocently in the ordinary course of his business.*]—Where a defendant is charged with making any die, block, machine, or other instrument for the purpose of forging, or being used for forging, a trade mark, or with falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or with applying to goods any false trade description, or causing any of the things in this section to be done, and proves—

(*a*) That in the ordinary course of his business he is employed, on behalf of other persons, to make dies, blocks, machines, or other instruments for making, or being used in making, trade marks, or as the case may be, to apply marks or descriptions to goods,

and that in the case which is the subject of the charge he was so employed by some person resident in the United Kingdom, and was not interested in the goods by way of profit or commission dependent on the sale of such goods; and

(*b*) that he took reasonable precautions against committing the offence charged; and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark, mark, or trade description; and

(*d*) that he gave to the prosecutor all the information in his power with respect to the persons on whose behalf the trade mark, mark, or description was applied—

he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence.

Sect. 7—*Application of the Act to watches.*]—Where a watch case has thereon any words or marks which constitute, or are by common repute considered as constituting, a description of the country in which the watch was made, and the watch bears no description of the country where it was made, those words or marks shall *primâ facie* be deemed to be a description of that country within the meaning of this Act, and the provisions of this Act with respect to goods to which a false trade description has been applied, and with respect to selling or exposing for or having in possession for sale, or any purpose of trade or manufacture, goods with a false trade description, shall apply accordingly, and for the purposes of this section the expression "*watch*" means all that portion of a watch which is not the watch case.

Sect. 8—*False declaration at assay office of country or place where watch case was made.*]—(1) Every person who after the date fixed by order in council [*see Order in Council of 28th Nov.*, 1887, *gazetted 9th Dec.*, 1887, *and printed in Statutory Rules and Orders Revised* (ed. 1904), *vol.* 8, *tit.* "*Merchandise Marks*," p. 8. *And as to proving the order, see ante*, p. 348] sends or brings a watch case, whether imported or not, to any assay office in the United Kingdom, for the purpose of being assayed, stamped, or marked, shall make a declaration declaring in what country or place the case was made. If it appears by such declaration that the watch case was made in some country or place out of the United Kingdom, the assay office shall place on the case such a mark (differing from the mark placed by the office on a watch case made in the United Kingdom), and in such a mode as may be from time to time directed by order in council.

(2) The declaration may be made before an officer of an assay office, appointed in that behalf by the office (which officer is hereby authorized to administer such a declaration), or before a justice of the peace, or a commissioner having power to administer oaths in the Supreme Court of Judicature in England or Ireland, or in the Court of Session in Scotland, and shall be in such form as may be from time to time directed by order in council. [*See the Order in Council, supra.*]

(3) Every person who makes a false declaration for the purposes of this section shall be liable, on conviction on indictment, to the penalties of perjury, and on summary conviction to a fine not exceeding twenty pounds for each offence. [*See ante*, pp. 1051, 1072.]

Sect. 9—*Pleading—Trade mark how described in—Copy or facsimile not necessary.*]—In any indictment, pleading, proceeding, or document, in

which any trade mark or forged trade mark is intended to be mentioned, it shall be sufficient, without further description and without any copy or facsimile, to state that trade mark or forged trade mark to be a trade mark or forged trade mark.

Sect. 10—*Evidence—Defendant and wife or husband of defendant may be witnesses for defence—Evidence in case of imported goods.*]—In any prosecution for an offence against this Act—

(1) A defendant, and his wife or her husband, as the case may be, may, if the defendant thinks fit, be called as a witness, and, if called, shall be sworn and examined, and may be cross-examined and re-examined in like manner as any other witness. [*See* 61 & 62 *Vict. c.* 36, *ante*, pp. 392–398.]

(2) In the case of imported goods, evidence of the port of shipment shall be *primâ facie* evidence of the place or country in which the goods were made or produced.

Sect. 11—*Accessories liable as principals—Place of trial of.*]—Any person who, being within the United Kingdom, procures, counsels, aids, abets, or is accessory to the commission, without the United Kingdom, of any act, which, if committed in the United Kingdom, would under this Act be a misdemeanor, shall be guilty of that misdemeanor as a principal, and be liable to be indicted, proceeded against, tried, and convicted in any county or place in the United Kingdom in which he may be, as if the misdemeanor had been there committed. [*See post, Book II. Part IV.*]

Sect. 12.]—*Search warrant.*

Sect. 13—*Vexatious Indictments Act applicable to offences under this Act.*]—The *Vexatious Indictments Act*, 1859 (22 & 23 *Vict. c.* 17, *extended by* 30 & 31 *Vict. c.* 35, *s.* 1), shall apply to any offence punishable on indictment under this Act, in like manner as if such offence were one of the offences specified in section one of that Act, but this section shall not apply to Scotland. [*See ante*, p. 7, *et seq.*]

Sect. 14—*Costs of prosecutions.*]—On any prosecution under this Act the court may order costs to be paid to the defendant by the prosecutor, or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively. [*See ante*, pp. 259, 260.]

Sect. 15—*Limitation of time for prosecutions.*]—No prosecution for an offence against this Act shall be commenced after the expiration of three years next after the commission of the offence, or one year next after the first discovery thereof by the prosecutor, whichever expiration first happens. [*See ante*, p. 96.]

Sect. 18—*Certain trade descriptions lawfully used at the passing of this Act exempted from its operation—Proviso.*]—Where, at the passing of this Act, a trade description is lawfully and generally applied to goods of a particular class, or manufactured by a particular method, to indicate the particular class or method of manufacture of such goods, the provisions of this Act with respect to false trade descriptions shall not apply to such trade description when so applied [*see Gridley* v. *Swinborne*, 52 *J. P.* 739, 791]: Provided that where such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced,

and the goods are not actually made or produced in that place or country, this section shall not apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner with that name, the name of the place or country in which the goods were actually made or produced, with a statement that they were made or produced there.

Sect. 19—*This Act not to exempt persons from civil proceedings,—nor to exempt persons from refusing to answer interrogatories in action, but answers not admissible in evidence in prosecution,—nor to render liable servant acting bonâ fide.*]—(1) This Act shall not exempt any person from any action, suit, or other proceeding which might, but for the provisions of this Act, be brought against him.

(2) Nothing in this Act shall entitle any person to refuse to make a complete discovery, or to answer any question or interrogatory in any action, but such discovery or answer shall not be admissible in evidence against such person in any prosecution for an offence against this Act.

(3) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in the United Kingdom who *bonâ fide* acts in obedience to the instructions of such master, and, on demand made by or on behalf of the prosecutor, has given full information as to his master.

54 & 55 *Vict. c.* 15 (*Merchandise Marks Act*, 1891), *s.* 1—*Customs entry to be trade description.*]—The customs entry relating to imported goods shall for the purpose of the *Merchandise Marks Act*, 1887, be deemed to be a trade description applied to the goods.

Sect. 2—*Prosecution of offences by Board of Trade.*]—(1) The Board of Trade may, with the concurrence of the lord chancellor, make regulations providing that in cases appearing to the board to affect the general interests of the country, or of a section of the community, or of a trade, the prosecution of offences under the *Merchandise Marks Act*, 1887, shall be undertaken by the Board of Trade, and prescribing the conditions on which such prosecutions are to be so undertaken. The expenses of prosecutions so undertaken shall be paid out of moneys provided by parliament.

(2) All regulations made under this section shall be laid before parliament within three weeks after they are made if parliament is then sitting, and if parliament is not then sitting, within three weeks after the beginning of the next session of parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act, and shall be published under the authority of [his] Majesty's stationery office. [*The regulations in force, made May* 21, 1892, *are printed in the Statutory Rules and Orders Revised* (ed. 1904), *vol.* 8, *tit.* "*Merchandise Marks*," p. 13.]

(3) Nothing in this Act shall affect the power of any person or authority to undertake prosecutions otherwise than under the said regulations.

57 & 58 *Vict. c.* 19 (*Merchandise Marks Prosecution Act*, 1894), *s.* 1—*Prosecution of certain offences by Board of Agriculture.*]—The power exercisable by the Board of Trade under the *Merchandise Marks Act*, 1891 (*supra*), with respect to the prosecution of offences under the *Merchandise Marks Act*, 1887 (*supra*), may in cases which appear to the Board of Agriculture to relate to agricultural or horticultural produce be exercised by that board, and in such cases the former Act shall apply as if the Board of Agriculture were referred to therein instead of the Board of

Trade. [*The regulations in force, made October 27, 1894, are printed in Statutory Rules and Orders Revised* (ed. 1904), *vol.* 8, *tit.* "*Merchandise Marks*," p. 14.]

Sect. 2.]—This Act shall not extend to Ireland.

62 & 63 *Vict. c.* 51 (*Sale of Food and Drugs Act*, 1899), *s.* 1.]—*Precautions against importation of margarine, margarine cheese, adulterated or impoverished butter, condensed separated or skimmed milk, or any adulterated or impoverished food, unless sufficiently marked with a name or description indicating the nature of the article, or that it has been adulterated or impoverished.*

Sect. 3.

OFFENCES ARISING OUT OF RELATION BETWEEN EMPLOYERS AND WORKMEN.

Former Law.

The law relating to combinations by workmen for the purpose of raising wages, shortening the hours of labour, dictating to masters what workmen they shall employ, and for other purposes, interfering with the free course of trade, was formerly regulated by the common law relating to conspiracy, and by the repealed statutes 6 *G.* 4, *c.* 129; 22 *Vict. c.* 34; and 24 & 25 *Vict. c.* 100, *s.* 41; and was illustrated and enforced by the following cases, viz.: *R.* v. *Bykerdyke*, 1 *M. & Rob.* 179: *R.* v. *Rowlands*, 17 *Q. B.* 671; 2 *Den.* 364; 21 *L. J.* (*M. C.*) 81: *R.* v. *Duffield*, 5 *Cox*, 404: *Walsby* v. *Anley*, 30 *L. J.* (*M. C.*) 121: *O'Neill* v. *Longman*, 4 *B. & S.* 376: *O'Neill* v. *Kruger*, 4 *B. & S.* 389: *Wood* v. *Bowron*, *L. R.* 2 *Q. B.* 21: *R.* v. *Druitt*, 10 *Cox*, 592, 601, 602 (dissented from in *Gibson* v. *Lawson* [1891] 2 *Q. B.* 545): *R.* v. *Shepherd*, 11 *Cox*, 325. The history of the law is fully dealt with in *Wright on Conspiracy*; *and see Encycl. Eng. Law*, *tit.* "*Conspiracy.*" Complaints as to the unfairness of the law led to the appointment of a Royal Commission in 1867; on its report in 1869 were passed the *Trade Union Act*, 1871 (34 & 35 *Vict. c.* 31, *infra*), and 34 & 35 *Vict. c.* 32. *Sect.* 7 of the latter Act repealed 6 *G.* 4, *c.* 129; 22 & 23 *Vict. c.* 34; and 24 & 25 *Vict. c.* 100, *s.* 41, as to assaults in pursuance of an unlawful conspiracy to raise the rate of wages, but did not affect 24 & 25 *Vict. c.* 100, *ss.* 39, 40, as to assaults with intent to obstruct sale or transit of grain, or assaults on seamen to prevent their exercise of their lawful trade. 34 & 35 *Vict. c.* 32 was repealed by 38 & 39 *Vict. c.* 86, *s.* 17, in consequence of the decision of *Brett*, J., in *R.* v. *Bunn*, 12 *Cox*, 316 (*the Gas-stokers' case*), that an improper combination to control a master was still a common law offence; and 38 & 39 *Vict. c.* 86 (*infra*), was passed on the recommendation of a Royal Commission appointed in 1874.

Statutes.

34 & 35 *Vict. c.* 31 (*Trade Union Act*, 1871), *s.* 2—*Trade union not criminal.*]—The purposes of any trade union [*defined* 39 & 40 *Vict. c.* 22, *s.* 16, *infra*] shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

39 & 40 *Vict. c.* 22 (*Trade Union Act*, 1876), *s.* 16—*Definition of trade union.*]—So much of *s.* 23 of the principal Act (34 & 35 *Vict. c.* 31) as defines the term "trade union," except the proviso qualifying such definition (*see infra*), is hereby repealed, and in lieu thereof be it enacted as follows:—The term "trade union" means any combination, whether temporary or permanent, for regulating the relations between workmen and master, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act (34 & 35 *Vict. c.* 31) had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade.

34 & 35 *Vict. c.* 31, *s.* 23.]— . . . [*Proviso referred to in* 39 & 40 *Vict. c.* 22, *s.* 16, *supra.*] Provided that this Act shall not affect—1. Any agreement between partners as to their own business; 2. Any agreement between an employer and those employed by him as to such employment; 3. Any agreement in consideration of the sale of the goodwill of a business, or of instruction in any profession, trade, or handicraft.

38 & 39 *Vict. c.* 86 (*Conspiracy and Protection of Property Act*, 1875), *s.* 3—*Amendment of law as to conspiracy in trade disputes.*]—An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.

Nothing in this section shall exempt from punishment any persons guilty of a conspiracy for which a punishment is awarded by any Act of Parliament.

Nothing in this section shall affect the law relating to riot (*ante*, p. 1100), unlawful assembly (*ante*, p. 1098), breach of the peace, or sedition (*ante*, p. 986), or any offence against the state or the sovereign (*ante*, p. 928).

A *crime* for the purposes of this section means an offence punishable on indictment, or an offence which is punishable on summary conviction, and for the commission of which the offender is liable, under the statute making the offence punishable, to be imprisoned either absolutely or at the discretion of the court as an alternative for some other punishment.

Where a person is convicted of any such agreement or combination as aforesaid to do or procure to be done an act which is punishable only on summary conviction, and is sentenced to imprisonment, the imprisonment shall not exceed three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person.

[*This section has been said to include all the existing law against combination in referen e to trade disputes. Gibson* v. *Lawson* [1891] 2 *Q. B.* 545, 560, *per Coleridge*, L.C.J., *where R.* v. *Bunn*, 12 *Cox*, 316: *R.* v. *Druitt*, 10 *Cox*, 592, *were disapproved: but it has nothing to do with civil remedies, and a combination of two or more persons, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him or not to deal with him or continue in his employment, is if it results in damage to him, actionable and not legalized by this section: Quinn* v. *Leathem* [1901] *App. Cas.* 495, *where the observations of Bramwell*, B., *in R.* v. *Druitt* (*ubi supra*), *to the effect that the liberty of a man's mind and will was as much the subject of the law's protection as that of his body, were approved. In Quinn* v. *Leathem* (*ubi supra*) *the effect of Mogul SS. Co.* v.

Macgregor, Gow & Co. [1892] *App. Cas.* 25: *Allen* v. *Flood* [1898] *App. Cas.* 1, *and numerous other cases bearing on this subject were considered; and see Read* v. *Operative Soc. of Stonemasons* [1903] 2 *K. B.* 732: *Glamorgan Coal Co.* v. *South Wales Miners Federation* [1903] 2 *K. B.* 545, now under appeal to the *H. L.*

Sect. 4—*Breach of contract of service by person employed by municipal authority, etc., in supply of gas or water.*]—Where a person employed by a municipal authority [*defined s.* 14, *post*, p. 1162], or by any company or contractor upon whom is imposed by Act of Parliament the duty [*interpreted s.* 14, *post*, p. 1162], or who have otherwise assumed the duty of supplying any city, borough, town, or place, or any part thereof, with gas or water, wilfully and maliciously [*defined s.* 15, *post*, p. 1163] breaks a contract of service with that authority or company or contractor, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city, borough, town, place, or part, wholly or to a great extent of their supply of gas or water, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned [*s.* 9, *post*, p. 1162], be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

Every such municipal authority, company, or contractor as is mentioned in this section, shall cause to be posted up, at the gasworks or waterworks, as the case may be, belonging to such authority or company or contractor, a printed copy of this section in some conspicuous place where the same may be conveniently read by the persons employed, and as often as such copy becomes defaced, obliterated, or destroyed, shall cause it to be renewed with all reasonable despatch.

If any municipal authority or company or contractor make default in complying with the provisions of this section in relation to such notice as aforesaid, they or he shall incur, on summary conviction, a penalty not exceeding five pounds for every day during which such default continues, and every person who unlawfully injures, defaces, or covers up any notice so posted up as aforesaid in pursuance of this Act, shall be liable on summary conviction to a penalty not exceeding forty shillings.

Sect. 5—*Breach of contract of service involving serious injury to person or property.*]—Where any person wilfully and maliciously [*defined s.* 15 *post*, p. 1163] breaks a contract of service or of hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury, he shall on conviction thereof by a court of summary jurisdiction, or on indictment as hereinafter mentioned [*s.* 9, *post*, p. 1162], be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

Sect. 6—*Neglect by master to provide food, clothing, etc., for servant or apprentice.*]—*Ante*, p. 871.

Sect. 7—*Intimidation, etc., to compel any person to abstain from doing or to do any act which he has a right to do or abstain from doing.*]—Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,—

1. Uses violence to or intimidates such other person or his wife or children, or injures his property; or
2. Persistently follows such other person about from place to place;
3. Hides any tools, clothes, or other property owned or used by such other person, or deprives him of or hinders him in the use thereof; or
4. Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or
5. Follows such other person with two or more other persons in a disorderly manner in or through any street or road,

shall, on conviction thereof by a court of summary jurisdiction or on indictment as hereinafter mentioned [*s.* 9, *infra*], be liable either to pay a penalty not exceeding twenty pounds, or to be imprisoned for a term not exceeding three months, with or without hard labour.

Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

"Compel."]—*See Lyons* v. *Wilkins* (No. 2) [1899] 1 *Ch.* 255.

"Intimidates."]—*The decisions on intimidation in trade disputes prior to this Act are collected in Wright on Conspiracy* (1873), pp. 45–67. *A threat made to a workman that his fellow workmen will strike unless such workman joins a union, or a threat made to an employer that the union men in his employ will strike if he continues to employ non-union men, is not intimidation within the meaning of this section. Gibson* v. *Lawson, Curran* v. *Treleaven* [1891] 2 *Q. B.* 545; 61 *L. J.* (*M. C.*) 9, *the ground of decision apparently being that, as strikes are now lawful, the mere threat to do a lawful act cannot amount to intimidation. A threat to picket has been held to be intimidation, picketing being expressly forbidden by sub-s.* 4. *Judge* v. *Bennett*, 36 *W. R.* 103; 52 *J. P.* 247, *cited in Gibson* v. *Lawson, ubi supra; and cf. R.* v. *McCarthy* [1903] 2 *Ir. Rep.* 146. *Cave*, J., *in R.* v. *McKeevit, Liverpool Assizes, Dec.* 16, 1890, *ruled that to constitute intimidation within the meaning of this section personal violence must be threatened. In Curran* v. *Treleaven the court expressed an opinion* obiter *that there was much to be said for the view entertained by Cave*, J. *As to black lists, see Trollope* v. *London Building Trades Federation*, 72 *L. T.* 342; 11 *T. L. R.* 228, 280.

"Persistently follows."]—*See Smith* v. *Thomasson*, 16 *Cox*, 740, *Pollock*, B. *All the English cases up to* 1896 *are discussed in the American case, Vegelahn* v. *Guntner*, 167 *Mass.* 92.

"Watches or besets"—Picketing.]—*Where the defendants, officers of a trade union, ordered a strike against the defendants, and also against* S., *a person who made goods for the plaintiffs only, and their pickets by their direction, watched and beset the works of the plaintiffs and of* S. *for the purpose of persuading workpeople to abstain from working for the plaintiffs, the Court of Appeal held that the defendants in so directing their pickets were guilty of an offence against s.* 7, *sub-s.* 4, *of this Act, and granted an interlocutory injunction to restrain the defendants and their agents from watching or besetting the plaintiffs' works for the purpose of persuading or otherwise preventing persons from working for them, or for any purpose except merely to obtain or communicate information; and also to restrain the defendants from preventing* S. *or any other persons from working for the plaintiffs by*

withdrawing his or their workmen from their employment. Lyons v. *Wilkins (No.* 1) [1896] 1 *Ch.* 811: *cf. R.* v. *Bauld,* 13 *Cox,* 282. *And the decision in Lyons* v. *Wilkins (No.* 1) *has been in no way affected by Allen* v. *Flood* [1898] *App. Cas.* 1: *Lyons* v. *Wilkins (No.* 2) [1899] 1 *Ch.* 255; *and approved by Lord Lindley, in Quinn* v. *Leathem* [1901] *App. Cas.* 495, 541. *"Such other" means "any other." Id. Cf. Charnock* v. *Court* [1899] 2 *Ch.* 35: *Walters* v. *Green* [1899] 2 *Ch.* 698. *The law as laid down by the Recorder of London (Russell Gurney), in his charge to the grand jury, at the Central Criminal Court, in R.* v. *Hibbert, on the 5th April,* 1875 *(subsequently printed in return to an address of the House of Commons, dated 22nd June,* 1875), *would seem to be incorrect, viz., to the effect that if the defendants had merely watched the employer's premises for the purpose of informing all comers of the existence of a strike, and endeavouring to persuade them to join the men on strike, that would be lawful so long as it was done peaceably, and without anything being done to interfere with the perfect exercise of free-will on the part of those who were otherwise willing to work on the terms proposed by the employer. The Recorder mentioned also, in support of this view, that the law had been previously so laid down by Lush,* J., *in two cases tried before him. But see the rulings of Cleasby,* B., *in R.* v. *Hibbert,* 13 *Cox,* 82. *Besetting a person who has a legal right to be on a ship is within the section. Farmer* v. *Wilson,* 69 *L. J.* (*Q. B.*) 496; 64 *J. P.* 486; 19 *Cox,* 502.]

Sect. 9—*Person accused before court of summary jurisdiction of offence against this Act may elect to be tried on indictment.*]—Where a person is accused before a court of summary jurisdiction of any offence made punishable by this Act, and for which a penalty amounting to twenty pounds, or imprisonment, is imposed, the accused may, on appearing before the court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly. [*See* 42 *&* 43 *Vict. c.* 49, *s.* 17 (*ante,* p. 6). *It is not necessary to aver in this indictment that the defendant elected to be tried by a jury. R.* v. *Chambers,* 18 *Cox,* 401; 65 *L. J.* (*M. C.*) 214. *The acts which the persons interfered with had a legal right to do should be specifically described. R.* v. *Mackenzie* [1892] 2 *Q. B.* 519; 17 *Cox,* 542. *In Ex parte Wilkins,* 18 *Cox,* 161; 64 *L. J.* (*M. C.*) 221, *"working as a shoe finisher" was held to be a sufficient description of such an act. In an indictment under s.* 7, *sub-s.* 1, *for "injuring property," the property injured must be specified. Smith* v. *Moody* [1903] 1 *K. B.* 56; 72 *L. J.* (*K. B.*) 43; 20 *Cox,* 369; 67 *J. P. Rep.* 69.]

Sect. 11—*Evidence.*]—Provided, that upon the hearing and determining of any indictment or information under sections four, five and six of this Act, the respective parties to the contract of service, their husbands or wives, shall be deemed and considered as competent witnesses. [*See now* 61 *&* 62 *Vict. c.* 36, *ante,* pp. 392–397.

Sect. 12.]—*Appeal to quarter sessions.*

Sect. 14—*Meaning of "municipal authority," "company," and "contractor."*]—The expression "municipal authority" in this Act means any of the following authorities, that is to say, the Metropolitan Board of Works, the Common Council of the City of London, the Commissioners of Sewers of the City of London, the town council of any borough for the time being subject to the *Municipal Corporations Act,* 1882 (5 *&* 6 *W.* 4,

c. 76), and any Act amending the same, any commissioners, trustees, or other persons invested by any local Act of Parliament with powers of improving, cleansing, lighting, or paving any town, and any local board. [*The Municipal Corporations Act*, 1882, *was substituted for* 5 & 6 *W.* 4, *c.* 76 (45 & 46 *Vict. c.* 50, *s.* 242 (3)).]

Any municipal authority or company or contractor who has obtained authority by or in pursuance of any general or local Act of Parliament to supply the streets of any city, borough, town, or place, or of any part thereof, with gas, or which is required by or in pursuance of any general or local Act of Parliament to supply water on demand to the inhabitants of any city, borough, town, or place, or any part thereof, shall for the purposes of this Act be deemed to be a municipal authority or company or contractor upon whom is imposed by Act of Parliament the duty of supplying such city, borough, town, or place, or part thereof, with gas or water.

Sect. 15—*Construction of word "maliciously."*]—The word "maliciously" used in reference to any offence under this Act shall be construed in the same manner as it is required by the 58th section [*ante*, p. 649] of the *Malicious Damage Act*, 1861 (24 & 25 *Vict. c.* 97), to be construed in reference to any offence committed under such last-mentioned Act. [*See ante*, pp. 651, 701.]

Sect. 16.]—Nothing in this Act shall apply to seamen or to apprentices to the sea service. [*This section does not exempt a person who is not a seaman from being charged with and being liable to punishment under the Act for an offence committed by him against a seaman. Kennedy* v. *Cowie* [1891] 1 *Q. B.* 771; 60 *L. J.* (*M. C.*) 170. *"Seaman" in this section has the same meaning as in the Merchant Shipping Act*, 1894, i.e., *a person actually employed or engaged on a ship, and not merely persons whose calling or occupation is the sea, but who are not actually employed or engaged on a ship. R.* v. *Lynch* [1898] 1 *Q. B.* 61 (*C. C. R.*)

Sect. 4.

Offences as to the Sale of Food and Drugs.

Common Law.

It is a misdemeanor at common law to sell food or drink with knowledge that it is dangerous or unfit for human consumption. *R.* v. *Dixon*, 3 *M. & Sel.* 11; 4 *Camp.* 12; 15 *R. R.* 381: *R.* v. *Mackarty*, 2 *Ld. Raym.* 1179; 3 *Id.* 487; *cited arguendo* 6 *East*, 133, 141; *criticized* 2 *East P. C. ch.* 18, *s.* 5: *R.* v. *Southerton*, 6 *East*, 126, 133, 141, *explaining R.* v. *Mackarty*: *R.* v. *Haynes*, 4 *M. & Sel.* 214: *Shillito* v. *Thompson*, 1 *Q. B. D.* 12; 45 *L. J.* (*M. C.*) 18; *and see post, tit.* "*Nuisance.*" If death ensues from eating such food, the seller is indictable for manslaughter. *R.* v. *Stevenson*, 3 *F. & F.* 106: *R.* v. *Kempson*, *Oxford Circuit*, 1893; 28 *L. J. Newsp.* 477. Sale by a false description is indictable as a common law cheat (*ante*, p. 619), or under the *Merchandise Marks Act*, 1887 (*ante*, p. 1151), or as obtaining money by false pretences. *See ante*, pp. 593, 602, 603. These common law offences are not abolished by the statutes set out below. *See* 38 & 39 *Vict. c.* 63, *s.* 28 (*post*, p. 1165).

Statutes.

NOTE.—*The ordinary procedure under the Acts relating to the sale of bread, food, and drugs is before a court of summary jurisdiction. Only*

those sections under which an indictment may be preferred are given below. As to the cases on the Acts, see Bell, Scrivener & Lloyd on Sale of Food and Drugs Acts (4th ed.), 1903.

38 & 39 *Vict. c.* 63 (*Sale of Food and Drugs Act*, 1875), *s.* 2—*Definition of "drug."*]— . . . The term "drug" shall include medicine for internal or external use. . . . [*As to what is or is not a drug, see Fowle* v. *Fowle*, 18 *Cox*, 462; 60 *J. P.* 278: *Houghton* v. *Taplin*, 13 *T. L. R.* 386.]

62 & 63 *Vict. c.* 51 (*Sale of Food and Drugs Act*, 1899), *s.* 26—*Definition of "food."*]—For the purposes of the *Sale of Food and Drugs Acts*, the expression "food" shall include every article used for food or drink by man other than drugs or water, and any article which ordinarily enters into or is used in the composition or preparation of human food, and shall also include flavouring matters and condiments.

38 & 39 *Vict. c.* 63, *s.* 3—*Mixing food with ingredient injurious to health or selling food so mixed—Second offence a misdemeanor.*]—No person shall mix, colour, stain or powder, or order or permit any other person to mix, colour, stain or powder, any article of food with any ingredient or material so as to render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed, coloured, stained, or powdered, under a penalty in each case not exceeding fifty pounds for the first offence. Every offence, after a conviction for a first offence, shall be a misdemeanor, for which the person, on conviction, shall be imprisoned for a period not exceeding six months with hard labour.

Sect. 4—*Mixing drug with injurious ingredient or selling drug so mixed—Second offence a misdemeanor.*]—No person shall, except for the purpose of compounding as hereinafter described, mix, colour, stain, or powder, or order or permit any other person to mix, colour, stain, or powder, any drug with any ingredient or material so as to affect injuriously the quality or potency of such drug, with intent that the same may be sold in that state, and no person shall sell any such drug so mixed, coloured, stained, or powdered, under the same penalty in each case respectively as in the preceding section for a first and subsequent offence.

Sect. 5—*Exemptions.*]—Provided that no person shall be liable to be convicted under either of the two last foregoing sections of this Act in respect of the sale of any article of food, or of any drug, if he shows to the satisfaction of the justice or court before whom he is charged that he did not know of the article of food or drug sold by him being so mixed, coloured, stained, or powdered as in either of those sections mentioned, and that he could not with reasonable diligence have obtained that knowledge.

Sect. 8—*Further exemptions—Labels.*]—Provided that no person shall be guilty of any such offence as aforesaid (*see s.* 3) in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug, he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed.

62 & 63 *Vict.* c. 51, s. 12—*Labels.*]—The label referred to in s. 8 of the *Sale of Food and Drugs Act*, 1875 (*supra*), shall not be deemed to be distinctly and legibly written or printed within the meaning of that section unless it is so written or printed that the notice of mixture given by the label is not obscured by other matter on the label: Provided that nothing in this enactment shall hinder or affect the use of any registered trade mark, or of any label which has been continuously in use for at least seven years before the commencement of this Act (1*st Jan.*, 1900): but the Controller-General of Patents, Designs, and Trade Marks shall not register any trade mark purporting to describe a mixture unless it complies with the requirements of this enactment.

38 & 39 *Vict.* c. 63, s. 28.]—Nothing in this Act contained shall affect the power of proceeding by indictment or take away any other remedy against any offender under this Act, or in any way interfere with contracts and bargains between individuals, and the rights and remedies belonging thereto. . . . [*Cf.* 52 & 53 *Vict.* c. 63, s. 33, *ante*, p. 170.]

38 & 39 *Vict.* c. 55 (*Public Health Act*, 1875), ss. 116-119.]—*Summary proceedings for sale of unsound meat, etc., intended for the food of man.*

54 & 55 *Vict.* c. 76 (*Public Health London Act*, 1891), s. 47.]—*Similar provisions as to the sale of unsound food in London. See R.* v. *Dennis* [1894] 2 *Q. B.* 458, *where the defendant was on his election tried by indictment; and see Hunt, London Government, vol.* 1, p. 309.

62 & 63 *Vict.* c. 51, s. 19—*Time for proceedings and regulations as to summons.*]—(1) When any article of food or drug has been purchased from any person for test purposes, any prosecution under the *Sale of Food and Drugs Acts* in respect of the sale thereof, notwithstanding anything contained in s. 20 of the *Sale of Food and Drugs Act*, 1875, shall not be instituted after the expiration of twenty-eight days from the time of the purchase. [*The prosecution is instituted when the information is laid. Brooks* v. *Bagshaw* [1904] 2 *K. B.* 798, 68 *J. P. Rep.* 514.]

(2) In any prosecution under the *Sale of Food and Drugs Acts* the summons shall state particulars of the offence or offences alleged, and also the name of the prosecutor, and shall not be made returnable in less time than fourteen days from the day on which it is served, and there must be served therewith a copy of any analyst's certificate obtained on behalf of the prosecutor. [*See McQueen* v. *Jackson* [1903] 2 *K. B.* 163.]

38 & 39 *Vict.* c. 63, s. 27 (1)—*Forgery of warranties.*]—Any person who shall forge, or shall utter, knowing it to be forged for the purposes of this Act, any certificate or any writing purporting to contain a warranty, shall be guilty of a misdemeanor and be punishable on conviction by imprisonment for a term of not exceeding two years with hard labour.

62 & 63 *Vict.* c. 51, s. 20—*Defence of warranty.*]—A warranty or invoice shall not be available as a defence to any proceeding under the *Sale of Food and Drugs Acts* unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to such person. (2) The person by whom such warranty or invoice is alleged to have been given shall be entitled to appear at the hearing and

to give evidence, and the court may, if it thinks fit, adjourn the hearing to enable him to do so. (3) A warranty or invoice given by a person resident outside the United Kingdom shall not be available as a defence in any proceeding under the *Sale of Food and Drugs Acts* unless the defendant proves that he had taken reasonable steps to ascertain and did in fact believe in the accuracy of the statement contained in the warranty or invoice. (4) Where the defendant is a servant of the person who purchased the article under a warranty or invoice, he shall, subject to the provisions of this section, be entitled to rely on section twenty-five of the *Sale of Food and Drugs Act*, 1875, and section seven of the *Margarine Act*, 1887 (50 & 51 *Vict.* c. 29), in the same way as his employer or master would have been entitled to do if he had been the defendant, provided that the servant further proves that he had no reason to believe that the article was otherwise than that demanded by the prosecutor. (5) Where the defendant in a prosecution under the *Sale of Food and Drugs Acts* has been discharged under the provisions of section twenty-five of the *Sale of Food and Drugs Act*, 1875, as amended by this Act; any proceedings under the *Sale of Foods and Drugs Acts* for giving the warranty relied on by the defendant in such prosecution, may be taken as well before a court having jurisdiction in the place where the article of food or drug to which the warranty relates was purchased for analysis as before a court having jurisdiction in the place where the warranty was given. (6) Every person who, in respect of any article of food or drug sold by him as principal or agent, gives to the purchaser a false warranty in writing, shall be liable on summary conviction, for the first offence to a fine not exceeding twenty pounds, for the second offence to a fine not exceeding fifty pounds, and for any subsequent offence to a fine not exceeding one hundred pounds, unless he proves to the satisfaction of the court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true. [*For the effect of the section, see Manners* v. *Tyler* [1902] 1 *K. B.* 585; 71 *L. J.* (*K. B.*) 385: *Whitaker* v. *Pomfret* [1902] 1 *K. B.* 661; 71 *L. J.* (*K. B.*) 353: *Irving* v. *Callow Park Dairy Co., Ltd.*, 66 *J. P.* 804.]

CHAPTER VI.

OFFENCES AGAINST PUBLIC MORALS AND POLICE.

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SECT. 1.

BIGAMY.

Statute.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 57—*Definition and punishment of bigamy.*]—"Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, (*a*) shall be guilty of felony, and being convicted

(*a*) As to the powers of colonial legislatures to punish extra-territorial bigamy, *see McLeod* v. *Att.-Gen. for N. S. W.* [1891] *App. Cas.* 455: *re Criminal Code of Canada*, 26 *Canada*, 461: *R.* v. *Hilaire* [1903] 3 *N. S. W. State Rep.* 228.

thereof shall be liable to be kept in penal servitude for any term not exceeding seven years;"

Venue.]—"And any such offence may be dealt with, inquired of, tried, determined and punished in any county or place in England or Ireland where the offender shall be apprehended or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place;

"Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of [his] Majesty or to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction." [*Bigamy was first made felony by* 1 *Jac.* 1, *c.* 11, *repealed and re-enacted by* 9 *G.* 4, *c.* 31, *s.* 22, *which is reproduced in the above enactment. The Act of James applied only to second marriages within England and Wales. Kel.* (*J.*), 79, 80; 1 *Hawk. c.* 42, *s.* 5. *It excepted marriage after divorce* a mensâ et thoro; 1 *Hale*, 694; *and marriages within the age of consent.* 3 *Co. Inst.* 59.]

Indictment.

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of April, in the year of our Lord ——, at the parish of C., in the county of D., did marry one A. C., spinster, and her the said A. then and there had for his wife; and that the said J. S. afterwards, and whilst he was so married to the said A. as aforesaid, to wit, on the first day of June, in the year of our Lord ——, at the parish of F., in the county of G., and within the jurisdiction of the said court, feloniously [and unlawfully] did marry and take to wife one M. Y., and to her the said M. was then and there married, the said A., his former wife, being then alive; against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. [And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the 10th day of June, in the year last aforesaid at the parish of B., in the county of E., within the jurisdiction of the said court was apprehended [*or*, that the said J. S. now is in custody at the parish of B., in the county of E., and within the jurisdiction of the said court] for the felony aforesaid.] *As to the venue, see ante*, p. 46, *and supra; and compare similar provisions in the Forgery Act*, 1861 (*s.* 41, *ante*, pp. 705, 711), *and the Commissioners for Oaths Act*, 1889 (*s.* 9, *ante*, p. 1054). *Where the indictment is not preferred in the county where the second marriage took place, but in that county in which the prisoner was apprehended or is in custody, it need not state the fact of the apprehension or custody in the latter county; for it will appear by the caption of the indictment that the prisoner was in custody in the county in which the indictment was found. R.* v. *Whiley*, 1 *C. & K.* 150, *which case is wrongly reported in* 2 *Mood. C. C.* 186. *See R.* v. *Smythies*, 1 *Den.* 498; 2 *C. & K.* 878, 881; 19 *L. J.* (*M. C.*) 31. *From that case* (*in which R.* v. *Whiley is explained*) *it appears that the prisoner need not be shown ever to have been in custody within the jurisdiction of the court of trial till the moment of his surrendering to take his trial As to*

amendment, see R. v. Smith, 1 *F. & F.* 36. *In R. v. Fraser*, 1 *Mood. C. C.* 407, *the first marriage was laid in Kent, the second in Surrey, the venue was Middlesex, and it was alleged that the prisoner was apprehended without stating any place, and the conviction was held bad, but no suggestion was made that the defect was cured by the caption; this case, therefore, may now be considered no authority.* 1 *Russ. Cr.* (6th ed.) 665, *n. The concluding averment in brackets of the form of indictment given above appears, therefore, to be unnecessary, but it is generally inserted. The words "or elsewhere" in the enactment mean "in any other part of the world," and are not limited to the King's dominions. Earl Russell's case* [1901] *App. Cas.* 446; 70 *L. J.* (*K. B.*) 998; 20 *Cox*, 51. *A British subject resident in England, who married a second wife in the lifetime of the first, both marriages being solemnized in Scotland, was held liable to be indicted and convicted of bigamy in England, under* 9 *G.* 4, *c.* 31, *s.* 22, *of which* 24 *&* 25 *Vict. c.* 100, *s.* 57, *is a re-enactment. R. v. Topping, Dears.* 647; 25 *L. J.* (*M. C.*) 72; *and see R. v. Fraser, R. v. Whiley, ubi supra. Where the second marriage took place elsewhere than in England and Ireland, it should be stated that the accused is a British subject* (*see ante*, p. 1168).

Under 1 *Jac.* 1, *c.* 11 (*rep.*), *the defendant might be tried in the county where he was apprehended, but the words "in custody" were not in that Act. Where, the defendant being in custody in the county of W. for larceny, a bill was preferred against him for bigamy in another county, upon which he was detained by order of the court; it was sufficient to warrant the trial in the county of W., because, being in custody upon a criminal charge, he was liable to be tried where he was imprisoned. R. v. Gordon, R. & R.* 48. *Where an indictment for bigamy alleged that the prisoner was apprehended in Gloucestershire, and this was not proved; Channell*, B., *allowed an amendment, stating that the prisoner was in custody in that county. R. v. Smith*, 1 *F. & F.* 36.

The allegation that the defendant married again, "the said A. his former wife being then alive," sufficiently charges the offence, without any further averment, that he was still married to A. when the offence was committed. Murray v. R., 7 *Q. B.* 700; 14 *L. J.* (*Q. B.*) 357; 1 *Cox*, 202: *R. v. Apley*, 1 *Cox*, 71.

Felony: penal servitude for not more than seven nor less than three years, or imprisonment, with or without hard labour, not exceeding two years. 24 *&* 25 *Vict. c.* 100, *s.* 57; 54 *&* 55 *Vict. c.* 69, *s.* 1, *sub-ss.* 1, 2 (*ante*, p. 235). *As to requiring the offender to enter into recognizances and find sureties for keeping the peace,* 24 *& 25 Vict. c.* 100, *s.* 71 (*ante*, p. 778).

This offence is not triable at quarter sessions. 5 *& 6 Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence for the Prosecution.

The following matters must be proved on the part of the prosecution:—1. *Celebration of the first marriage and identity of the parties.* 2. *The validity of the first marriage.* 3. *That it subsisted at the date of the second marriage.* 4. *Celebration of the second marriage.* The first wife or husband is not a competent witness *for the prosecution* on any part of the case, either at common law (1 *Hawk. c.* 42, *s.* 8) or under the *Criminal Evidence Act*, 1898 (61 *& 62 Vict. c.* 36). *R. v. Green, Hertford Assizes, Nov.* 18, 1899, 34 *L. J. Newsp.* 622, *Wills*, J. In *R. v. Ayley*, 15 *Cox*, 328, the alleged first wife was allowed to be called on production of a certificate of her previous marriage to another man and of his death after her alleged marriage to the defendant. The second wife is a competent witness as soon as the first marriage is proved. 1 *Hale*, 693. *See R. v. Peat*, 2 *Lewin*, 111, 288; 1 *Russ. Cr.* (6th ed.) 715, *n.*: *R. v. Wakefield*, 2 *Lewin*, 279; *Murray's Report*, p. 155; *M. & M.* 197, *n.*; *and ante*, p. 398.

1. *Celebration of the first marriage.*]—It is immaterial when or where the first marriage was celebrated, whether in England or elsewhere. 2 *Hale*, 692; 1 *Hawk.* c. 42, *s.* 7; 3 *Chit. Cr. L.* 720.

There must be evidence of celebration: as evidence of acknowledgment, cohabitation, or repute will not suffice. *R.* v. *Willshire*, 6 *Q. B. D.* 366: *Morris* v. *Miller*, 4 *Burr.* 2057, 2058, *Lord Mansfield*, C.J. In *R.* v. *Wilson*, 4 *F. & F.* 119, 122, *n.*, however, the contrary seems to have been decided. To prove the celebration, it is not essential to prove that banns were published or a licence obtained or the marriage registered; *R.* v. *Allison*, *R. & R.* 109: *R.* v. *Manwaring*, 26 *L. J.* (*M. C.*) 10; and it is sufficient to call a person present at the ceremony, who can describe it so as to enable the judge to determine whether it would constitute a marriage in law; *R.* v. *Allison*, *ubi supra*: *R.* v. *Millis*, 10 *Cl. & F.* 534; and can identify the parties. *R.* v. *Manwaring*, *ubi supra*: *R.* v. *Simpson*, 15 *Cox*, 423. Since the establishment of a complete system of registration of marriages it is, however, now simpler and more satisfactory, and more usual to prove the celebration by a certified copy of the marriage register obtained from the general register office, or from the custodian of the particular register.

Identity.]—Evidence of the identity of the parties must also be given, and should be by persons who were present at the ceremony, or have other adequate means of knowing the parties to the marriage. Identification by photograph has been allowed; *R.* v. *Tolson*, 4 *F. & F.* 103; but is unsatisfactory, and in matrimonial cases is now rejected if uncorroborated by other evidence. *Frith* v. *Frith* [1896] *Prob.* 74.

The special modes of proving marriages by particular ceremonies are as hereunder stated.

Marriage in Church of England.]—If celebrated in England, according to the rites of the Established Church, the marriage may be proved by the production of the original register of the marriage from the proper custody, that is, from the church itself, or from the custody of the "rector, vicar, curate or other officiating minister;" *Doe* v. *Fowler*, 14 *Q. B.* 700; or by a copy thereof, or extract therefrom, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted; 14 & 15 *Vict.* c. 99, *s.* 14 (*ante*, p. 379): *Sayer* v. *Glossop*, 2 *C. & K.* 694: *Re Hall's Estate*, 22 *L. J.* (*Ch.*) 177: *Re Porter's Trusts*, 25 *L. J.* (*Ch.*) 688; together with some proof either direct or presumptive of the identity of the parties. *See ante*, p. 353.

Where it was proved that the marriage was solemnized, not in the parish church, but in a chamber in a building a few yards from the church, while the church was under repair, and it was further proved that divine service had several times been performed in the building in question, it was held that the building must be presumed to have been licensed, and that therefore the marriage might properly be solemnized there. *R.* v. *Cresswell*, 1 *Q. B. D.* 446; 45 *L. J.* (*M. C.*) 77. As to marriages by banns in chapels, *see R.* v. *Bowen*, 2 *C. & K.* 227. As to the liability of the clergy to prosecution for a refusal to celebrate a marriage according to the directions of 6 & 7 *W.* 4, *c.* 85, and as to the requisites of the indictment and evidence in such cases, *see R.* v. *James*, 2 *Den.* 1; 3 *C. & K.* 167; 19 *L. J.* (*M. C.*) 179.

With respect to the place where the banns may be published and a marriage solemnized, *see the Marriage Acts* of 1823 (4 *G.* 4, *c.* 76), 1825 (6 *G.* 4, *c.* 92), and 1836 (6 & 7 *W.* 4, *c.* 85). The non-residence of the

parties where the banns were published, or, if by licence, where the marriage was solemnized, is immaterial. 4 *G.* 4, *c.* 76, *s.* 26: *R.* v. *Hind*, *R. & R.* 253; 15 *R. R.* 740; 19 *& 20 Vict. c.* 119, *s.* 17. The Act of 1823 (4 *G.* 4, *c.* 76) does not apply to marriages beyond sea or in Scotland. *See R.* v. *Topping*, *Dears.* 647.

As to marriages of illegitimate children, by licence in England, *see Priestly* v. *Hughes*, 11 *East*, 1; 10 *R. R.* 406.

In Church of Rome.]—Where the marriage to be proved has been celebrated in accordance with the rites of the Church of Rome, in some part of the United Kingdom, it is not sufficient to prove the marriage by a certificate from the officiating priest; but it is also necessary to prove that the statutory requirements in the case of such marriages have been complied with; *i.e.*, either (1) that the marriage has been celebrated in the presence of the registrar under 6 *& 7 W.* 4, *c.* 85, *s.* 20, or that the church where the marriage was celebrated was registered under the *Marriage Act*, 1898 (61 *& 62 Vict. c.* 58). In *R.* v. *Savage*, 13 *Cox*, 178, it was held by *Lush*, J., that in an indictment for bigamy everything must be proved most strictly, and therefore that evidence of the first marriage in Scotland, by a Roman Catholic priest who had many times previously performed similar ceremonies there, would not suffice, without proof of the law of Scotland as to such marriage, and this decision was followed by *Walton*, J., in *R.* v. *Lindsay*, 66 *J. P.* 505; 18 *T. L. R.* 761; *and see R.* v. *Povey*, *Dears.* 82; 22 *L. J.* (*M. C.*) 19 (*post*, p. 1173). But where the only evidence of the second marriage was that of the second wife, who proved that she had been married to the prisoner in the State of Illinois by a Roman Catholic priest according to the rites of his church, this was held to be sufficient evidence of the second marriage, without proof of the law of that state relating to marriage. *R.* v. *Griffin*, 14 *Cox*, 308; 4 *L. R. Ir.* 497. Where the first marriage was celebrated abroad, it is submitted that evidence should be given to prove that a religious marriage according to the rites of the Church of Rome was accepted as valid by the civil authorities of the state in which it was celebrated. But in *R.* v. *Brampton*, 10 *East*, 282; 10 *R. R.* 299, followed in *R.* v. *Griffin* (*ubi supra*), it would seem to have been considered that proof that the ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony according to the rites and customs of the foreign country, would be sufficient presumptive evidence of it, so as to throw upon the defendant the *onus* of impugning its validity. Where a man and woman were married in Ireland with the ceremonies making a marriage of Roman Catholics valid, they declaring themselves to be Roman Catholics, it was held that the man could not, on an indictment for bigamy, set up his alleged Protestantism to defeat such marriage. *R.* v. *Orgill*, 9 *C. & P.* 80.

In Greek Church.]—A first marriage in England according to the rites of the Greek Church must be proved under the *Marriage Act*, 1898 (61 *& 62 Vict. c.* 58), if the church where the marriage took place is registered under that Act, otherwise a proof of marriage in the presence of or before a registrar (6 *& 7 W.* 4, *c.* 85, *s.* 20) will be necessary to establish the validity of the marriage in England. *See the Greek Marriages Act*, 1884 (47 *& 48 Vict. c.* 20). Where the second marriage was according to the Greek rite, it is submitted that it is enough to prove celebration (*see post*, p. 1177).

Of Jews.]—Marriages between persons of the Jewish faith were excepted

out of 4 *G.* 4, *c.* 76 (*see s.* 31), *and* 61 *&* 62 *Vict. c.* 58 (*see s.* 13); but they are provided for by 6 *&* 7 *W.* 4, *c.* 85, *ss.* 2, 16, 39; 3 *&* 4 *Vict. c.* 72, *s.* 5; 19 *&* 20 *Vict. c.* 119, *ss.* 20–22. As to such marriages, see *Lindo* v. *Belisario*, 1 *Hagg. Consist. Rep.* 216: *Goldsmid* v. *Bromer*, *Id.* 324: *Ruding* v. *Smith*, 2 *Hagg. Consist. Rep.* 371; 1 *St. Tr., N. S.* 1053, 1064, 1065, *Lord Stowell*: *R.* v. *Millis*, 10 *Cl. & F.* 534; 8 *Eng. Rep.* 844. Where the marriage is alleged to have been celebrated according to Jewish law, evidence must be given of a written contract between the parties; *Horn* v. *Noel*, 1 *Camp.* 61: *R.* v. *Althausen*, 17 *Cox*, 630: *R.* v. *Nasillski*, 61 *J. P.* 520: *R.* v. *Weinberg*, 33 *L. J. Newsp.* 239; and that the witnesses to the marriage were not blood relations of the parties. *Nathan* v. *Woolf* [1899] 15 *T. L. R.* 250. Jews domiciled in England cannot validly contract a marriage within the degrees prohibited by English law. *Re De Wilton* [1900] 2 *Ch.* 481.

Of Quakers.]—Marriages between Quakers (*see Deane* v. *Thomas*, *M. & M.* 361) are excepted out of 4 *G.* 4, *c.* 76 (*see s.* 31), *and* 61 *&* 62 *Vict. c.* 58 (*see s.* 13; but are provided for by 6 *&* 7 *W.* 4, *c.* 85, *ss.* 2, 16, 39; 3 *&* 4 *Vict. c.* 72, *s.* 5; 19 *&* 20 *Vict. c.* 119, *ss.* 20, 21; 23 *&* 24 *Vict. c.* 18; 35 *&* 36 *Vict. c.* 10. The two last-mentioned Acts apply even when one only or neither of the parties is a Quaker.

Of Protestant dissenters.]—Where the marriage was celebrated under the *Marriage Act*, 1898 (61 *&* 62 *Vict. c.* 58), in a registered building without the presence of the registrar, it may be proved by a certified copy from the general register office given under 6 *&* 7 *W.* 4, *c.* 86, *s.* 38, or by a certified copy given by the minister in charge of the register belonging to the building.

Where the marriage was celebrated in a registered building in the presence of the registrar under *ss.* 18–21 of the *Marriage Act*, 1836 (6 *&* 7 *W.* 4, *c.* 85), it may be proved by certified copies of the register from the general registry office at Somerset House (6 *&* 7 *W.* 4, *c.* 86, *s.* 38), or from the registrar who has custody of the original register (*Id. s.* 35).

Where the marriage was solemnized under 6 *&* 7 *W.* 4, *c.* 85, the certificate authorized by the 7th section of that Act (*now rep.*), and under 6 *&* 7 *W.* 4, *c.* 86, *s.* 38, coupled with evidence of the identity of the parties by persons present at the marriage, was held to be sufficient *primâ facie* evidence of a valid marriage. *R.* v. *Hawes*, 1 *Den.* 270; 2 *Cox*, 432. Proof of marriage before a registrar, or in a chapel not duly licensed has been held sufficient. *R.* v. *Tilson*, 1 *F. & F.* 54. Proof that the marriage took place in a dissenting chapel, in the presence of the registrar, that the entry in the registrar's book was signed by a person who proved the fact of the marriage, as a witness to the marriage, and that the parties afterwards cohabited for some years, was held to be sufficient *primâ facie* evidence that the chapel was duly registered, and was a place in which marriages might be lawfully solemnized under the above Act. *R.* v. *Manwaring*, *Dears. & B.* 132; 26 *L. J.* (*M. C.*) 10. So where it was proved that the marriage was celebrated in a dissenting chapel by a dissenting minister in the presence of the registrar of the district and two witnesses, and the certificate was produced, it was held unnecessary to prove that the chapel was registered. *R.* v. *Cradock*, 3 *F. & F.* 837.

By registrar.]—A marriage solemnized before a registrar under *s.* 21 of the *Marriage Act*, 1836 (6 *&* 7 *W.* 4, *c.* 85), may be proved by certified

copies under *ss.* 35 or 38 of the *Births and Deaths Registration Act*, 1836 (6 *&* 7 *W.* 4, *c.* 86), coupled with proof of the identity of the parties. As to certificates of marriages in the presence of the registrar and in buildings registered under *s.* 18 of the *Marriage Act*, 1836, *vide supra.*

Marriages in Scotland.]—Regular marriages in Scotland are best proved by certified extracts from the marriage register given under 17 *&* 18 *Vict. c.* 56, *s.* 58, which, if authenticated as required, are admissible in evidence in all parts of the King's dominions. *See also Lyell* v. *Kennedy* [1889] 14 *App. Cas.* 437, 449.

Marriages in Ireland.]—A marriage in Ireland, if according to the rites of the Church of Rome, is best proved by certified copies from the general register office or the superintendent registrar of the district in which the marriage was celebrated: 26 *&* 27 *Vict. c.* 90, *ss.* 17, 18. Marriages in Ireland (other than Roman Catholic) are best proved by certified copies of the register under 7 *&* 8 *Vict. c.* 81, *ss.* 68, 69, 70.

Marriages abroad.]—A marriage celebrated abroad may be proved by any person who was present at it; circumstances should also be proved from which the jury may infer that it was a valid marriage according to the laws of the country in which it was celebrated, or according to the national law of the parties if celebrated outside the state to which they belong. On this subject oral but not written evidence by experts is admissible. *Sussex Peerage Claim*, 6 *St. Tr., N. S.* 79; 11 *Cl. & F.* 85; 8 *Eng. Rep.* 1034. As to French marriages, *see Lacon* v. *Higgins*, *D. & R.* (*N. P.*) 88; 3 *Stark.* (*N. P.*) 178. Marriages celebrated abroad by British officials under the *Foreign Marriage Act*, 1892 (55 *&* 56 *Vict. c.* 23), are proved under *s.* 13 of that Act.

2. *Validity of the marriage.*]—The second marriage is not bigamous unless the first marriage was valid; and the validity of the first marriage must be proved by the prosecution; *R.* v. *Kay*, 16 *Cox*, 292; for the law will not presume it in the case of bigamy as it will in civil cases. *Smith* v. *Huson*, 1 *Phillimore*, 287. And the first marriage must also have been a monogamous marriage as understood in Christian countries. *See Ardaseer Curseljee* v. *Perozeboye*, 10 *Moore, P. C.* 575; 14 *Eng. Rep.* 533: *Re Ullee*, 54 *L. T.* (*N. S.*) 286: *Re Bethell*, 38 *Ch. D.* 220: *Hyde* v. *Hyde*, *L. R.* 1 *P. & D.* 130: *Brinkley* v. *Att.-Gen.* 15 *P. D.* 76; *Mayne, Ind. Cr. L.* (1896) p. 771.

In *R.* v. *Newton*, 2 *M. & Rob.* 503, the prisoner's admission of a prior marriage was held to be evidence that it was lawfully solemnized. *See* same case reported as *R.* v. *Simmonsto*, 1 *C. & K.* 164; and as *R.* v. *Simmonite*, 1 *Cox*, 30. But in *R.* v. *Savage*, 13 *Cox*, 178, *Lush*, J., refused to act upon *R.* v. *Newton*, as being inconsistent with the *Sussex Peerage Claim*, 11 *Cl. & F.* 85, 134; 8 *Eng. Rep.* 1034, and held that the prisoner's admission upon being apprehended that he had been married to his first wife in Scotland, was no evidence that that marriage had been lawfully solemnized, and this view seems to be supported by *R.* v. *Truman*, 1 *East, P. C.* 470: *R.* v. *Flaherty*, 2 *C. & K.* 782, and was adopted by *Walton*, J., in *R.* v. *Lindsay*, 66 *J. P.* 505; 18 *T. L. R.* 761.

How proved.]—The validity of a marriage *in point of form* is substantially the same as due celebration, and in the case of a marriage in England no further proof is needed except that the persons married were not within

the prohibited degrees, or were not already married. If the defence seek to defeat the validity of the marriage by setting up an earlier and subsisting marriage of one of the parties, they must prove it. *Dalrymple* v. *Dalrymple*, 2 *Hagg. Consist. Rep.* 54: *R.* v. *Millis*, 10 *Cl. & F.* 504; 8 *Eng. Rep.* 844.

It was decided in *R.* v. *Millis*, *ubi supra*, that by the common law of England a marriage between British subjects is void unless solemnized in the presence of a person in holy orders or episcopally ordained in the Anglican, Greek, or Roman churches, and therefore that all marriages not so solemnized, in those parts of the British dominions to which the *Marriage Act*, 26 *G.* 2, *c.* 33 (*rep.*), did not extend, were void, and would not subject the parties, if they afterwards contracted a second marriage in the lifetime of both parties, to the penalties of bigamy. The decision in *R.* v. *Millis* has been much doubted, but binds English courts in cases where a statutory authority for the form of marriage in question does not exist. *See Dicey, Conflict of Laws*, 634. *See also Lautour* v. *Teesdale*, 8 *Taunt*, 830: *Re McLoughlin*, 1 *L. R. Ir.* 421. A priest in holy orders cannot lawfully solemnize a marriage between *himself* and another person. *Beamish* v. *Beamish*, 9 *H. L. C.* 274; 11 *Eng. Rep.* 735.

A marriage is valid at common law if celebrated on a British ship at sea by an episcopally-ordained minister; *Culling* v. *Culling* [1896] *Prob.* 116: *Du Moulin* v. *Druitt*, 13 *Ir. C. L. Rep.* 212; or on a British public ship in accordance with the *Foreign Marriage Act*, 1892 (55 & 56 *Vict. c.* 23); or within the lines of a British army in a foreign country, if celebrated by an episcopally-ordained minister and if one party is subject to military law. *R.* v. *Brampton* (*Inhabitants*), 10 *East*, 282; 10 *R. R.* 299: *Burn* v. *Farrar*, 2 *Hagg. Consist. Rep.* 369: *Ruding* v. *Smith*, 2 *Id.* 371; 1 *St. Tr., N. S.* 1053: *Waldegrave Peerage Claim*, 4 *Cl. & F.* 649. Such a marriage is also valid if celebrated as prescribed by the *Foreign Marriage Act*, 1892, *s.* 22.

A marriage abroad between British subjects is not valid at common law if celebrated before a layman (*Catherwood* v. *Caslon*, 13 *M. & W.* 261: *but see Catterall* v. *Catterall*, 1 *Rob. Eccl.* 304; 3 *Id.* 580: *Burt* v. *Burt*, 29 *L. J.* (*Matr.*) 133); but may be validly celebrated by a marriage officer under the *Marriage Act*, 1892 (55 & 56 *Vict. c.* 23). As to forms and regulations, *see Stat. Rules and Orders Revised* (ed. 1904), *vol.* 8, *tit.* "*Marriage*," p. 36.

To be valid the marriage, if contracted in England, must have been celebrated in a manner recognized by the law of England and between persons capable of contracting marriage, and who might lawfully intermarry; and if contracted elsewhere must have been according to the *lex loci contractûs*, or if contracted abroad must be valid under English law as to such marriages so contracted (55 & 56 *Vict. c.* 23, *s.* 19), or if celebrated in England not in accordance with English law, then only if celebrated in a foreign embassy or embassy chapel between subjects of the ambassador's sovereign. *Ruding* v. *Smith*, 2 *Hagg. Consist. Rep.* 371; 1 *St. Tr., N. S.* 1066: *Pertreis* v. *Tondear*, 1 *Hagg. Consist. Rep.* 136. The latter class of marriage is treated as ex-territorial. *Dicey, Conflict of Laws*, 631.

Consent.]—It is not now necessary in order to establish the validity of a marriage in England between parties, one or both of whom is a minor, to prove that the consent of parent or guardian required by law has been given. *See Marriage Act*, 1823 (4 *G.* 4 *c.* 76), *s.* 14: *R.* v. *Birmingham*, 8 *B. & C.* 29: *Marriage Registration Act*, 1856 (19 & 20 *Vict. c.* 119), *s.* 17, which applies to marriages celebrated under that Act or the Acts of

1836 (6 & 7 *W.* 4, *c.* 85), 1837 (7 *W.* 4 & 1 *Vict. c.* 22), and 1840 (3 & 4 *Vict. c.* 72): *Prowse* v. *Spurway*, 46 *L. J.* (*Prob.*) 49. In the case of an illegitimate minor for whom no guardian has been appointed, no consent has ever been needed. *Horner* v. *Horner*, 1 *Hagg. Consist. Rep.* 337: *Priestley* v. *Hughes*, 11 *East* 1 (*and see* 4 *G.* 4, *c.* 76, *ss.* 14, 16, 17). In the case of a marriage in a foreign country where the consent of parents, etc., is necessary, it is submitted that such consent must be proved on a prosecution in England for bigamy.

If the marriage was celebrated in England, under English law, between foreigners not domiciled here, and in defiance of their national law, it would seem to be valid for purposes of a prosecution for bigamy. But this cannot be treated as absolutely settled. *See Sottomayor* v. *De Barros*, 5 *P. D.* 94: *Scott* v. *Att.-Gen.*, 11 *P. D.* 128: *Warter* v. *Warter*, 15 *P. D.* 152.

Effect of marriage in false name or without due notice.]—Under the *Marriage Act*, 1823 (4 *G.* 4, *c.* 76, *s.* 22), in order to invalidate a marriage for want of due publication of the banns, the misdescription in the banns must be knowingly and wilfully consented to by both parties. The rule under *Lord Hardwicke's Act* (26 *G.* 2, *c.* 33, *rep.*) was different. *See R.* v. *Tibshelf*, 1 *B.* & *Ad.* 190: *R.* v. *Wroxton*, 4 *B.* & *Ad.* 640; 38 *R. R.* 356: *R.* v. *Clarke*, 10 *Cox*, 474; 15 *W. R.* 796. Upon a prosecution for bigamy it appeared that the first marriage was by banns, and that the prisoner on procuring the publication of the banns fraudulently misstated the name of his intended wife, and that she was married in that name. There being no affirmative evidence that the woman was unaware of the misstatement, it was held that the first marriage was void. *R.* v. *Kay*, 16 *Cox*, 292, *Huddleston*, B.; *sed quære.* Under the same enactment, to invalidate a marriage for want of a licence, it must be established affirmatively that at the time the ceremony was solemnized both the parties were cognizant of the fact that the licence had not issued, and, knowing that fact, that they wilfully intermarried. *Greaves* v. *Greaves*, 41 *L. J.* (*P.* & *M.*) 66. To render a marriage invalid within 6 & 7 *W.* 4, *c.* 85, *s.* 42, which enacts, "that if any persons shall knowingly and wilfully intermarry under the provisions of this Act (*inter alia*), without due notice to the superintendent-registrar, the marriage of such persons shall be null and void," it must be contracted with a knowledge by both parties that no due notice had been given; and therefore when one of the parties under *s.* 4 of the Act, which requires that the notice shall state (*inter alia*) the name and surname of each of the parties intending marriage, gave a notice stating therein a false christian name for such party, but it did not appear that that was done with the knowledge of the other party, the marriage was held to be valid. *R.* v. *Rea*, *L. R.* 1 *C. C. R.* 365; 41 *L. J.* (*M. C.*) 92: *and see Nathan* v. *Woolf* [1899] 15 *T. L. R.* 250: *Re Knox*, 23 *L. R. Ir.* 542: *R.* v. *Clarke*, *ubi supra.*

Scotch marriages.]—As to what is necessary to constitute a valid marriage in Scotch law, *see R.* v. *Graham*, 2 *Lewin*, 97: *R.* v. *Savage*, 13 *Cox*, 178: *Dalrymple* v. *Dalrymple* (*ante*, p. 1174): *Ruding* v. *Smith*, 2 *Hagg. Consist. Rep.* 371, 376: *Ilderton* v. *Ilderton*, 2 *H. Bl.* 145: *Compton* v. *Bearcroft*, *Bull.* (*N. P.*) 113: *R.* v. *Povey*, *Dears.* 32; 22 *L. J.* (*M. C.*) 19: *R.* v. *Topping*, *Dears.* 647; 25 *L. J.* (*M. C.*) 72; *Fraser on Husband and Wife* (*Sc.*). Gretna Green marriages were treated as valid in England until 1856, when they were made invalid unless celebrated in compliance with 19 & 20 *Vict. c.* 96. *Compton* v. *Bearcroft*, *ubi supra*: *Lawford* v. *Davis*, 4 *P. D.* 61. The validity of a Scotch marriage must be proved by an expert in Scotch law. *R.* v. *Povey*, *Dears.* 32; 22 *L. J.* (*M. C.*) 19.

Irish marriages.]—In Ireland marriages between Protestant Episcopalians, or where one party is such, are regulated by 33 & 34 *Vict. c.* 110; between Presbyterians, by 7 & 8 *Vict. c.* 81; between Roman Catholics, by the law of their church; *R.* v. *Orgill*, 9 *C. & P.* 80; 7 & 8 *Vict. c.* 81, *s.* 3; or in case of mixed marriages, by 33 & 34 *Vict. c.* 49, and 33 & 34 *Vict. c.* 110: *and see Re Knox*, 23 *L. R. Ir.* 542. These statutes override the decision in *R.* v. *Harley*, *Carr. Sup.* 254. As to the view of the Irish courts as to Irish law, *see R.* v. *Fanning*, 17 *Ir. C. L. R.* 289; 10 *Cox*, 411 (*C. C. R.*): *R.* v. *Griffin*, 14 *Cox*, 308; 4 *L. R. Ir.* 497; and as to mixed marriages, *see R.* v. *Sunderland*, 2 *Lewin*, 139: *R.* v. *Fanning*, *ubi supra.*

Foreign marriages.]—In addition to proof of celebration, expert evidence as to the validity of the marriage should be called. Marriages between foreign Christians in Eastern countries appear to be valid if in accordance with the ecclesiastical law of their communion. *Parapano* v. *Happaz* [1894] *App. Cas.* 165. But such a marriage abroad between persons domiciled in England would appear to be insufficient to support a prosecution for bigamy. *De Mette* v. *De Mette*, 28 *L. J.* (*Matr.*) 117; *Dicey*, *Conflict of Laws*, 645.

Colonial marriages.—In the case of colonial marriages, the validity of the marriage should also be proved by an expert in the law of the colony.

Void and voidable marriages.]—A marriage between persons within the prohibited degrees of consanguinity or affinity is absolutely void under *Lord Lyndhurst's Act* (5 & 6 *W.* 4, *c.* 54) if celebrated in England; *R.* v. *Chadwick*, 11 *Q. B.* 173; 17 *L. J.* (*M. C.*) 33; 2 *Cox*, 381; or if celebrated abroad between British subjects who at the time of celebration were domiciled in England. *Re De Wilton* [1900] 2 *Ch.* 481: *Brook* v. *Brook*, 9 *H. L. C.* 193; 11 *Eng. Rep.* 703. It would seem that if a marriage validly celebrated in the country of the husband's domicile between persons who are within the prohibited degrees of consanguinity or affinity according to English law, the parties would be indictable in England on a second marriage there, as the first marriage would be valid in England for succession to personalty (*Brook* v. *Brook*, *ubi supra*); though not for succession to realty. Proof of a marriage which is *voidable* merely, will support an indictment for bigamy. 3 *Co. Inst.* 88. Thus a marriage by a minor in Ireland, without consent, which by the *Irish Marriage Act* was voidable only within a year, will support a conviction for bigamy, if the marriage be not vacated (*R.* v. *Jacobs*, 1 *Mood. C. C.* 140), and the same rule applies to a marriage voidable for impotence of one of the parties. *B.*, *alias A.* v. *B.*, 27 *L. R. Ir.* 587, 608. But it is otherwise if the marriage be not voidable merely, but void; as, for instance, if a woman marry A., and in the lifetime of A. marry B.; and after the death of A., and whilst B. is alive, she marry C., she cannot be indicted for bigamy, in her marriage with C., because her marriage with B. was a mere nullity. 1 *Hale*, 693. And so if a man marry A., and in the lifetime of A. marry B., and afterwards, in the lifetime of A. and B. marry C., he cannot be indicted for bigamy in marrying C., his wife "B." being then alive, because the marriage with B. was void. *See R.* v. *Willshire*, 6 *Q. B. D.* 366. So the marriage of an idiot, or of a lunatic not in a lucid interval, is void, because he is deemed in law incapable of entering into such a contract. 1 *Bl. Com.* 438, 439: *Durham* (*Earl*) v. *Durham* (*Countess*) 10 *P. D.* 80. The law on this subject is fully considered in *Wood Renton on Lunacy*, 17–28. So, if a boy under fourteen

or a girl under twelve contract matrimony, it is void, unless both husband and wife consent to and confirm the marriage after the minor arrives at the age of consent. *Co. Litt.* 79. *See R.* v. *Gordon, R. & R.* 48.

In 1864 W. married A. In 1868 he was charged with bigamy in marrying B. in 1868, his wife A. being then alive, and was on such charge convicted. In 1879 he married C., and in 1880, C. being then alive, he married D. Afterwards, upon a charge of bigamy in marrying D., C. being then alive, W. was convicted, it being held by the presiding judge that there was no evidence that A. was alive when W. married C., or that the marriage with C. was invalid by reason of A. being then alive. It was held that the conviction could not be sustained, as the question should have been left to the jury whether upon the above facts A. was alive or not when W. married C. *R.* v. *Willshire, L. R.* 6 *Q. B. D.* 366; 50 *L. J.* (*M.C.*) 57. *See also R.* v. *Lumley, infra.*

3. *That the first marriage was subsisting.*]—On the trial of an indictment for bigamy it is incumbent on the prosecution to prove to the satisfaction of the jury that the first wife or husband was alive at the date of the second marriage, and that is purely a question of fact. This may be done by some one who was acquainted with her, or saw her at the time of the second marriage or afterwards, or by her production in court and identification as the first wife. The existence of the first wife at a period *antecedent* to the second marriage may or may not afford a reasonable inference that she was living *at the time* of the second marriage. If, for example, it was proved that she was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that she was living on the day of the second marriage, and the jury would in all probability find that she was so. If, on the other hand, it was proved that she was in a dying condition on the day preceding the second marriage, and nothing further was proved, they would probably decline to draw the inference that she was living on the day of the second marriage. Thus the question is entirely for the jury, and the law makes no presumption either way. *R.* v. *Lumley, L. R.* 1 *C. C. R.* 196; 38 *L. J.* (*M. C.*) 86. Therefore, where, on the trial of a woman for bigamy, the proof was that the second marriage took place in 1847, and that the first husband had been last seen alive in 1843, and the judge directed the jury that, there being no circumstances leading to any reasonable inference that he had died, he *must* be presumed to have been living at the date of the second marriage, this direction was held to be erroneous, and the jury having found the prisoner guilty, the conviction was quashed. *Id. See also R.* v. *Willshire, supra.*

A marriage is a subsisting marriage even after a decree *nisi* for its dissolution and until the decree is made absolute. *Hulse* v. *Hulse, L. R.* 2 *P. & D.* 259.

The prosecution need not prove, but the defence may prove, that the first marriage was validly dissolved before the celebration of the second. *See post*, p. 1179.

Though the defendant cannot be convicted unless the jury are satisfied that the defendant knew that the first wife (or husband) was alive, the prosecution need not as a general rule prove this affirmatively. *R.* v. *Jones*, 11 *Cox*, 358: *R.* v. *Ellis*, 1 *F. & F.* 309: *and see post*, p. 1179.

4. *The subsequent marriage.*]—The prosecutor must prove the defendant's subsequent marriage with M. Y. (*i.e.*, that the defendant went through a form of marriage with M. Y.). Though the subsequent marriage would have been void, as for consanguinity or the like, the

defendant is guilty of bigamy. *R.* v. *Brawn*, 1 *C. & K.* 144. The following general rule on this subject was laid down in a case reserved for the consideration of all the judges, viz.: that where a person already bound by an existing marriage goes through a form of marriage known to and recognized by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is not the less within the statute (24 & 25 *Vict. c.* 100, *s.* 57, *ante*, p. 1167) by reason of any special circumstances, which independently of the bigamous character of the marriage may constitute a legal disability in the particular parties, or make the form of marriage resorted to specially inapplicable to their individual case. *R.* v. *Allen*, *L. R.* 1 *C. C. R.* 367, 369; 41 *L. J.* (*M. C.*) *at* p. 101. And therefore where A., having a wife living, married another woman, to whom he stood within the prohibited degrees of affinity, so that the second marriage, even if not bigamous, would have been void under 5 & 6 *W.* 4, *c.* 54, *s.* 2, he was held to be guilty of bigamy. *Id.* The case of *R.* v. *Fanning*, 17 *Ir. C. L. R.* 289; 10 *Cox*, 411, in which the Irish Court of Criminal Appeal held that to constitute the offence of bigamy, the second marriage must have been one which, but for the existence of the previous marriage, would have been a valid marriage, was fully considered in *R.* v. *Allen*, *ubi supra*, and disapproved. Under the Act of James I. this must have been proved to have taken place in England; for it is the second marriage which constitutes the offence (1 *Hale*, 692, 693); but under the present enactment it is immaterial whether the second marriage takes place in England, or elsewhere, provided that, if the second marriage take place out of England, the defendant is a subject of his Majesty. 24 & 25 *Vict. c.* 100, *s.* 57 (*ante*, pp. 1167, 1168). *Earl Russell's case* [1901] *App. Cas.* 446; 20 *Cox*, 51. The celebration of the second marriage is proved in the same manner as that of the first (*ante*, p. 1170). Proof of marriage merely by evidence of acknowledgment, cohabitation, or reputation is insufficient. 1 *Hawk. c.* 42, *s.* 9 (*and see ante*, p. 1170).

The offence will be complete though the defendant assume a fictitious name at the second marriage. *R.* v. *Allison*, *R. & R.* 109. And where, upon an indictment for marrying Anna T., the defendant's first wife being alive, it appeared that her name was not Anna but Susanna; but the defendant wrote her name Anna in the note for the publication of banns, and signed the register in which she was so called; it was held, that, although her name might not be Anna, he could not defend himself on the ground that he did not marry Anna T. *R.* v. *Edwards*, *R. & R.* 283. So also, where the second wife was married by the name of Eliza Thick, which name she had assumed when the banns were published, purposely, that she might not be known to be the person intended (her name being Eliza Brown), *Gurney*, B., held it to be no answer to the charge. *R.* v. *Penson*, 5 *C. & P.* 412. And a man, who being married, marries a woman after stating a false name in his notice to the registrar without it appearing that she knew of that fact at the time, is guilty of bigamy. *R.* v. *Rea*, *L. R.* 1 *C. C. R.* 365; 31 *L. J.* (*M. C.*) 92 (*ante*, p. 1175).

Evidence for the Defence.

The first wife or husband is a competent witness *for the defence*, and may be called on the application of the defendant. 61 & 62 *Vict. c.* 36, *s.* 1 (*ante*, pp. 892–897).

The following are good defences to an indictment for bigamy:—

1. *Seven years' absence.*]—That the wife or husband of the party indicted has been "continually absent from the other for the space of seven years then last past, and has not been known to the other to be living within that time" (*i.e.*, has not been known at any period during the seven years to be alive, *R.* v. *Cullen*, 9 *C. & P.* 681). 24 & 25 *Vict. c.* 100, *s.* 57 (*ante*, p. 1167). Where the defendant's first wife had left him sixteen years, and it was proved by the second wife that she had known him for nine years living as a single man, and had never heard of the first wife, who it appeared had been living seventeen miles from where the defendant (a poor labouring man) resided; he was held entitled to an acquittal under this proviso. *R.* v. *Jones*, *C. & Mar.* 614. On the trial of a woman for bigamy, whose first husband had been absent from her for more than seven years, the jury found that they had no evidence that, at the time of her second marriage, she knew that he was alive; but that she had the means of acquiring knowledge of that fact, had she chosen to make use of them. It was held, that upon this finding the conviction could not be supported. *R.* v. *Briggs*, *Dears. & B.* 98; 26 *L. J.* (*M. C.*) 7. *See R.* v. *Dane*, 1 *F. & F.* 323: *R.* v. *Cross*, *Id.* 510. As to presumptions in favour of the accused in such cases, *see R.* v. *Twyning*, 2 *B. & Ald.* 386; 20 *R. R.* 480.

Where, on a trial for bigamy, absence for seven years is proved, it is for the prosecution to show that the prisoner knew his wife to be alive at some time during the seven years, and if they fail in doing so, the prisoner is entitled to an acquittal. *R.* v. *Curgerwen*, *L. R.* 1 *C. C. R.* 1; 35 *L. J.* (*M. C.*) 58: *R.* v. *Heaton*, 3 *F. & F.* 819. But where on the trial of an indictment for bigamy, it was proved that the prisoner had married W. in 1865, and lived with her after the marriage, but for how long was not known; that in 1882, W. being still alive, prisoner had gone through the form of marriage with another woman, but there was no evidence as to the prisoner and W. having ever separated, or as to when, if separated, they last saw each other, it was held that the prisoner was rightly convicted. *R.* v. *Jones*, 11 *Q. B. D.* 118; 52 *L. J.* (*M. C.*) 96; 15 *Cox*, 284.

2. *Bonâ fide belief of death.*]—It is a good defence to an indictment for bigamy to prove that the prisoner, even though the seven years have not elapsed before the second marriage, at the time of the second marriage, in good faith and on reasonable grounds, believed that his first wife was dead. *R.* v. *Tolson*, 23 *Q. B. D.* 168; 58 *L. J.* (*M. C.*) 97; 16 *Cox*, 629. In *R.* v. *Faulkes*, 19 *T. L. R.* 250; 114 *L. T. J.* 383, 413, 439, *Kennedy*, J., held that the fact that the prisoner had wilfully deserted his first wife did not deprive him of this defence.

3. *Dissolution of marriage.*]—That, before the second marriage, the party indicted was divorced from the bond of the first marriage. 24 & 25 *Vict. c.* 100, *s.* 57 (*ante*, p. 1167). The English courts will accept as valid a divorce *a vinculo* granted by any competent court of the country in which the husband was *bonâ fide* domiciled at the time of the grant of the decree, but will treat as invalid divorces granted by a court having jurisdiction only by reason of the so-called "matrimonial domicile," or when resort has been had to the jurisdiction merely for the purpose of divorce. *Le Mesurier* v. *Le Mesurier* [1895] *App. Cas.* 517: *Shaw* v. *Gould*, *L. R.* 3 *H. L.* 55: *Green* v. *Green* [1893] *Prob.* 89: *Harvey* v. *Farnie*, 8 *App. Cas.* 43. The grounds of divorce in the state where the husband was domiciled when he obtained the decree need not be those recognized by English law, but the decree must have been obtained in good faith, and without fraud or collusion. *See Dicey*, *Conflict of Laws*, 387, 430. In *R.* v. *Lolley*,

R. & R. 237; 2 *Cl. & F.* 567, *n.*; 15 *R. R.* 737, it had been laid down that "no sentence or Act of any foreign country or any state can dissolve an English marriage *a vinculo matrimonii* for grounds on which it is not liable to be dissolved *a vinculo matrimonii* in England." But this decision was overruled in *Harvey* v. *Farnie*, *ubi supra*, and it was pointed out in the judgment of the Court of Appeal in that case (6 *P. D.* 35) that the Scotch divorce *a vinculo*, on the ground of the husband's adultery, which in *R.* v. *Lolley* was held to be invalid in England, was that of persons whose marriage had not only been solemnized in England, but whose domicil at the time of the divorce was *English*, so that the rule as above laid down in *R.* v. *Lolley* went much further than, and was not necessary to support, the actual decision in that case. *See also Le Mesurier* v. *Le Mesurier* [1895] *App. Cas.* 517 (*ante*, p. 1179), where *R.* v. *Lolley* was considered.

4. That the former marriage was absolutely null and void by reason of the consanguinity or affinity of the parties (*ante*, p. 1176), or because of the incapacity of one or both of the parties to contract the marriage by reason of a prior subsisting marriage; *Dalrymple* v. *Dalrymple*, 2 *Hagg. Consist. Rep.* 54: *R.* v. *Millis*, 10 *Cl. & F.* 534; or of non-age or lunacy (*ante*, pp. 22, 23), or that the former marriage was declared to be void by the sentence of a court of competent jurisdiction. 24 & 25 *Vict. c.* 100, *s.* 57. The corresponding clause of 1 *Jac.* 1, *c.* 11, *s.* 3 (*rep.*), was held not to extend to the sentence of an ecclesiastical court in a cause of jactitation; *Duchess of Kingston's case*, 20 *St. Tr.* 355; 2 *Sm. L. C.* (11th ed.) 731, 739 (*see ante*, p. 364); and even sentences within this clause of the Act may be impeached on the part of the crown, upon the ground of fraud or collusion. *Id.* It has been pointed out (*ante*, p. 1176) that it is not enough for the defence to prove the first marriage voidable. (*a*)

Sect. 2.

COMMON NUISANCE.

Common Law.

Every person is guilty of a misdemeanor at common law, known as common nuisance, who (*a*) does an act not warranted by law, or (*b*) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all his Majesty's subjects. 2 *Chit. Cr. L.* 565; 1 *Hawk. c.* 75; *Steph. Dig. Cr. L.* (6th ed.) p. 140: *Hubert* v. *Groves*, 1 *Esp.* 147, and earlier cases there collected: *Wilkes* v. *Hungerford Market Co.*, 2 *Bing. N. C.* 281: *Barber* v. *Penley* [1893] 2 *Ch.* 447. It is immaterial whether the annoyance arises from noise, stench, unwholesomeness, or interference with public comfort or convenience. *See Att.-Gen.* v. *Keymer Brick & Tile Co.*, 67 *J. P. Rep.* 431.

If the legal duty does not exist at common law, and a particular

(*a*) In the U.S. it has been held no defence to a charge of bigamy that the defendant by his religion was under an obligation to commit polygamy. *See Reynolds* v. *U.S.* [1878] 98 *U.S.* 145, where a woman was held to have been rightly convicted of bigamy. But if the first marriage was non-Christian, a second marriage would not be bigamy (*see ante*, p. 1173).

penalty is imposed by the statute creating the duty, the remedy by indictment for common nuisance would seem to be excluded. *Bulbrook* v. *Goodere*, 3 *Burr.* 1768, 1770; *and cf. Saunders* v. *Holborn District Board* [1895] 1 *Q. B.* 64; 61 *L. J.* (*Q. B.*) 101.

The object with which the act or omission is done or made is immaterial if the probable result is to affect injuriously, in any of the ways above stated, the public (*R.* v. *Moore*, 3 *B. & Ad.* 184; 37 *R. R.* 383: *R.* v. *Carlisle*, 6 *C. & P.* 636: *Barber* v. *Penley* [1893] 2 *Ch.* 447) or any appreciable part of it (*R.* v. *Lloyd*, 4 *Esp.* 200), and if the effect is such, the nuisance cannot be legalized by long continuance. *Dewell* v. *Saunders*, *Cro. Jac.* 490. It is only in this respect, and in the quantum of annoyance, that public differs from private nuisance.

Many forms of nuisance can now be punished summarily under statutes or bye-laws, but with few, if any, exceptions the remedy by indictment is preserved. *See* 52 *&* 53 *Vict. c.* 63, *s.* 33 (*ante*, p. 170).

Some acts which have been treated as nuisances are difficult to classify at all—*i.e.*, the offences of eavesdropping; 1 *Hawk. c.* 61, *s.* 4; *Burn's Justice* (30th ed.), *tit.* "*Eavesdropping*"; being a common scold (*communis rixatrix*), 1 *Hawk. c.* 61, *ss.* 4, 15; 1 *Russ. Cr.* (6th ed.) 752; 4 *Bl. Comm.* 109; night-walking; 2 *Hawk. c.* 10, *s.* 58; refusal by a common innkeeper to admit traveller when he has accommodation. *R.* v. *Rymer*, 2 *Q. B. D.* 136; 46 *L. J.* (*M. C.*) 108: *R.* v. *Ivens*, 7 *C. & P.* 213: *R.* v. *Sprague*, 63 *J. P.* 233 (*Surrey Quarter Sessions*); *R.* v. *Smith* [1901] 65 *J. P.* 521; *and see* 1 *Russ. Cr.* (6th ed.) 740. Keeping booths and stages for rope-dancers and the like, or unlicensed stage plays, are not nuisances *per se*, but only as they draw together great numbers of people or coaches and sharpers thither; 1 *Hawk. c.* 75, *s.* 7: *R.* v. *Betterton*, *cas. temp. Holt*, 538; 5 *Mod.* 142: *Barber* v. *Penley* [1893] 2 *Ch.* 447, 449—*i.e.*, they may be indictable as disorderly houses (*post*, p. 1194), or as causing obstruction and nuisance to a highway (*post*, p. 1210; *and see Bellamy* v. *Wells*, 39 *W. R.* 158; 7 *T. L. R.* 135).

Public nuisances which are indictable may be thus classified:—

(*a*) Interference with comfort, enjoyment, or health; *infra.*

(*b*) Acts dangerous to public safety (*post*, p. 1186).

(*c*) Acts injurious to public morals or decency (*post*, p. 1188).

(*d*) Unlawful treatment of dead bodies (*post*, p. 1207).

(*e*) Interference with public rights of passage by land or water (*post*, p. 1210).

(*a*) NUISANCES TO PUBLIC COMFORT, ENJOYMENT, OR HEALTH.

Statutes.

1 *&* 2 *G.* 4, *c.* 41 (*Steam Engine Furnaces Act*, 1821), *s.* 1—*Costs of prosecution.*]—Whereas great inconvenience has arisen, and a great degree of injury has been and is now sustained by his Majesty's subjects, in various parts of the United Empire, from the improper construction as well as from the negligent use of furnaces employed in the working of engines by steam: and whereas by law every such nuisance, being of a public nature, is abateable as such by indictment; but the expense attending the prosecution thereof has deterred parties suffering thereby from seeking the remedy given by law: be it therefore enacted, etc., that it shall and may be lawful for the court by which judgment ought to be

pronounced in case of conviction on any such indictment to award such costs as shall be deemed proper and reasonable to the prosecutor or prosecutors, to be paid by the party or parties so convicted as aforesaid, such award to be made either before or at the time of pronouncing final judgment, as to the court may seem fit.

Sect. 2—*Order to prevent repetition of nuisance.*]—If it shall appear to the court by which judgment ought to be pronounced, in case of conviction on any such indictment, that the grievance may be remedied by altering the construction of the furnace so employed in the working of engines by steam, it shall be lawful for the court, without the consent of the prosecutor, to make such order touching the premises, as shall be by the said court thought expedient for preventing the nuisance in future, before passing final sentence upon the defendant or defendants so convicted.

Sect. 3—*Exemptions from the Act.*]—Provided always, that the provisions of this Act, as far as they relate to the payment of costs and the alteration of furnaces, shall not extend or be construed to extend to the owners, or proprietors, or occupiers of any furnaces of steam-engines erected solely for the purpose of working mines of different descriptions, or employed solely in the smelting of ores and minerals, or in the manufacturing of the produce of such ores or minerals, on or immediately adjoining the premises where they are raised.

38 & 39 *Vict.* c. 55 (*Public Health Act*, 1875), *s.* 91.]—*Definition of nuisances to be summarily dealt with under the Act.*

Sect. 111.]—The provisions of this Act relating to nuisances shall be deemed to be in addition to, and not to abridge or affect, any right remedy or proceeding under any other provision of this Act or under any other Act, or at law or in equity. Provided that no person shall be punished for the same offence both under the provisions of this Act relating to nuisances, and under any other law or enactment. [*Cf.* 52 & 53 *Vict.* c. 63, *s.* 33 (*ante*, p. 170). *Provisions similar to those of ss.* 91, 111, *are contained in the Public Health* (*London*) *Act*, 1891 (54 & 55 *Vict.* c. 76), *s.* 138.]

Indictment for carrying on an Offensive Trade. (*Common Law.*)

Middlesex, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, at the parish of B., in the county of M., near unto divers public streets, being the King's common highways, and also near unto the dwelling-houses of divers liege subjects of our said lord the King there situate and being, unlawfully and injuriously did make, erect, and set up, and did cause and procure to be made, erected, and set up, a certain furnace and boiler, for the purpose of boiling tripe and other entrails and offal of beasts: and that the said J. S., on the day and year aforesaid, and on divers other days * and times between that day and the day of the taking of this inquisition, at the parish aforesaid, in the county aforesaid, unlawfully and injuriously did boil, and cause and procure to be boiled, in the said boiler, divers large quantities of tripe and other entrails and offal of beasts; by reason of which said premises, divers noisome (*see R.* v. *White*, 1 *Burr.* 333), and offensive [and "unwholesome": *this word is not essential*

(*R.* v. *White, supra*)] smokes, smells, and stenches, during the time aforesaid, were from thence emitted and issued, so that the air then and there was and yet is greatly filled and impregnated with the said smokes, smells, and stenches, and was and is rendered and become, and was and is corrupted, offensive, and uncomfortable [and unwholesome], to the great damage and common nuisance of all the liege subjects of our said lord the King there inhabiting, being, and residing, and going, returning, and passing through the said streets and highways; and against the peace of our lord the King, his crown and dignity. (*2nd Count, for continuing the nuisance.*)—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., on the said first day of June, in the year aforesaid, and from that day until the day of the taking of this inquisition, at the parish aforesaid, in the county aforesaid, a certain other furnace and boiler, for the purpose of boiling tripe and other entrails and offal of beasts, before that time made, erected, and set up by certain persons to the jurors aforesaid unknown, unlawfully and injuriously did continue and yet doth continue; and that the said J. S., on the said first day of June, in the year aforesaid, and on divers other days, *etc., as in the first count from the asterisk to the end.*

Since 14 *&* 15 *Vict. c.* 100, *s.* 24 (*ante*, pp. 54, 85), *the conclusion* in commune nocumentum *is not essential. R.* v. *Holmes, Dears.* 207; 22 *L. J.* (*M. C.*) 122; 6 *Cox*, 216.

See the following precedents: for using a shop in a public market as a slaughter-house, Cro. Circ. Comp. 301, *and see* 4 *Went.* 224; *and R.* v. *Watts,* 2 *C. & P.* 486; 31 *R. R.* 686;—*for erecting a manufactory for hartshorn, Cro. Circ. Comp.* 311;—*for erecting a privy near the highway,* 3 *Went.* 225;—*for making sulphuric acid near a highway, R.* v. *White,* 1 *Burr.* 333;—*for polluting water, R.* v. *Medley,* 6 *C. & P.* 292;—*for placing putrid carrion near the highway,* 4 *Went.* 213;—*for keeping a corpse unburied, R.* v. *Vann,* 2 *Den.* 331 (*see post*, p. 1207);—*for keeping animals (dogs and fowls) to the annoyance of the public by their noise or the unwholesomeness of their kennels or coops;—for keeping hogs near a public street and feeding them with offal, Cro. Circ. Comp.* 305, *and see* 2 *Ld. Raym.* 1163;—*for bringing a horse diseased with glanders into a public place, to the danger of infecting the King's subjects, R.* v. *Henson, Dears.* 24;—*for exposing in the public streets a person infected with small-pox or any infectious disease, R.* v. *Vantandillo,* 4 *M. & Sel.* 73; 16 *R. R.* 389: *Metropolitan Asylums Managers* v. *Hill,* 6 *App. Cas.* 193, 204, *Lord Blackburn.*

Incautious inoculation for small-pox was indictable. R. v. *Burnett,* 4 *M. & Sel.* 272. *Inoculation is now absolutely forbidden.* 30 *&* 31 *Vict. c.* 84, *s.* 32. *Burning arsenic so as to emit poisonous fumes is indictable. R.* v. *Garland,* 5 *Cox*, 165: *and see the Alkali Works Act,* 1881 (44 *&* 45 *Vict. c.* 37) *and* 1892 (55 *&* 56 *Vict. c.* 30).

Misdemeanor at common law: fine or imprisonment, without hard labour (*ante*, pp. 238, 240), *or both; and judgment for prostration or abatement if the nuisance is alleged and proved to be then continuing. See R.* v. *Incledon,* 13 *East*, 164. 12 *&* 13 *Vict. c.* 45, *s.* 18, *by which any order of quarter sessions may be removed into the High Court* (*K. B. D.*) *and enforced as a rule of court, does not apply to an order of quarter sessions to abate a nuisance made after the trial of an indictment for such nuisance. R.* v. *Bateman,* 8 *E. & B.* 584; 27 *L. J.* (*M. C.*) 95.

Evidence.

Prove that the defendant erected the boiler in question, or that he continued it after being erected by some other person; prove that he

used it for the purposes alleged in the indictment; prove that the smoke or smell arising from it was either injurious to health, or so offensive as to detract sensibly from the enjoyment of life and property in its neighbourhood; *see R.* v. *White*, 1 *Burr.* 333; it is not necessary that the smells produced by it should be injurious to health, it is sufficient if they be offensive to the senses; *R.* v. *Neil*, 2 *C. & P.* 485; 31 *R. R.* 685: *Malton Local Board* v. *Malton Farmers' Trading Co.*, 4 *Ex. D.* 302; 49 *L. J.* (*M. C.*) 90; *Bishop Auckland Local Board* v. *Bishop Auckland Iron Co.*, 10 *Q. B. D.* 138. Prove also that it is in a populous neighbourhood, or near a highway; *R.* v. *Pappineau*, 2 *Str.* 686; for its being a nuisance depends in a great measure upon the number of houses and the concourse of people in its vicinity; and which is a matter of fact to be determined by the jury. *R.* v. *White* (*ubi supra*). As to the quantum of annoyance necessary to justify proceedings, *see St. Helens Smelting Co.* v. *Tipping*, 11 *H. L. C.* 642; 11 *Eng. Rep.* 1483; 35 *L. J.* (*Q. B.*) 66. Nuisance by noise, if sufficiently great, is indictable (*see Walker* v. *Brewster*, *L. R.* 5 *Eq.* 25: *Bellamy* v. *Wells*, 39 *W. R.* 158: 7 *T. L. R.* 135: *Christie* v. *Davey* [1893] 1 *Ch.* 316), unless made in exercise of statutory powers and without negligence. *Harrison* v. *Southwark and Vauxhall W. W. Co.* [1891] 2 *Ch.* 409: *Colwell* v. *Mayor, etc., of St. Pancras* [1904] 1 *Ch.* 707; 68 *J. P. Rep.* 286.

A distinction has been drawn between quiet and noisy neighbourhoods in considering whether the quantum of noise is sufficient to justify legal proceedings. *Sturges* v. *Bridgman*, 11 *Ch. D.* 852; 48 *L. J.* (*Ch.*) 875.

It has been held that the defendant may prove that the business complained of as a nuisance was set up before the houses were built, or the roads constructed. *R.* v. *Cross*, 2 *C. & P.* 483; 31 *R. R.* 684. But in *Hole* v. *Barlow*, as reported in 27 *L. J.* (*C. P.*) 208, *Byles*, J., said that "it used to be thought that if a man knew there was a nuisance, and went and lived near it, he could not recover, because it was said it is he that goes to the nuisance, and not the nuisance to him. That used to be thought 100 years ago to be the law. That, however, is not the law now." But proof of its long continuance may justify a finding that it is not a nuisance in fact. *Id.* In *R.* v. *Russell*, 6 *B. & C.* 566; 9 *D. & R.* 566; 5 *L. J.* (*K. B.*) 221; 30 *R. R.* 432, it was said if a private person who goes to a nuisance may maintain an action in respect of it, it is difficult to see why, where the public go to a nuisance, an indictment may not be sustained for its continuance: or in a neighbourhood where there were already established other trades, etc., emitting smells extremely offensive or insalubrious, and which smells were not perceptibly increased by the alleged nuisance in question. *R.* v. *Neville, Peake* (3rd ed.), 125; 3 *R. R.* 662: *R.* v. *Watts*, *M. & M.* 281. It is no defence to say that the alleged nuisance has existed for a number of years: for no length of time will legalize a public nuisance. *Dewell* v. *Saunders*, *Cro. Jac.* 490: *R.* v. *Cross*, *ubi supra: and see Weld* v. *Hornby*, 7 *East*, 195, 199, *Ellenborough*, C.J.: *Bliss* v. *Hall*, 4 *Bing. N. C.* 183; 7 *Rep. Crim. Law Commissioners*, 59; *Steph. Dig. Cr. L.* (6th ed.) 140, *n.*. In *R.* v. *Russell*, *ubi supra*, it was said that in judging of a public nuisance the public good it does might in some cases, where the public health was not concerned, be taken into consideration, to see if the public benefit outweighed the public annoyance; but this doctrine was overruled in *R.* v. *Ward*, 4 *A. & E.* 384; 6 *Nev. & M.* 38; 5 *L. J.* (*K. B.*) 221, where it was held to be no answer to an indictment for a nuisance in a harbour, by erecting an embankment, that although the work was in some degree a hindrance to navigation, it was advantageous in a greater degree to the other uses of the

port. *See also* the observations of *Jessel*, M.R., on *R.* v. *Russell*, in *Att.-Gen.* v. *Terry*, *L. R.* 9 *Ch.* 423, 426, *n*: *and see Att.-Gen.* v. *L. N. W. R.* [1900] 2 *Q. B.* 78: *R.* v. *Morris*, 1 *B. & Ad.* 441: *R.* v. *Tindall*, 1 *Nev. & P.* 719; 6 *A. & E.* 143; 6 *L. J.* (*M. C.*) 97: *R.* v. *Randall*, *C. & Mar.* 496: *R.* v. *Betts*, 16 *Q. B.* 1022: *R.* v. *Train*, 2 *B. & S.* 640; 31 *L. J.* (*M. C.*) 169; 9 *Cox*, 180. A statute may, however, authorize and legalize acts which would otherwise amount to a nuisance. Defendants were authorized by Act of Parliament to make a railway, which ran by the side of a highway, and to use locomotives upon the railway. Horses upon the highway were frightened by the locomotives, but it was held, by the Court of King's Bench, that the defendants were not liable to be indicted for a nuisance, as the Act of Parliament had given them unqualified authority to use the locomotives. *R.* v. *Pease*, 4 *B. & Ad.* 30; 2 *L. J.* (*M. C.*) 26; 38 *R. R.* 207. The authority of *R.* v. *Pease* was impugned by *Bramwell*, B., in *Powell* v. *Fall*, 5 *Q. B. D.* 597, but appears to be fully established by the decisions of the House of Lords in *Hammersmith, etc., Rail. Co.* v. *Brand*, *L. R.* 4 *H. L.* 171, and *London, Brighton and South Coast Rail. Co.* v. *Truman*, 11 *App. Cas.* 45: *Withington Local Board* v. *Mayor, etc., of Manchester* [1893] 2 *Ch.* 19: *Att.-Gen.* v. *Mayor, etc., of Nottingham* [1904] 1 *Ch.* 673. But the statutory authority will not protect those who have it unless (1) it is given specifically or by necessary implication (*Metrop. Asylums Managers* v. *Hill*, 6 *App. Cas.* 193, *and cases above cited*: *Canadian Pacific Rail. Co.* v. *Parke* [1899] *App. Cas.* 535); and (2) the manner of doing it follows the authority of the statute, and avoids causing a nuisance if it can be avoided by reasonable care. *London, Brighton and South Coast Rail. Co.* v. *Truman*, 11 *App. Cas.* 45; *Beven, Negligence* (2nd ed.), 345; *Hardcastle on Statutes* (3rd ed.), 278. It is not unusual for a statute expressly to reserve liability to indictment for nuisance. This is done as to gasworks by the *Gas Works Clauses Acts*, 1847 (10 & 11 *Vict. c.* 15, *s.* 29) *and* 1871 (34 & 35 *Vict. c.* 41, *s.* 9). *See Att.-Gen.* v. *Gas Light and Coke Co.*, 7 *Ch. D.* 217: *Jordeson* v. *Hull Gas Co.* [1899] 2 *Ch.* 217; 68 *L. J.* (*Ch.*) 457: and as to electric lighting authorities by their provisional orders or special Acts, *see Colwell* v. *Mayor, etc., of St. Pancras* [1904] 1 *Ch.* 707; and as to the use of locomotives on highways by 24 & 25 *Vict. c.* 70, *s.* 13; 28 & 29 *Vict. c.* 83, *s.* 12 (*post*, p. 1214); and as to alkali works by 44 & 45 *Vict. c.* 37, *s.* 1, *and* 55 & 56 *Vict. c.* 30.

The provisions for summary prosecution of nuisances under the *Public Health Act*, 1875, do not take away the remedy by indictment. 38 & 39 *Vict. c.* 55, *s.* 111 (*ante*, p. 1182); 54 & 55 *Vict. c.* 76, *s.* 138 (*London*): *Att.-Gen.* v. *Logan* [1891] 2 *Q. B.* 100. A summary conviction for causing noxious effluvia by a trade process has been held inadmissible in favour of the Crown on a subsequent indictment at common law for the same offence. *R.* v. *Fairrie*, 8 *Cox*, 66.

It was laid down in *Hole* v. *Barlow*, 4 *C. B.* (*N. S.*) 334; 27 *L. J.* (*C. P.*) 208, that an action does not lie for the reasonable use of a lawful trade in a convenient place, although it may annoy another. But this case was overruled by *Bamford* v. *Turnley*, 3 *B. & S.* 62, 66; 31 *L. J.* (*Q. B.*) 286 (*Ex. Ch.*). *See also Cavey* v. *Leadbitter*, 13 *C. B.* (*N. S.*) 470; 32 *L. J.* (*C. P.*) 104: *St. Helens Smelting Co.* (*Limited*) v. *Tipping*, 11 *H. L. C.* 642: *Shotts Iron Co.* v. *Inglis*, 7 *App. Cas.* 518: *Att.-Gen.* v. *Cole* [1901] 1 *Ch.* 205. These decisions appear to apply equally to indictments.

Where works are so carried on as to be a nuisance, it is no answer to an indictment against the master for the nuisance, that he did not personally superintend the works, and that he had given express orders to the workmen that they should be carried on in a mode which, if

followed, would have prevented their causing a nuisance. *R.* v. *Stephens*, *L. R.* 1 *Q. B.* 702; 35 *L. J.* (*Q. B.*) 251; 7 *B. & S.* 510; 11 *Cox*, 340. It was, however, held that an employer was not criminally responsible for a smoke nuisance caused by his servant using a furnace in a negligent manner, and that the employer could not be convicted under such circumstances of an offence under the *Smoke Nuisance* (*Metropolis*) *Act* (16 & 17 *Vict.* c. 128), *s.* 1 (*rep.*). *Chisholm* v. *Doulton*, 22 *Q. B. D.* 736; 58 *L. J.* (*M. C.*) 133 (*and see ante*, p. 33). That Act is repealed and superseded by 54 & 55 *Vict.* c. 76, *s.* 23.

Indictment for selling Food unfit for Human Consumption.
(*Common Law.*)

A precedent for this will be found in R. v. *Dixon*, 3 *M. & Sel.* 11; 15 *R. R.* 381. *The offence is now usually dealt with summarily under ss.* 116–119 *of the Public Health Act*, 1875 (38 & 39 *Vict.* c. 55), *and in London under s.* 47 *of the Public Health* (*London*) *Act*, 1891. *Under the latter section the defendant can elect to be indicted* (*see* 42 & 43 *Vict.* c. 49, *s.* 17, *ante*, p. 6). *For a precedent of such indictment, see R.* v. *Dennis* [1894] 2 *Q. B.* 458 (*C. C. R.*). *To expose for sale, or to have possession of, with intent to sell, meat unfit for food, is a nuisance at common law; Shillito* v. *Thompson*, 1 *Q. B. D.* 12; 45 *L. J.* (*M. C.*) 18, *and cases collected ante*, p. 1163; *and if death results from eating such meat, the seller may be indicted for manslaughter. R.* v. *Stevenson*, 2 *F. & F.* 106: *R.* v. *Kempson*, 28 *L. J. Newsp.* 477 (*ante*, p. 798). *It may be questioned whether the offence is a public nuisance or a common law cheat, as to which see ante*, pp. 618–620, *and R.* v. *Roebuck, Dears. & B.* 24; 25 *L. J.* (*M. C.*) 101 (*ante*, p. 612). *If the latter, knowledge of the condition of the food is essential.*

(*b*) ACTS INJURIOUS TO PUBLIC SAFETY.

Common Law.

Under this head fall such cases as keeping a fierce and unruly bull in a field crossed by a public footway, *Cro. Circ. Comp.* 310; keeping a ferocious dog unmuzzled, *Cro. Circ. Comp.* 311; baiting a bull in the highway, 4 *Went.* 213; keeping naphtha in a populous place in such quantities as to cause terror or danger, *R.* v. *Lister*, *D. & B.* 209; 26 *L. J.* (*M. C.*) 196: *see, too, Williams* v. *H. E. I. C.*, 3 *East*, 192; 6 *R. R.* 589; keeping gunpowder or other explosives in dangerous proximity to streets or houses, 1 *Russ. Cr.* (6th ed.) 784, *n.*: *R.* v. *Taylor*, 2 *Str.* 1167; allowing a house near a highway to be ruinous, *R.* v. *Watts*, 1 *Salk.* 357: *R.* v. *Watson*, 2 *Ld. Raym.* 856; having an unfenced excavation near a highway, *Hardcastle* v. *South Yorks. Ry. Co.*, 4 *H. & N.* 67: *Barnes* v. *Ward*, 9 *C. B.* 392. Negligently blasting stone in a quarry, and thereby projecting large pieces of stone so as to endanger the safety of persons in houses and on the highways adjoining the quarry, is a misdemeanor indictable at common law. *R.* v. *Mutters*, *L. & C.* 491; 34 *L. J.* (*M. C.*) 22. As to allowing a quarry near a highway to be unfenced, *see Hounsell* v. *Smith*, 7 *C. B.* (*N. S.*) 731; 29 *L. J.* (*C. P.*) 203: *R.* v. *Clerk of Assize of Oxford Circuit* [1897] 1 *Q. B.* 370; 18 *Cox*, 518. The making and selling of fireworks or throwing them about in the street was declared a common nuisance by 9 & 10 *W.* 3, *c.* 7 (*rep.*). *R.* v. *Bennett*, *Bell*, 1; 28 *L. J.* (*M. C.*)

27; 8 *Cox*, 74. The manufacture is now regulated by the *Explosives Act*, 1875, and lighting them in a street is summarily punishable under *s.* 80 of that Act, but apparently without prejudice to a remedy by indictment where a nuisance is created. (*See post*, p. 1188.) In *R.* v. *Meade* [1903] 19 *T. L. R.* 540, *Wills*, J., held an indictment good which contained a count for going abroad in a public street armed without lawful occasion so as to be a nuisance and terror to the public (*and see ante*, p. 1107).

Statutes.

Storage of petroleum.]—The *Petroleum Acts*, 1871 (34 & 35 *Vict. c.* 105), 1879 (42 & 43 *Vict. c.* 47), and 1881 (44 & 45 *Vict. c.* 67), which are to be read together, provide numerous penalties summarily recoverable for breach of their regulations as to storage, carriage, etc., of inflammable substances. The penalties are for the most part recoverable summarily (*see* 34 & 35 *Vict. c.* 105, *s.* 15), but *s.* 18 of the Act of 1871 provides "that nothing in this Act contained shall be deemed to exempt any person from any penalty to which he would otherwise be subject in respect of a nuisance." In the case of petroleum, etc., for the use of light locomotives, the Acts apply only subject to Home Office regulations under 59 & 60 *Vict. c.* 36, *s.* 5. *See Statutory Rules and Orders Revised* (ed. 1904), *vol.* 8, *tit.* "*Locomotive*," p. 3.

Storage of explosives.]—The *Explosives Act*, 1875 (38 & 39 *Vict. c.* 17), is "An Act to amend the law with respect to manufacturing, keeping, selling, carrying, and importing gunpowder, nitro-glycerine, and other explosive substances," and contains a variety of regulations on all these subjects, enforcing them by forfeitures and pecuniary penalties, with the alternative of imprisonment. In order to give a complete view of the subject, it would be necessary to insert the whole statute; but as the branch of law to which it relates is not likely, excepting in few cases, to form the subject of inquiry on indictment, as it may generally be enforced by courts of summary jurisdiction, it has not been thought desirable to do more than insert the following sections, which show when offences against the Act may, and when they must, be prosecuted by indictment.

38 & 39 *Vict. c.* 17, *s.* 91.]—Every offence under this Act may be prosecuted, and every penalty under this Act may be recovered, and all explosives and ingredients liable to be forfeited under this Act may be forfeited either on indictment or before a court of summary jurisdiction, in manner directed by the *Summary Jurisdiction Acts*. Provided that the penalty imposed by a court of summary jurisdiction shall not exceed one hundred pounds exclusive of costs, and exclusive of any forfeiture or penalty in lieu of forfeiture, and the term of imprisonment imposed by any such court shall not exceed one month. . . .

Sect. 92.—*Election to be tried on indictment.*]—Where a person is accused before a court of summary jurisdiction of any offence under this Act, the penalty for which offence as assigned by this Act, exclusive of forfeiture, exceeds one hundred pounds, the accused may, on appearing before the court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence, and not an offence punishable on summary conviction, and the offence may be prosecuted

on indictment accordingly. [*See R. v. Chambers*, 65 *L. J.* (*M. C.*) 214; 18 *Cox*, 401, *ante*, p. 1162.]

Sect 102.]— . . . This Act shall not exempt any person from any indictment or other proceeding for a nuisance, or for an offence which is indictable at common law, or by any Act of Parliament other than this Act, so that no person be punished twice for the same offence. [*See* 52 *&* 53 *Vict. c.* 63, *s.* 38, *ante*, p. 170.]

When proceedings are taken before any court against any person in respect of any offence under this Act which is also an offence at common law, or by some Act of Parliament other than this Act, the court may direct that, instead of such proceedings being continued, proceedings shall be taken for indicting such person at common law or under some Act of Parliament other than this Act. . . .

(*c*) ACTS INJURIOUS TO PUBLIC DECENCY, MORALS, OR ORDER. OPEN AND NOTORIOUS LEWDNESS.

Common Law.

It is a misdemeanor indictable at common law publicly to expose the naked person. *R. v. Sedley*, 17 *St. Tr.* 155, n.; 1 *Sid.* 168; 1 *Keb.* 620; *and see* 1 *East, P. C.* p. 3: *R. v. Gallard*, 1 *Sess. Cas.* 231: *R. v. Newcastle-on-Tyne Justices*, 1 *B. & Ad.* 933: *R. v. Rowed*, 3 *Q. B.* 180; 11 *L. J.* (*M. C.*) 74 (*see ante*, p. 926).

An indecent exposure, though in a place of public resort, if visible only by one person, is not indictable as a common nuisance. *R. v. Webb*, 1 *Den.* 338; 18 *L. J.* (*M. C.*) 39; 2 *C. & K.* 933; 3 *Cox*, 183: *R. v. Watson*, 2 *Cox*, 376: *see R. v. Elliott*, *L. & C.* 103: *R. v. Farrell*, 9 *Cox*, 446 (*C. C. R. Ir.*). An omnibus is a public place sufficient to support the indictment. *R. v. Holmes*, *Dears.* 207; 22 *L. J.* (*M. C.*) 122. In *R. v. Orchard*, 2 *Cox*, 248, an enclosed urinal, to which the public had free access, in a public market, was held not to be a public place. But in *R. v. Harris*, *L. R.* 1 *C. C. R.* 282; 40 *L. J.* (*M. C.*) 67, *Bovill*, C.J., said that he could not think that all the facts had been stated in the report of *R. v. Orchard*, and that he could not understand that case as reported. In *R. v. Harris*, *ubi supra*, it was held, that an urinal open to the public and approached by a gate opening from a public footpath, but built in compartments, is such a public place as to make an act of indecency committed in the urinal and witnessed by two persons an indictable nuisance. It is not necessary that the exposure should be made in a place open to the public; it is sufficient if it be made where a number of persons may be offended by it, and several see it. *R. v. Thallman*, *L. & C.* 326; 33 *L. J.* (*M. C.*) 58; 9 *Cox*, 388. The prisoner was convicted of indecently exposing his person to divers subjects of the Queen in a certain public place, upon evidence showing that the place in question was out of sight of the public footpath, but was a place to which the prisoner had gone with several little girls, though without any legal right to go there, and was a place to which persons were in the habit of going without any strict legal right so to do, and that persons so going were never in any way hindered or interfered with. On a case reserved, the court held that the conviction was correct, and that the jury were justified in finding that the place was public. *R. v. Wellard*, 14 *Q. B. D.* 63; 54 *L. J.* (*M. C.*)

14. *Semble*, that the offence of indecent exposure of the person may be indictable if committed before several persons, even if the place be not public. *Id.* (*a*). Men who bathe without any screen or covering, so near to a public footpath that exposure of their persons must necessarily occur, are guilty of an indictable nuisance. *R.* v. *Reed*, 12 *Cox*, 1, *Cockburn*, C.J.; *and see* 41 & 42 *Vict. c.* 14, *s.* 11. Nor is it any defence that there has been, so long as living memory extends, an usage so as to bathe at the place, and that there has been no exposure beyond what is necessarily incidental to such bathing. *Id. See also R.* v. *Crunden*, 2 *Camp.* 89; 11 *R. R.* 671.

As to obscene libels and exhibitions, *see post*, p. 1190.

Indictment against a Man for publicly exposing his Naked Person. (Common Law.)

Middlesex, to wit:—The jurors for our lord the King upon their oath present, that J. S., being a scandalous and evil-disposed person, and devising, contriving, and intending the morals of divers liege subjects of our lord the King to debauch and corrupt, on the first day of June, in the year of our Lord ——, on a certain public and common highway situate in the parish of ——, in the county of M., in the presence of divers liege subjects of our said lord the King then there being, and within sight and view of divers other liege subjects through and on the said highway then there passing and repassing, unlawfully, wickedly, and scandalously did expose to the view of the said persons so present, and so passing and repassing as aforesaid, the body and person of him the said J. S. naked and uncovered, for a long space of time, to wit, for the space of one hour; to the great scandal of the said liege subjects of our said lord the King, to the manifest corruption of their morals, in contempt of our said lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. *The allegation that the offence was committed "within sight and view of divers liege subjects," etc., appears to be necessary. See R.* v. *Webb*, 1 *Den.* 338; 2 *C. & K.* 938; 18 *L. J.* (*M. C.*) 39; 3 *Cox*, 183. *The indictment need not conclude* in commune nocumentum. *R.* v. *Holmes*, *Dears.* 207; 22 *L. J.* (*M. C.*) 122; 6 *Cox*, 216; *and see* 14 & 15 *Vict. c.* 100, *s.* 25 (*ante*, pp. 54, 86).

Misdemeanor at common law: fine or imprisonment (with or without hard labour, 14 & 15 *Vict. c.* 100, *s.* 29, *ante*, p. 238), *or both.*

The offence is now usually punished summarily under s. 4 *of the Vagrancy Act*, 1824 (5 *G.* 4, *c.* 83), *where the intent is to insult any female; and cf.* 2 & 3 *Vict. c.* 47, *s.* 54 (12); 10 & 11 *Vict. c.* 89, *s.* 28 (*which is applied to urban districts by* 38 & 39 *Vict. c.* 55, *s.* 171); *and* 41 & 42 *Vict. c.* 14, *s.* 11.

Evidence.

Prove the place to be public, (*a*) the exposure to be deliberate, and that it took place in the view of several persons.

(*a*) In *R.* v. *Madercine* [1899] 20 *N. S. W. Rep.* (*Law*), 86, on a case reserved, it was held that exposure of the person on the verandah of a private house, in the presence of a number of children, was indictable at common law, and it seems to have been considered that the word "public" in the indictment was unnecessary. The court relied on the dicta of the judges in *R.* v. *Wellard*, and on *R.* v. *Bunyan*, 1 *Cox*, 74, where a conviction took place on evidence that two persons had locked themselves in a room in a public-house, and had been seen behaving indecently through the window of another room by a servant, who fetched a constable.

OBSCENE LIBELS, EXHIBITIONS, ETC.

Common Law.

Libels.]—The publication of any obscene libel is a misdemeanor punishable at common law on indictment or information. 1 *Hawk. c.* 73, *s.* 9: *R.* v. *Curl*, 2 *Str.* 788: *R.* v. *Wilkes*, 4 *Burr.* 2527, 2574: *R.* v. *Hicklin*, *L. R.* 3 *Q. B.* 360; 37 *L. J.* (*M. C.*) 80. "The test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall." *R.* v. *Hicklin*, *L. R.* 3 *Q. B.* *at* p. 371, *Cockburn*, C.J.

In *R.* v. *Thompson*, 64 *J. P.* 456, a prosecution for publishing the *Heptameron*, *Bosanquet*, Common Serjeant, directed the jury to consider the book as a whole, as well as the extracts referred to in the particulars, and to consider the circumstances of the publication and the nature of the general business of the defendant before deciding whether the publication was with "intent to corrupt" public morals.

The *obtaining and procuring* of obscene prints, with intent to sell them, is a misdemeanor (*see ante*, p. 3); but the mere keeping of them with that intent is not. *Dugdale* v. *R.*, 1 *E. & B.* 435; *Dears.* 64; 22 *L. J.* (*M. C.*) 50. But may be the subject of summary proceedings under 20 *& 21 Vict. c.* 83, *s.* 1 (*post*, p. 1191).

The indiscriminate publication of a pamphlet, half of which relates to controversial questions which are not obscene, but the other half of which is obscene, as relating to impure acts and words, is a misdemeanor, and proper to be prosecuted as such, although the publisher does not sell the pamphlet for the purposes of gain, nor to prejudice good morals,—although the indiscriminate sale of it is calculated to have that effect,—but sells it as a member of a politico-religious society, to promote the objects of that society, and to expose what he deems to be the errors of the Church of Rome, and particularly the immorality of the confessional. *R.* v. *Hicklin*, *ubi supra*: *Steele* v. *Brannan*, *L. R.* 7 *C. P.* 261; 41 *L. J.* (*M. C.*) 85. And the publication of an accurate report of a trial for the misdemeanor of publishing an obscene pamphlet, in which report such obscene pamphlet, which was in evidence on the trial, is fully set out, is not privileged on the ground of being a report of proceedings in a court of justice, but such publication of the trial is itself an indictable misdemeanor. *Steele* v. *Brannan*, *ubi supra*. 51 *& 52 Vict. c.* 64, *s.* 3 (*ante*, p. 1121), which gives a modified protection to newspaper reports of judicial proceedings, and *s.* 4 of the same statute (*ante*, p. 1121), which gives a modified protection to newspaper reports of public meetings; both contain provisoes that nothing in those sections shall authorize the publication of any indecent matter. As to whether such a publication can in any case be justified, *see Steph. Dig. Cr. Law* (6th ed.), pp. 133, 134.

Exhibitions.]—The prisoners were indicted in one count for keeping a booth for the purpose of showing an indecent exhibition; in a second, for showing for gain an indecent exhibition in a booth; in a third, for showing an indecent exhibition in a public place. It was proved that during the Epsom races the prisoners kept a booth on Epsom Downs for the purpose of an indecent exhibition, that they invited people to enter, and that those who paid entered and saw an indecent exhibition. It was

held, that the prisoners had committed an indictable offence, and that it was well laid in the indictment. *R.* v. *Saunders*, 1 *Q. B. D.* 15; 45 *L. J.* (*M. C.*) 11; 13 *Cox*, 116. Where the exhibition is exposed to view in a street, road, highway, or public place, or in the window or other part of any shop or building situate in any street, etc., it is also punishable under *s.* 4 of the *Vagrancy Act*, 1824 (5 *G.* 4, *c.* 83), and *s.* 2 of the *Vagrancy Act*, 1838 (1 *& 2 Vict. c.* 38).

A herbalist who publicly exposes in his shop, on a highway, a picture of a man naked to his waist and covered with sores, is guilty of a nuisance although there is nothing immoral or indecent in the picture, and the motive for its exhibition is innocent. *R.* v. *Grey*, 4 *F. & F.* 73; *and see R.* v. *Clark*, 15 *Cox*, 170 (*post*, p. 1208).

Statutes.

20 *& 21 Vict. c.* 83 (*Obscene Publications Act*, 1857: "*Lord Campbell's Act*"), *s.* 1—*Search under warrant for, and destruction of, obscene prints, etc.*]—"*Whereas it is expedient to give additional powers for the suppression of the trade in obscene books, prints, drawings, and other obscene articles:*" *be it enacted as follows:*

1. It shall be lawful for any metropolitan police magistrate, or other stipendiary magistrate, or for any two justices of the peace, upon complaint made before him or them upon oath that the complainant has reason to believe, and does believe, that any obscene books, papers, writings, prints, pictures, drawings, or other representations are kept in any house, shop, room, or other place within the limits of the jurisdiction of any such magistrate or justices, for the purpose of sale or distribution, exhibition for purposes of gain, lending upon hire, or being otherwise published for purposes of gain, which complainant shall also state upon oath that one or more articles of the like character have been sold, distributed, exhibited, lent, or otherwise published as aforesaid, at or in connection with such place so as to satisfy such magistrate or justices that the belief of the said complainant is well founded, and upon such magistrate or justices being also satisfied that any of such articles so kept for any of the purposes aforesaid are of such a character and description that the publication of them would be a misdemeanor and proper to be prosecuted as such, to give authority by special warrant to any constable or police officer into such house, shop, room, or other place, with such assistance as may be necessary, to enter in the daytime, and if necessary to use force, by breaking open doors or otherwise, and to search for and seize all such books, papers, writings, prints, pictures, drawings, or other representations as aforesaid found in such house, shop, room, or other place, and to carry all the articles so seized before the magistrate or justices issuing the said warrant, or some other magistrate or justices exercising the same jurisdiction; and such magistrate or justices shall thereupon issue a summons calling upon the occupier of the house or other place which may have been so entered by virtue of the said warrant to appear within seven days before such police, stipendiary magistrate, or any two justices in petty sessions for the district, to show cause why the articles so seized should not be destroyed; and if such occupier or some other person claiming to be the owner of the said articles shall not appear within the time aforesaid, or shall appear, and such magistrate or justices shall be satisfied that such articles or any of them are of the character stated in the warrant, and that such or any of them have been kept for any of the purposes aforesaid, it shall be lawful for the said magistrate or justices, and he or they are hereby

required to order the articles so seized, except such of them as he or they may consider necessary to be preserved as evidence in some further proceeding, to be destroyed at the expiration of the time hereinafter allowed for lodging an appeal (*see s.* 4), unless notice of appeal as hereinafter mentioned be given, and such articles shall be in the meantime impounded; and if such magistrate or justices shall be satisfied that the articles seized are not of the character stated in the warrant or have not been kept for any of the purposes aforesaid, he or they shall forthwith direct them to be restored to the occupier of the house or other place in which they were seized. [*A warrant or an order under the section is bad unless it states that the publication of the prints, etc., ordered to be destroyed are of such a character that the publication would be a misdemeanor fit to be prosecuted as such. Ex parte Bradlaugh*, 8 *Q. B. D.* 509; 47 *L. J.* (*M. C.*) 107.]

Sect 4.]—*Appeal to quarter sessions within seven days by either party against order or determination of magistrate, etc.*

47 & 48 *Vict. c.* 76 (*Post Office Protection Act*, 1884), *s.* 4 (1)—*Punishment for sending by post indecent or obscene prints, etc.*]—*Post*, p. 1254.

51 & 52 *Vict. c.* 64 (*Law of Libel Amendment Act*, 1888), *s.* 7—*Obscene matter need not be set forth in indictment or other judicial proceeding.*]—It shall not be necessary to set out in any indictment or other judicial proceeding instituted against the publisher of any obscene libel the obscene passages; but it shall be sufficient to deposit the book, newspaper, or other documents containing the alleged libel with the indictment or other judicial proceeding, together with particulars showing precisely by reference to pages, columns, and lines in what part of the book, newspaper, or other document the alleged libel is to be found, and such particulars shall be deemed to form part of the record, and all proceedings may be taken thereon as though the passages complained of had been set out in the indictment or judicial proceeding. [*This was enacted in consequence of Bradlaugh* v. *R.*, 8 *Q. B. D.* 607; 48 *L. J.* (*M. C.*) 5; *but the section does not specifically deal with an indictment for "procuring with intent to publish."*]

Sect. 8—*No prosecution without order of court of persons responsible for publication of newspaper for libel thereon.*]—*Ante*, p. 1122.

52 & 53 *Vict. c.* 18 (*Indecent Advertisements Act*, 1889).]—*Summary punishment for exhibiting, affixing, etc., indecent advertisements.*

Indictment for publicly selling an Obscene Print. (*Common Law.*)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., being a scandalous and evil-disposed person, and devising, contriving, and intending the morals as well of youth as of divers other liege subjects of our said lord the King to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, and the clergy of this kingdom to bring into great contempt, hatred, scandal, infamy, and disgrace, on the third day of April, A.D. ——, at the parish of ——, in the county of London, and within the jurisdiction of the said court, in a certain open and public shop of him the said J. S. there situate, unlawfully, wickedly, maliciously,

and scandalously * did sell, utter, and publish to one J. N., a certain lewd, wicked, scandalous, and obscene print, or paper, intituled, "The Parson receiving Tithes in Kind," representing a man in the habit of a clergyman, in an obscene, impudent, and indecent posture with a woman; and which said lewd, wicked, scandalous, and obscene print or paper is contained in a certain printed pamphlet then and there uttered and sold by him the said J. S. to the said J. N., intituled "The Covent Garden Magazine, or Amorous Repository, calculated solely for the Entertainment of the Polite World, for April, 1773;" to the manifest corruption of the morals as well of youth as of other liege subjects of our said lord the King, to the great scandal, infamy, and disgrace of the clergy of this kingdom; in contempt, etc. [*as ante*, p. 1189]. *See the precedents*, 2 *Chit. Cr. L.* 42, *et seq. It would seem that a count charging the "publishing" merely is good: and that it is unnecessary to state to whom the print was uttered.*

A count charging possession of an obscene print "with intent to publish" states no indictable offence. R. v. *Rosenstein*, 2 *C. & P.* 414; 1 *Russ. Cr.* (6th ed.) 633, *n.*: *Dugdale* v. *R.*, *Dears.* 64 (*ante*, p. 1190). *But such possession may be the subject of summary proceedings under* 20 *&* 21 *Vict. c.* 83, *s.* 1 (*ante*, p. 1189).

Where the print or picture is publicly exposed to view in a street, highway, road, or public place, or in a shop window, the publication is also punishable summarily under s. 4 *of the Vagrancy Act*, 1824 (5 *G.* 4, *c.* 83, *s.* 4): *see the Vagrancy Act*, 1838 (1 *&* 2 *Vict. c.* 38, *s.* 2).

For precedents of indictments for keeping a room for the purpose of exhibiting obscene prints or performances, see 2 *Chit. Cr. L.* 48: *R.* v. *Saunders*, 1 *Q. B. D.* 15; 13 *Cox*, 116.

Misdemeanor at common law: fine or imprisonment, or both. R. v. *Wilkes*, 4 *Burr.* 2527, 2574. *Imprisonment may be with hard labour if the book was publicly sold or exposed to public view or for public sale.* 14 *&* 15 *Vict. c.* 100, *s.* 29 (*ante*, p. 238).

Indictment for selling and publishing Obscene Books, etc. (*Common Law.*)

An indictment for selling or publishing an obscene book may be in the form of the preceding precedent down to the * [*omitting the words referring to the clergy*], *and continuing*]—did sell, publish, and utter to one E. F. a certain indecent, lewd, wicked, scandalous, and obscene libel in the form of a book intituled "The ——," and containing divers lewd, impure, gross, bawdy, and obscene matters; to the manifest corruption, etc. [*as ante*].

A second count may be added for "unlawfully obtaining and procuring" *the said book* "in order and for the purpose of afterwards unlawfully and wickedly uttering and publishing, selling, and disseminating and causing to be uttered, published, sold, and disseminated the said book to and amongst the liege subjects of our said lord the King, and thereby contaminating, vitiating, and corrupting the morals of the said liege subjects, and bringing the said liege subjects into a state of wickedness, lewdness, debauchery, and immorality; in contempt," etc. [*as ante*, p. 1189]. *As to this count, see Dugdale* v. *R.* (*ante*, p. 1190). *It seems to be no defence that the libel is in a foreign language. R.* v. *Hirsch, London County Sessions, March*, 1899, 34 *L. J. Newsp.* 132. *But if it is, a translation of the obscene words must be included in the particulars. See R.* v. *Peltier*, 28 *St. Tr.* 589; *and ante*, p. 991.

It is unnecessary to set out the obscene passages on an indictment for publication of an obscene libel (51 & 52 *Vict.* c. 64, *s.* 7, *ante*, p. 1119); *but it would seem still to be necessary to do so in an indictment for "procuring" with intent to publish. When the indictment is for publishing, it is sufficient to deposit with the indictment particulars as provided by that section, which may be in the following form:—*

R. v. ——.

Particulars of Obscene Libels contained in (*Books*) *intituled* ——.

Count 1 *of indictment*]—book intituled the ——, beginning at page ——, line ——, and ending at page ——, line ——, with the words —— (*and so on with other counts and passages*).

Evidence.

Under the indictment on p. 1192 give the print in evidence, and prove that J. N. purchased it of the defendant, or of his servant, at his shop.

Put in evidence the print or book, or the passages of the book included in the particulars, and prove that it was purchased of the defendant, or his servant, or at his shop, or otherwise published by him. As to publication of libels generally, *see ante*, pp. 993, 1130.

The tables and contents of other books on sale upon the premises where the book is said to have been sold may be relevant evidence on the question whether the sale was with intent to corrupt public morals. *R.* v. *Thompson*, 64 *J. P.* 546, *Bosanquet*, Common Serjeant.

DISORDERLY HOUSES: INCLUDING BAWDY-HOUSES, GAMING-HOUSES, AND BETTING-HOUSES.

General Statutory Provisions as to Disorderly Houses.

25 *G.* 2, *c.* 36 (*Disorderly Houses Act*, 1751), *s.* 2—*Unlicensed places of public entertainment within certain limits declared disorderly houses.*]—And whereas the multitude of places of entertainment for the lower sort of people is another great cause of thefts and robberies, as they are thereby tempted to spend their small substance in riotous pleasures, and in consequence are put on unlawful methods of supplying their wants and renewing their pleasures: in order, therefore, to prevent the said temptation to thefts and robberies, and to correct as far as may be the habit of idleness which is becoming general over the whole kingdom, and is productive of much mischief and inconvenience, be it enacted by the authority aforesaid that:

From and after the 1st day of December, 1752, any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, in the cities of London and Westminster, or within twenty miles thereof [*except in the administrative county of Middlesex*, 56 & 57 *Vict.* c. 15], without a licence had for that purpose from the last preceding Michaelmas quarter sessions of the peace to be holden for the county, city, riding, liberty, or division in which such house, room, garden, or other place is situate (who are hereby authorized and empowered to grant such licence as they in their discretion shall think proper), signified under the hands and seals of four or more of the justices there assembled, shall be deemed a disorderly house or place . . .

[*provisions as to mode of granting licence and entry of police*] . . . and every person keeping such house, room, garden, or other place without such licence as aforesaid shall forfeit the sum of 100*l.* to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses. [*See R.* v. *Tucker*, 2 *Q. B. D.* 417; 46 *L. J.* (*M. C.*) 197; 13 *Cox*, 600. *This enactment applies only to the old cities of London and Westminster, and places within twenty miles thereof. The functions of the justices within this area were transferred by s.* 3 *of the Local Government Act*, 1888 (51 *& 52 Vict. c.* 41), *to County Councils. The present administrative county of Middlesex is no longer subject to the Act*, 56 *& 57 Vict. c.* 15. *The licensing of such places outside the twenty-mile limit is regulated by* 53 *& 54 Vict. c.* 59, *s.* 51.]

Sect. 3.]—*Inscription over licensed places; conditions and revocation of licence.*

Sect. 4.]—*Saving as to theatres carried on under letters patent or licence from the Lord Chamberlain.*

Sect. 5.]—*Provisions for prosecution of disorderly houses on complaint of inhabitants.* [*Amended* 58 *G.* 3, *c.* 70; *and see post*, p. 1196.]

Sect. 6.]—*Warrant to arrest keepers of such houses; and provisions for committal for trial.* [*See R.* v. *Newton* [1892] 1 *Q. B.* 648, *and post*, p. 1196.]

Sect. 8—*Persons to be deemed to keep disorderly houses.*]—And whereas, by reason of the many subtle and crafty contrivances of persons keeping bawdy-houses, gaming-houses, or other disorderly houses, it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment: be it enacted, etc., that any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof.

Sect. 10—*No certiorari.*]—And . . . no indictment which shall at any time after the said 1st day of June [1752] be preferred against any person for keeping a bawdy-house, gaming-house, or other disorderly house, shall be removed by any writ of *certiorari* into any other court; but such indictment shall be heard, tried, and finally determined at the same general or quarter session (*sic*) or assizes where such indictment shall have been preferred (unless the court shall think proper, upon cause shown, to adjourn the same), any such writ or allowance thereof notwithstanding.

Bawdy-houses.

A common bawdy-house is a house or room, or set of rooms in any house, kept for purposes of prostitution. *Steph. Dig. Cr. L.* (6th ed.) 142. A "brothel" is the same thing as a "bawdy-house," and is a term which in its legal acceptation applies to a place resorted to by persons of both sexes for the purposes of prostitution. *Singleton* v. *Ellison* [1895] 1 *Q. B.* 608, *Wright*, J. A woman who occupies a house frequented by men for the purpose of committing fornication with her, cannot be convicted of keeping a "brothel." *Id.* Until the passing of 48 *& 49 Vict. c.* 69, *s.* 13, *infra*,

the offence of keeping a bawdy-house was only punishable on indictment at common law.

Statute.

48 & 49 *Vict. c.* 69 (*Criminal Law Amendment Act*, 1885), *s.* 13—*Suppression of brothels, etc.*]—Any person who—

(1) Keeps or manages or assists in the management of a brothel; or,

(2) Being the tenant, lessee, or occupier of any premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution; or,

(3) Being the lessor or landlord of any premises, or the agent of such lessee or landlord, lets the same or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel,

Shall on summary conviction, in manner provided by the *Summary Jurisdiction Acts*, be liable—

(1) To a penalty not exceeding 20*l.*, or, in the discretion of the court, to imprisonment for any term not exceeding three months, with or without hard labour; and

(2) On a second or subsequent conviction, to a penalty not exceeding 40*l.*, or, in the discretion of the court, to imprisonment for any term not exceeding four months, with or without hard labour. [*Here follow provisions as to recognizances on a third or subsequent conviction and appeals from summary convictions, and as to application of ss.* 5, 6, 7 *of the Disorderly Houses Act*, 1751, *supra. See R.* v. *Newton* [1892] 1 *Q. B.* 648: *Kirwin* v. *Hines*, 54 *L. T.* (*N. S.*) 610. *A person accused under the section after a first conviction may elect to be indicted.* 42 & 43 *Vict. c.* 49, *s.* 17 (*ante*, p. 6). *And the indictment need not aver the fact of his election. R.* v. *Chambers*, 65 *L. J.* (*M. C.*) 14; 18 *Cox*, 401.

The offence committed by a publican in permitting his house to be used as a brothel, contrary to s. 15 *of the Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *is a continuing offence. Ex parte Burnby* [1901] 2 *K. B.* 458; 20 *Cox*, 25.

Indictment for keeping a Bawdy-house. (Common Law.)

County of London, to wit:—The jurors for our lord the King upon their oath present, that J. S., and A. his wife, on the first day of June, in the year of our Lord ——, and on divers other days and times between that day and the day of the taking of this inquisition, at the parish of B., in the county of L., unlawfully did keep and maintain a certain common ill-governed and disorderly house; and in the said house, for the lucre and gain of him the said J. S., certain persons, as well men as women, of evil name and fame, and of dishonest conversation, then and on the said other days and times, there unlawfully and wilfully did cause and procure to frequent and come together; and the said men and women, in the said house of him the said J. S., at unlawful times, as well in the night as in the day, then and on the said other days and times, there to be and remain drinking, tippling, whoring, and misbehaving themselves, unlawfully and wilfully did permit, and yet do permit; to the great damage and common nuisance of all the liege subjects of our said lord the King there inhabiting, being, residing, and passing, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Misdemeanor at common law: imprisonment (with or without hard labour, 3 *G.* 4, *c.* 114, *ante*, p. 287), *or fine, or both. Counts may be joined for keeping a disorderly house other than a bawdy-house, or for keeping several bawdy-houses.* 1 *Burn's Justice* (30th ed.), 1395; *and see R.* v. *Higginson,* 2 *Burr.* 1232, *and* 2 *Chit. Cr. L.* 39. *Local description of the parish in which the house is situate seems to be necessary. The indictment may be in general terms, but particulars may be ordered. I'Anson* v. *Stuart,* 1 *T. R.* 748, 752; 1 *R. R.* 392: *Clarke* v. *Periam,* 2 *Atk.* 337, 339. *See ante,* pp. 70, 71. *No indictment can be preferred for keeping a bawdy-house, unless one or other of the preliminary steps required by* 22 *&* 23 *Vict. c.* 17, *s.* 1, *as extended by* 30 *&* 31 *Vict. c.* 35, *s.* 1, *has been taken. See ante,* p. 7. *If proceedings are taken under* 25 *G.* 2, *c.* 36, *ss.* 5, 6, *the magistrate need not take any depositions. A married woman may be indicted with her husband for this offence. R.* v. *Williams,* 1 *Salk.* 384; 10 *Mod.* 63; *and see R.* v. *Dixon,* 10 *Mod.* 335. *The indictment shall not be removed by certiorari;* 25 *G.* 2, *c.* 36, *s.* 10 (*ante*, p. 1195); *unless upon the part of the crown; R.* v. *Davies,* 5 *T. R.* 626; 2 *R. R.* 683; *and it shall be determined at the same sessions or assizes at which it is preferred, unless the court, upon cause shown, think proper to adjourn the same.* 25 *G.* 2, *c.* 36, *s.* 10 (*ante*, p. 1195): *see* 14 *&* 15 *Vict. c.* 100, *s.* 27 (*ante*, p. 123). *This offence is triable at the court of quarter sessions for a borough. R.* v. *Charles, L. & C.* 90; 31 *L. J.* (*M. C.*) 69; 9 *Cox,* 18. *Where the offence is committed within the limits of* 25 *G.* 2, *c.* 36, *s.* 2 (*ante*, p. 1194), *except the administrative county of Middlesex* (*ante*, p. 1195), *the indictment, if the facts so warrant, may also contain a count for keeping the house for public music or dancing without the licence of the county council or other licensing authority. As to the offence of procuring the defilement of girls, see ante,* pp. 912, 920, *et seq.*

Evidence.

Prove that the house in question, or a room or rooms in it, were let out for the purposes mentioned in the indictment. And if a lodger let her apartment for the purpose of indiscriminate prostitution, it is as much a bawdy-house as if she held the whole house. *R.* v. *Peirson,* 2 *Ld. Raym.* 1197; 1 *Salk.* 382; 3 *Co. Inst.* 204. It is not necessary that there should be evidence of any indecency or disorderly conduct being perceptible from the exterior of the house. *R.* v. *Rice, L. R.* 1 *C. C. R.* 21; 35 *L. J.* (*M. C.*) 93: *I'Anson* v. *Stuart,* 1 *T. R.* 748; 1 *R. R.* 392: *and cf. R.* v. *MacNamara,* 20 *Ontario,* 489, as to evidence of reputation.

Secondly, prove that the defendants "acted or behaved as master or mistress, or as the persons having the care, government, or management" of the house in question; which is sufficient evidence that the defendants kept the house. 25 *G.* 2, *c.* 36, *s.* 8 (*ante*, p. 1195). Mere frequenters of the house seem not to be indictable; *but see Wood's Inst. bk.* 8, *c.* 3: *Dalton, Country Justice, c.* 124.

If a weekly tenant of a house use it as a brothel, and the landlord receive no additional rent by reason of its immoral occupation, the latter cannot be convicted of keeping a brothel merely because, having notice of the nature of the occupation, he does not give the tenant notice to quit; *R.* v. *Barrett, L. & C.* 263; 32 *L. J.* (*M. C.*) 86; 9 *Cox,* 255; nor would the landlord be liable to be so convicted even if at the time he let the house he knew that it was to be used for purposes of prostitution, and, by reason of its occupation as such, received an additional rent. *R.* v. *Stannard, L. & C.* 349; 33 *L. J.* (*M. C.*) 61; 9 *Cox,* 405: but the facts in this case would now justify proceedings under 48 *&* 49 *Vict. c.* 69, *s.* 13 (*ante*, p. 1196).

And thirdly, prove the house to be situate in the parish mentioned in the indictment; for this being matter of local description, it must be proved as laid, unless amended. [*See ante*, pp. 67, 298.]

On an indictment under 48 & 49 *Vict.* c. 69, *s.* 13, the evidence appears to be in substance the same as above. *See Mead and Bodkin, Criminal Law Amendment Act*, 1885, p. 72.

Gaming-houses.

33 *H.* 8, *c.* 9—*Punishment of unlawful games.*]—*Excessive gaming*, per se, *is no longer a criminal offence, but may be evidence of unlawful gaming. As to what is now an unlawful game, see Jenks* v. *Turpin*, 13 *Q. B. D.* 505: *R.* v. *Rogier*, 1 *B. & C.* 252; 2 *D. & R.* 431; 25 *R. R.* 393, *and post*, p. 1202.

8 & 9 *Vict.* c. 109 (*Gaming Act*, 1845), *s.* 2—*Evidence of house being common gaming-house.*]—In default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players, exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play or bet; and every such house or place shall be deemed a common gaming-house, such as is contrary to law, and forbidden to be kept by the said Act of King Henry VIII. (33 *H.* 8, *c.* 9), and by all other Acts containing any provision against unlawful games or gaming-houses.

Sect. 4—*Penalty for keeping common gaming-house.*]—The owner or keeper of any common gaming-house, and every person having the care or management thereof, and also every banker, croupier, and other person who shall act in any manner in conducting the business of any common gaming-house, shall on conviction thereof, by his own confession, or by the oath of one or more credible witnesses, before any two justices of the peace, beside any penalty or punishment to which he may be liable under the provisions of the said Act of King Henry VIII. (33 *H.* 8, *c.* 9), be liable to forfeit and pay such penalty, not more than 100*l.* as shall be adjudged by the justices before whom he shall be convicted, or, in the discretion of the justices before whom he shall be convicted, may be committed to the house of correction, with or without hard labour, for any time not more than six calendar months [*levy of penalties by distress*] . . . Provided always, that nothing herein contained shall prevent any proceeding by indictment against the owner or keeper, or other person having the care or management of a common gaming-house: but no person who shall have been summarily convicted of any such offence shall be liable to be proceeded against by indictment for the same offence. [*On a charge under this section the accused may elect to be indicted.* 42 & 43 *Vict.* c. 49, *s.* 17, *ante*, p. 6; *and see note to s.* 4 *of* 17 & 18 *Vict.* c. 38, *post*, p. 1202.]

Sect. 5.]—It shall not be necessary, in support of any information for gaming in, or suffering any games or gaming in, or for keeping or using, or being concerned in the management or conduct of, a common gaming-house, to prove that any person found playing at any game was playing for any money, wager, or stake.

Sect. 6.]—*Power to commissioners of metropolitan police to authorize superintendents and constables to enter gaming-houses in metropolitan police district and arrest persons there found and seize instruments of gaming, etc.*

Sect. 7.]—*Power to such superintendent and constable to search, etc.*

Sect. 8—*Evidence of gaming.*]—Where any cards, dice, balls, counters, tables, or other instruments of gaming used in playing any unlawful game shall be found in any house, room, or place suspected to be used as a common gaming-house, and entered under a warrant or order issued under the provisions of this Act, or about the person of any of those who shall be found therein, it shall be evidence, until the contrary be made to appear, that such house, room, or place is used as a common gaming-house, and that the persons found in the room or place where such tables or instruments of gaming shall have been found were playing therein, although no play was actually going on in the presence of the superintendent or constable entering the same under a warrant or order issued under the provisions of this Act, or in the presence of those persons by whom he shall be accompanied as aforesaid. . . . [*Power to magistrate to order destruction of instruments of gaming.*]

Sect. 9.]—*Persons concerned in gaming and giving evidence to be exempt from prosecution.*

17 *&* 18 *Vict. c.* 38 (*Gaming Houses Act*, 1854), *s.* 2—*Obstructing entry of constable to be evidence that house is a gaming-house.*]—Where any constable or officer, authorized as aforesaid [*under the Gaming Act*, 1845 (8 *&* 9 *Vict. c.* 109, *s.* 3)] to enter any house, room, or place, is wilfully prevented from, or obstructed or delayed in entering the same, or any part thereof, or where any external or internal door of, or means of access to any such house, room, or place, so authorized to be entered, shall be found to be fitted or provided with any bolt, bar, chain, or any means or contrivance for the purpose of preventing, delaying, or obstructing the entry into the same, or any part thereof, of any constable or officer authorized as aforesaid, or for giving an alarm in case of such entry, or if any such house, room, or place, is found fitted or provided with any means or contrivance for unlawful gaming, or with any means or contrivance for concealing, removing, or destroying any instruments of gaming, it shall be evidence, until the contrary be made to appear, that such house, room, or place is used as a common gaming-house within the meaning of this Act and of the former Acts relating to gaming, and that the persons found therein were unlawfully playing therein.

Sect. 4—*Penalty for keeping house, etc., for unlawful gaming.*]—*Post*, p. 1201.

Indictment for keeping a Common Gaming-house. (*Common Law.*)

Commencement as in the last precedent]—at the parish of B., in the county of M., unlawfully did keep and maintain a certain common gaming-house; and in the said common gaming-house, for lucre and gain, on the said first day of June, in the year aforesaid, and on the said other days and times, there unlawfully and wilfully did cause and procure divers idle and evil-disposed persons to frequent and come, to play together at a certain unlawful game of cards called *Rouge et noir*:

and in the said common gaming-house, on the said first day of June, in the year aforesaid, and on the said other days and times, there unlawfully and wilfully did permit and suffer the said idle and evil-disposed persons to be and remain, playing and gaming at the same unlawful game called *Rouge et noir*, for divers large and excessive sums of money; to the great damage and common nuisance of all the liege subjects of our said lord the King, to the evil example [*as ante*, p. 1196]. (*2nd Count.*)—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the said first day of June, in the year aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, at the parish aforesaid, in the county aforesaid, unlawfully did keep and maintain a certain common gaming-room in the house of one J. N. there situate; and in the said common gaming-room, *etc., etc., as in the last count, only substituting* "gaming-room" *for* "gaming-house." *The offence is a continuing offence. See* Onley v. *Gee*, 30 *L. J.* (*M. C.*) 222: *Ex parte Burnby* [1901] 2 *K. B.* 458; 20 *Cox*, 28. *This precedent was held good in R.* v. *Rogier*, 2 *D. & R.* 431; 1 *B. & C.* 272; 25 *R. R.* 393: *cf. the form in R.* v. *Taylor*, 3 *B. & C.* 502. *In R.* v. *Rogier*, *Holroyd*, J., *said that, in his opinion, it would be sufficient merely to have alleged that the defendant kept a common gaming-house.*

Misdemeanor: fine or imprisonment (with or without hard labour, 3 *G.* 4, *c.* 114, *ante*, p. 237), *or both. No indictment can be preferred for keeping a gaming-house, unless one or other of the preliminary steps required by* 22 *&* 23 *Vict. c.* 17, *s.* 1, *as extended by* 30 *&* 31 *Vict. c.* 35, *s.* 1, *has been taken* (*see ante*, p. 7). *A married woman may be indicted with her husband for this offence. R.* v. *Dixon*, 10 *Mod.* 335. *The indictment shall not be removed by* certiorari; 25 *G.* 2, *c.* 36, *s.* 10; *unless on the part of the crown*; *R.* v. *Davies*, 5 *T. R.* 626; 2 *R. R.* 683; *and it shall be determined at the same sessions or assizes at which it is preferred, unless the court, upon cause shown, think proper to adjourn the same.* 25 *G.* 2, *c.* 36, *s.* 10. *This offence is triable at the court of quarter sessions for a borough. R.* v. *Charles*, *L. & C.* 90; 31 *L. J.* (*M. C.*) 69; 9 *Cox*, 18. (*See ante*, p. 126.)

Evidence.

Prove that the house in question, or a room or rooms in it, were used as a "common gaming-house." *See* 5 *T. R.* 338. As to the evidence sufficient for this purpose, *see* 8 *&* 9 *Vict. c.* 109, *ss.* 2, 5, 8, and 17 *&* 18 *Vict. c.* 38, *s.* 2 (*ante*, pp. 1198, 1199).

Prove that the defendant "acted or behaved as master or mistress, or as the person having the care, government, or management" of the house or room in question; which is sufficient evidence that the house or room was kept by the defendant. 25 *G.* 2, *c.* 36, *s.* 8, *ante*, p. 1195. And, lastly, prove the house to be situate within the parish mentioned in the indictment. [*See ante*, pp. 67, 298.]

Keeping and maintaining a common gaming-house for lucre and gain, and causing and procuring idle and disorderly persons to come there to play at *Rouge et noir*, and permitting such persons to play there at such a game for money, is an indictable offence at common law. *R.* v. *Rogier*, *ubi supra*. To constitute "unlawful gaming," it is not necessary that the games played should be "unlawful games;" it is enough that the play is carried on in a "common gaming-house." *Jenks* v. *Turpin*, 13 *Q. B. D.* 505. It makes no difference that play is confined to members of a club; it is not a *public* but a *common* gaming-house that is prohibited. *Id., and see post*, p. 1202.

After an indictment for keeping a gaming-house has been preferred by

a private prosecutor, the court will allow any other person to go on with it, even against the consent of the prosecutor. *R.* v. *Wood*, 3 *B. & Ad.* 657; 1 *L. J.* (*M. C.*) 98.

Statute.

17 & 18 *Vict. c.* 38 (*Gaming Houses Act*, 1854) *s.* 4—*Penalty for keeping or using house, etc., for unlawful gaming.*]—Any person being the owner or occupier or having the use of any house, room, or place, who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein, and any person who being the owner or occupier of any house or room, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purpose aforesaid, and any person having the care or management of or in any manner assisting in conducting the business of any house, room, or place opened, kept, or used for the purpose aforesaid, and any person who shall advance or furnish money for the purpose of gaming with persons frequenting such house, room, or place, may, on summary conviction thereof before any two justices of the peace, be adjudged by such justices to forfeit and pay such penalty, not exceeding 500*l.*, as to such justices shall seem fit, and may be further adjudged by such justices to pay such costs attending such conviction as to them shall seem reasonable: and [*on non-payment of such penalty and costs, or in the first instance* (*rep.* 47 & 48 *Vict. c.* 43, *s.* 4)], if to the said justices shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding twelve calendar months. [*The accused may elect to be tried on indictment.* 42 & 43 *Vict. c.* 49, *s.* 17, *ante*, p. 6. *And the fact of election need not be averred.* *R.* v. *Chambers*, 65 *L. J.* (*M. C.*) 214; 18 *Cox*, 401, *ante*, p. 1162. *As to scope of the section, see Jenks* v. *Turpin*, 13 *Q. B. D.* 505.

Indictment under 17 & 18 *Vict. c.* 38, *s.* 4.

County of London (Northern Division), to wit:—The jurors for our lord the King upon their oath present, that A. B., on the first day of January, A.D. 1905, and on divers days thereafter between that day and the tenth day of February, A.D. 1905, in the parish of ——, in the county of London, then being the occupier (*owner or occupier*) of a certain house (*house, room, or place*) known as No. 10, —— Street, situate in the parish and county aforesaid,* unlawfully did use (*open, keep, or use*) the said house for the purpose of unlawful gaming being carried on therein; against the form, etc. (*as ante*, p. 465). (*2nd Count.*)—And the jurors aforesaid, etc. (*as in Count* 1 *down to the* *) unlawfully, knowingly, and wilfully did permit the said house (*house or room*) to be used (*opened, kept, or used*) by a certain other person, to wit, by one C. D., for the purpose of unlawful gaming being carried on therein; against the form, etc. (*3rd Count.*)—And the jurors, etc., do further present that the said C. D., on the first day, etc., then being a person having the use of the said house (*house, room, or place*) unlawfully did use (*open, keep, or use*) the said house for the purpose of unlawful gaming being carried on therein; against the form, etc. *Add counts, if necessary, charging* E. F. *with* "having the care and management," *or* "assisting in conducting the business" *of the house, as the case may be: also a count charging the keeping of a common gaming-house* (*ante*, p. 1199).

Misdemeanor: punishment, fine not exceeding 500*l.*, *and in default of payment, or in the first instance, imprisonment, with or without hard labour, for not more than twelve months.* 17 & 18 *Vict. c.* 38, *s.* 4.

Evidence.

See evidence in support of indictment for keeping a common gaming-house, *ante*, p. 1200.

Unlawful games.]—Various games have been made unlawful by 33 *H.* 8, *c.* 9, and other statutes, some of which have been repealed. The effect of this legislation is considered in *Jenks* v. *Turpin*, 13 *Q. B. D.* 505. "The unlawful games now are—ace of hearts, faro, basset, hazard, passage, roulette, every game of dice except backgammon, and every game of cards which is not a game of *mere* skill; and, I incline to add, any other game of mere chance." *Id.*, *per Hawkins*, J., *at* p. 524. Baccarat is an unlawful game. *Id.* "To play at a game of cards for money in a common gaming-house is unlawful gaming," *Id.*, *per A. L. Smith*, J., *at* p. 531. The question of whether a particular game of cards is an unlawful game is a question of law for the judge, and not of fact for the jury, who must apply the facts to the definition of the law given by the judge. *R.* v. *Davies* [1897] 2 *Q. B.* 199.

Keep or use.]—Where the defendant with three friends went to his house, and after playing whist there, played an unlawful game of cards, but there was no evidence that they or any one else had ever played an unlawful game of cards at the defendant's house or on any other occasion, it was held that he could not be convicted of opening, keeping, or using the room within *s.* 4. *R.* v. *Davies*, *ubi supra*; *but see R.* v. *Preedy*, 17 *Cox*, 433, 437, *Hawkins*, J.: *and cf. R.* v. *Mean*, 69 *J. P. Rep.* 27 (*post*, p. 1204). Where the defendant kept in his shop an automatic machine, by means of insertion of a penny into which money would be won or lost without the exercise of skill on the part of the operator, it was held that he was rightly convicted of keeping, etc., his shop for the purpose of unlawful gaming within *s.* 4. *Fielding* v. *Turner* [1903] 1 *K. B.* 867; 67 *J. P. Rep.* 252.

Care and management—assisting in conducting the business.]—In *Jenks* v. *Turpin* (*ubi supra*) it was held that the mere *players* at an unlawful game in a club which was a common gaming-house, as distinct from the proprietor and committee men of the club, were not liable to be summarily convicted of an offence under this branch of the section. But a "banker" at faro, who has "bought the bank," is a person assisting in conducting the business, etc., within this section. *Derby* v. *Bloomfield*, 68 *J. P. Rep.* 391.

Betting-houses.

16 *& 17 Vict. c.* 119 (*Betting Act*, 1853), *s.* 1—*Betting-houses a common nuisance.*]—No house, office, room, or other place, shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof betting with persons resorting thereto;

Or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person aforesaid, as or for the consideration for any assurance, undertaking, promise or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing

the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid;

And every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law. [*An offence declared to be a nuisance is indictable as such, though the statute creating the offence renders it punishable on summary conviction. R.* v. *Crawshaw, Bell,* 303; 30 *L. J.* (*M. C.*) 58; 8 *Cox,* 375.]

Sect. 2—*Betting-houses to be deemed gaming-houses within* 8 *&* 9 *Vict. c.* 109.]—Every house, room, office, or place opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming-house within the meaning of the *Gaming Act,* 1845 (8 *&* 9 *Vict. c.* 109). [*As to what is evidence of a house being a common gaming-house, see ss.* 2, 5, *and* 8 *of that statute* (*ante,* pp. 1189, 1190).]

Sect. 3—*Penalty on owner or occupier of betting-house.*]—Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place, opened, kept, or used for the purposes aforesaid, or either of them, shall on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty, not exceeding 100*l.*, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable; [*and on the non-payment of such penalty and costs*] or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding six calendar months. [*Words in italics rep.* 47 *&* 48 *Vict. c.* 43, *s.* 4. *The accused can elect to be tried on indictment, and the election to be so tried need not be averred. R.* v. *Chambers,* 65 *L. J.* (*M. C.*) 14; 18 *Cox,* 401.

Sect. 4.]—*Penalty on persons receiving money on condition of paying money on event of any bet, etc.* (*not indictable*).

Sect. 7.]—*Penalty on persons exhibiting placards or advertising betting-houses* (*not indictable*).

Sect. 11.]—*Power of justice to authorize search of suspected houses.*

Sect. 12.]—*Power of search and seizure by metropolitan police.*

37 *&* 38 *Vict. c.* 15 (*Betting Act,* 1874).]—*Extension of provisions as to penalties for advertising as to betting.*

Indictment for using a Room contrary to 16 *&* 17 *Vict. c.* 119, *ss.* 1, 3.

Commencement as ante, p. 1201]—that A. B., on the, *etc.*, (as in the precedent, *ante,* p. 1201), in the parish, *etc.*, being persons using a certain

room (*house, office, room, or other place*), situate and being upon certain premises known as No. 2, —— Street, in the parish and county aforesaid,* unlawfully did use the said room for the purpose of betting with persons resorting thereto; against the form, etc. (*2nd Count*) (*as in count* 1 *down to the* *, *then proceed*) * unlawfully did use the said room for the purpose of money being received by and on behalf of him the said A. B., a person using the same as and for the consideration of undertakings, promises, and agreements to pay thereafter money on events and contingencies of and relating to horse-races. *A set of counts may be added describing the room used as a* "place," *also a set charging the defendant as* "having the care and management," *or* "assisting in conducting the business," *etc. The indictment should conclude with a count charging the defendant with keeping a common gaming-house. See s.* 2 *of the Act and notes thereto, supra. See the summary of the indictment in R.* v. *Currie,* 68 *J. P. Rep.* 294. *For a precedent of an indictment against an occupier, see R.* v. *Hobbs* [1898] 2 *Q. B.* 647.

Misdemeanor: punishment, fine not exceeding 100*l., and in default of payment, or in the first instance imprisonment, with or without hard labour, for not more than six months.* 16 & 17 *Vict. c.* 119, *s.* 3.

Evidence.

The two branches of this section create distinct offences. *Bond* v. *Plumb* [1894] 1 *Q. B.* 169. As to its scope and effect, *see Powell* v. *The Kempton Park Racecourse Co.* [1899] *App. Cas.* 143: *Brown* v. *Patch* [1899] 1 *Q. B.* 892. Various forms of "coupon competitions" have been held to be within the section. *See R.* v. *Stoddart* [1901] 1 *K. B.* 177; 70 *L. J.* (*Q. B.*) 189; 19 *Cox,* 587; 64 *J. P.* 774: *Mackenzie* v. *Hawke* [1902], 2 *K. B.* 216; 71 *L. J.* (*K. B.*) 565; 66 *J. P.* 709: *Lennox* v. *Stoddart* [1902] 2 *K. B.* 21; 71 *L. J.* (*K. B.*) 747; 66 *J. P.* 469: *Stoddart* v. *Hawke* [1902] 2 *K. B.* 351; 71 *L. J.* (*K. B.*) 133; 20 *Cox,* 111; 66 *J. P.* 469.

Use.]—In order to convict a bookmaker of using the bar of a public-house within this section, he must "have something in the nature of a right or licence to use the bar for the purposes of his betting business over and above the right of an ordinary member of the public to resort there." *Belton* v. *Busby* [1899] 2 *Q. B.* 380; 68 *L. J.* (*Q. B.*) 859: *Tromans* v. *Hodkinson* [1903] 1 *K. B.* 30. Where therefore it was proved that the defendant was in the habit of frequenting the bar of a public house for the purpose of carrying on a business of ready money betting with persons resorting thereto, but for the purposes of his business did not occupy any specific portion of the bar, it was held that the question whether he was guilty of "using" the bar within the section depended upon whether he carried on his betting business there with the knowledge and consent of the occupier of the house. *R.* v. *Deaville*: *R.* v. *Simpson* [1903] 1 *K. B.* 468; 67 *J. P. Rep.* 82 (*C. C. R.*). The contents of betting slips and other documents found upon the defendants, or in the house which they are charged with using, is admissible evidence against them, though such documents do not relate to the days on which the offence is alleged in the indictment to have been committed. *R.* v. *Mean* [1904] 69 *J. P. Rep.* 27 (*C. C. R.*).

Resorting.]—An offence against this branch of the section may be proved by showing that the house was opened and advertised as a betting-house, although no person ever physically resorted thereto. But where "resorting" is relied upon as evidence of the offence there must

be some evidence of a physical resorting, and it is not sufficient to show that letters and telegrams were sent to the defendant directing him to make bets with the senders. *R.* v. *Brown* [1895] 1 *Q. B.* 119; 64 *L. J.* (*M. C.*) 1; 18 *Cox*, 81.

Paying in the bar of a public-house bets previously made elsewhere is not using such bar for the purpose of betting with persons resorting thereto within the section. *Bradford* v. *Dawson* [1897] 1 *Q. B.* 307; *but see Lennox* v. *Stoddart*, *infra*.

Receipt of money.]—It has been held that in order to convict under the second branch of *s.* 1, the money must be received in the house, or if received outside the house the defendant must resume possession of it in the house; *Davies* v. *Stephenson*, 24 *Q. B. D.* 529; but proof that the house has been used by the occupier for an essential part of operations carried on for the purpose of money being received by him in contravention of the section is sufficient. *Lennox* v. *Stoddart* [1902] 2 *K. B.* 21, *ubi supra*. A sweepstake is not within the section. *R.* v. *Hobbs* [1898] 2 *Q. B.* 647.

Betting in clubs.]—Members of a *bonâ fide* club who make bets with other members upon the club premises cannot be convicted of using the club for the purpose of betting with persons resorting thereto within the section. *Downes* v. *Johnson* [1895] 2 *Q. B.* 203. But where the jury found that the club was "used as a blind for betting purposes," and there was evidence that the members of the club were divided into two classes, the defendants being the bookmakers, and other members going there to bet with them, it was held that the defendants were properly convicted under the section. *R.* v. *Corrie and Watson* [1904] 68 *J. P. Rep.* 294 (*C. C. R.*).

LOTTERIES.

The offence of keeping a lottery is rarely punished on indictment. For a precedent, *see R.* v. *Crawshaw, Bell*, 303; 30 *L. J.* (*M. C.*) 58; 8 *Cox*, 375.

Statutes.

10 *W.* 3, *c.* 23 (10 & 11 *W.* 3, *c.* 17, *Ruffhead*), *s.* 1 (1698).]—*All lotteries declared to be common and public nuisances.*

[*Sects.* 2, 3 *impose specific penalties on persons opening or drawing at lotteries. These and subsequent enactments of a similar character do not take away the right to indict for a common and public nuisance under s.* 1. *R.* v. *Crawshaw, Bell*, 303; 30 *L. J.* (*M. C.*) 58; 8 *Cox*, 375.]

8 *G.* 1, *c.* 2 (*Lotteries Act*, 1721).]—*Erection of offices for sales by way of lot and the publishing of a proposal or scheme for the same made punishable by fine before two justices: appeal to quarter sessions.*

9 *G.* 1, *c.* 19 (*Lotteries Act*, 1722), *s.* 4—*Foreign lotteries.*]—*Similar provisions with regard to any person who after* 1*st July*, 1723, "shall . . . by virtue or colour of any grant or authority from any foreign prince, state, or government whatsoever, erect, set up, continue, or keep, or shall cause

or procure to be erected, set up, continued, or kept, any lottery or undertaking in the nature of a lottery, under any denomination whatsoever, or shall make, print, or publish, or cause to be made, printed, or published, any proposal or scheme for any such lottery or undertaking, or shall within this kingdom sell or dispose of any ticket or tickets in any foreign lottery. . . ."

6 *G.* 2, *c.* 35 (*Lotteries Act*, 1732), *s.* 29—*Foreign lotteries.*]—*Similar provisions, also penalty recoverable by action by informer with regard to any person who after 24th June*, 1833, "shall sell, procure, or deliver any ticket, receipt, chance, or number in or belonging to any foreign lottery or pretended foreign lottery or in or belonging to any class, part, or division of such lottery, or pretended lottery, or in or belonging to any undertaking whatsoever in the nature of a lottery, or shall sell, procure, or deliver any ticket, receipt, chance, or number in or belonging to any duplicate, or pretended duplicate, of any foreign lottery or pretended foreign lottery, or shall receive or cause to be received any money whatsoever for any such ticket, receipt, chance, or number, or for or in consideration of any money to be repaid in case any ticket or tickets, number or numbers, in any foreign lottery or pretended foreign lottery, or any class, part, or division thereof shall prove fortunate . . ."

42 *G.* 3, *c.* 119 (*Gaming Act*, 1802), *s.* 2.]—*Every person to forfeit* 500*l.* *at the suit of the Attorney-General, and to be deemed a rogue and vagabond, who* "shall publicly or privately keep any office or place to exercise, keep open, show, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little goe, or any other lottery whatsoever not authorized by parliament, or shall knowingly suffer to be exercised, kept open, shown, or exposed to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any such game or lottery in his or her house, room, or place . . ." [*As to what is a lottery, see infra*, p. 1207.]

4 *G.* 4, *c.* 60 (*Lotteries Act*, 1823), *s.* 41.]—*After authorizing a Treasury lottery, all persons to forfeit* 50*l.*, *and to be deemed rogues and vagabonds, who* "shall sell any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances in any lottery or lotteries authorized by any foreign potentate or state, or to be drawn in any foreign country, or in any lottery or lotteries, except such as are or shall be authorized by this or some other Act of Parliament to be sold, or shall publish any proposal or scheme for the sale of any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, except such lottery or lotteries as shall be authorized as aforesaid . . ."

6 *& 7 W.* 4, *c.* 66 (*Lotteries Act*, 1836), *s.* 1—*Advertising lotteries.*]—*Every person to forfeit* 50*l.* *in proceedings by action at law or information who after August* 13, 1866, "shall print or publish, or cause to be printed or published, any advertisement or other notice of or relating to the drawing or intended drawing of any foreign lottery, or of any lottery or lotteries not authorized by some Act or Acts of Parliament;" *or who* "shall print or publish, or cause to be printed or published, any advertisement or other notice of or for the sale of any ticket or tickets, chance or chances, or of any share or shares of any ticket or tickets, chance or chances of or in any such

lottery or lotteries as aforesaid, or any advertisement or notice concerning or in any manner relating to any such lottery or lotteries, or any ticket, chance, or share, tickets, chances, or shares thereof or therein . . ."

Evidence.

A lottery is a distribution of prizes by lot or chance without the use of any skill. *See R.* v. *Harris*, 10 *Cox*, 352 ("The Eastern Bazaar"): *Taylor* v. *Smetten*, 11 *Q. B. D.* 207 (sale of pound packages of tea with prize coupon): *Caminada* v. *Hulton*, 60 *L. J.* (*M. C.*) 116; 17 *Cox*, 307 (racing coupon competition): *Barclay* v. *Pearson* [1893] 2 *Ch.* 154 ("missing word competition"): *Stoddart* v. *Sagar* [1895] 2 *Q. B.* 474 (racing coupon competition): *Hall* v. *Cox* [1899] 1 *Q. B.* 198 (*C. A.*) (prediction of coming event): *Hall* v. *McWilliam*, 20 *Cox*, 33; 65 *J. P.* 742 ("spot" competition in newspaper).

A publican who promotes a sweepstakes on his premises is guilty of an offence against s. 2 of the *Gaming Act*, 1802 (42 *G.* 3, *c.* 119), *ante*, p. 1206, at all events if he makes any profit out of the transaction. *Hardwick* v. *Lane* [1904] 1 *K. B.* 204; 68 *J. P. Rep.* 94: *cf. R.* v. *Hobbs* [1898] 2 *Q. B.* 647.

As to breach of the *Lottery Acts* by societies or public companies, *see Sykes* v. *Beadon*, 11 *Ch. D.* 170: *Wallingford* v. *Mutual Benefit Society*, 5 *App. Cas.* 685: *McNee* v. *Persian Investment Corporation*, 44 *Ch. D.* 306.

UNLICENSED SUBURBAN RACECOURSES.

Statute.

42 & 43 *Vict. c.* 18.]—*By this statute a horse-race within ten miles of Charing Cross is prohibited, and shall be deemed to be a nuisance, unless held under licence by the justices (now the county council) of the county in which it is held.*

(*d*) Offences as to Corpses.

Common Law.

There is no property in a corpse; it is therefore not the subject of larceny (*see ante*, p. 437); though the executors have a right to its possession. *Williams* v. *Williams* [1882] 20 *Ch. D.* 659; 51 *L. J.* (*Ch.*) 385; 15 *Cox*, 39. But larceny may be committed with respect to coffins, shrouds, or property interred with the corpse. As to laying the property in such goods, *see ante*, p. 57.

To leave unburied the corpse of a person for whom the defendant was bound to provide "Christian burial" (which probably means only "decent burial:" *Steph. Dig. Cr. L.* (6th ed.) 138), such as a wife or child, is also an indictable misdemeanor, if he be shown to have been of ability to provide such burial. *R.* v. *Vann*, 2 *Den.* 325; 21 *L. J.* (*M. C.*) 39; 5 *Cox*, 379: *R.* v. *Stewart*, 12 *A. & E.* 773, 778; 4 *P. & D.* 349: *Jenkins* v. *Tucker* [1788] 1 *H. Bl.* 90. But the mere burning of a dead body, instead of burying it, is not a misdemeanor; yet if it be burnt in such a place and such a manner as to annoy persons passing along public roads or other places where they

have a right to go, this is an indictable nuisance. *R.* v. *Price* [1884] 12 *Q. B. D.* 247; 53 *L. J.* (*M. C.*) 51; 15 *Cox*, 389. *See* 7 & 8 *Vict. c.* 101, *s.* 31: 12 & 13 *Vict. c.* 103, *ss.* 16, 17; 31 & 32 *Vict. c.* 122, *s.* 13; 53 & 54 *Vict. c.* 5, *s.* 297, as to the burial of poor persons by the parish officers. And as to burial of persons dying of infectious disease, etc., *see* 38 & 39 *Vict. c.* 55, *s.* 142; 54 & 55 *Vict. c.* 76, *s.* 89. As to preventing burial, *see* 1 *Russ. Cr.* (6th ed.) 942. And now the burning of dead bodies is regulated by the *Cremation Act*, 1902 (2 *Edw.* 7, c. 8) (*vide infra*), which (*s.* 10) expressly provides that nothing therein contained shall authorize the creation or permission of a nuisance.

Any disposition of a corpse with intent to obstruct or prevent a coroner's inquest, (*a*) when one ought to be held, is a misdemeanor at common law. *R.* v. *Stephenson*, 13 *Q. B. D.* 331; 56 *L. J.* (*M. C.*) 176: *R.* v. *Price*, *ubi supra*.

Exposing the naked dead body of a child in or near, and within view of, the highway is a common law nuisance. *R.* v. *Clark*, 15 *Cox*, 171. As to secret disposition of the bodies of newly-born infants with intent to conceal their birth, *see ante*, pp. 823–826.

It is a misdemeanor at common law to remove, without lawful authority, a corpse from a grave, whether in a churchyard or in the burial-ground of a congregation of Protestant dissenters; and it is no defence to such a charge that the motives of the defendant were pious and laudable. *R.* v. *Sharpe*, *Dears. & B.* 160: 26 *L. J.* (*M. C.*) 47; 7 *Cox*, 214. In *R.* v. *Kenyon* [1901] 36 *L. J. Newsp.* 571, four persons were indicted before *Phillimore*, J., for unlawfully, wilfully, and indecently digging open graves in a Roman Catholic burial-ground, which had been closed for burials by order in council in 1859, and for taking out portions of bodies of deceased persons interred therein. The indictment also contained a count for contravening the *Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), by building on the disused burial-ground in question. Pleas of guilty were entered, and sentences of imprisonment imposed. For precedent of indictment in such cases, *see R.* v. *Jacobson*, 14 *Cox*, 522. Penalties are imposed by *s.* 25 of the *Burials Act*, 1857 (20 & 21 *Vict. c.* 81), for removal of bodies from any place of burial without the licence of a Secretary of State, except in the cases of removal under faculty from one consecrated place of burial to another. *R.* v. *Tristram* [1898] 2 *Q. B.* 371; 68 *L. J.* (*Q. B.*) 637. These penalties appear to be alternative to the common law remedy (*see* 52 & 53 *Vict. c.* 63, *s.* 33, *ante*, p. 170). A person who without lawful authority disposes of a dead body for the purpose of dissection, is indictable at common law. *R.* v. *Lynn*, 2 *T. R.* 733; 1 *Leach*, 497; 1 *R. R.* 607: *R.* v. *Gilles*, *R. & R.* 366, *n.* It appears to be immaterial whether the body was disposed of for gain or not. *R.* v. *Cundick*, *Dowl. & Ry.* (*N. P.*) 13. But where the master of a workhouse, having as such the lawful possession of the bodies of paupers who died therein, and who therefore was authorized under the 7th section of the *Anatomy Act* (2 & 3 *W.* 4, c. 75, *rep.*) to permit the bodies of such paupers to undergo anatomical examination, unless to his knowledge the deceased person had expressed in his lifetime, in the manner therein mentioned, his desire to the contrary, "or unless the surviving husband or wife, or any known relative of the deceased person,

(*a*) The coroner at common law can legally direct disinterment for the purposes of an inquest (*ante*, p. 154). *R.* v. *Clerk* [1702] *cas. temp. Holt*, 167: *R.* v. *Bond* [1716] 1 *Str.* 22; 1 *Hawk. c.* 9, *s.* 27; *Jervis on Coroners* (6th ed.), 37, 38. But in practice the disinterment is made under the authority of the Home Secretary under 20 & 21 *Vict. c.* 81, *s.* 25, or of the High Court under *s.* 6 of the *Coroners Act*, 1887 (50 & 51 *Vict. c.* 71). *See Jervis on Coroners* (6th ed.), pp. 58–56.

should require the body to be interred without such examination,"—in order to prevent the relatives of the deceased paupers from making this requirement, and to lead them to believe that the bodies were buried without dissection, showed the bodies to the relatives in coffins, and caused the appearance of a funeral to be gone through; and, having by this fraud prevented the relatives from making the requirement, then sold the bodies for dissection; he was held not to be indictable at common law. *R.* v. *Feist, Dears. & B.* 590; 27 *L. J.* (*M. C.*) 164; 8 *Cox*, 18.

Statute.

2 *Edw.* 7, *c.* 8 (*Cremation Act*, 1902), *s.* 8, *sub-s.* (1).]—Every person who shall contravene any such regulation as aforesaid, or shall knowingly carry out or procure or take part in the burning of any human remains except in accordance with such regulations and the provisions of this Act, shall (in addition to any liability or penalty which he may otherwise incur) be liable, on summary conviction to a penalty not exceeding fifty pounds. . . . [*Appeal to quarter sessions. See regulations contained in Stat. Rules and Orders Revised* (ed. 1904), *vol.* 4, *tit.* "*Cremation, E.*"]

(2) Every person who shall wilfully make any false declaration or representation, or sign or utter any false certificate, with a view to procuring the burning of any human remains, shall (in addition to any penalty or liability which he may otherwise incur) be liable to imprisonment, with or without hard labour, not exceeding two years.

(3) Every person who, with intent to conceal the commission or impede the prosecution of any offence, procures or attempts to procure the cremation of any body, or, with such intent, makes any declaration or gives any certificate under this Act, shall be liable to conviction on indictment to penal servitude for a term not exceeding five years.

Indictment for digging up and carrying away a Dead Body.
(Common Law.)

Central Criminal Court to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, the churchyard of and belonging to the parish church of the parish of B., in the county of M., unlawfully and wilfully did break and enter, and the grave there in which one J. N., deceased, had lately before then been interred, and then was, unlawfully, wilfully, and indecently did dig open, and the body of him the said J. N. out of the grave aforesaid unlawfully, wilfully, and indecently did then take and carry away; in contempt of our lord the King and his laws, to the evil example of all others in like case offending, and against the peace of our lord the King, his crown and dignity; *and see R.* v. *Kenyon* [1901] 36 *L. J. Newsp.* 571 (*ante*, p. 1208).

If the corpse cannot be recognized, state it to be the body of a person to the jurors aforesaid unknown, and where it is doubtful from what place the body is taken, the statement of place can be omitted. R. v. *Gilles, R. & R.* 366, *n.*

Misdemeanor: fine or imprisonment without hard labour, or both. (*See ante*, pp. 238, 240.)

Evidence.

Prove that the defendant dug up the corpse; and the slightest removal of it would, it seems, be sufficient to constitute the offence. Or, prove

that the corpse was found in the defendant's possession, and that it had been previously interred in the churchyard mentioned in the indictment; from which the jury may fairly presume that the defendant was the person who dug it up or removed it. *R.* v. *Jacobson*, 14 *Cox*, 522.

(*e*) INTERFERENCE WITH PUBLIC RIGHTS OF PASSAGE. NUISANCE TO HIGHWAYS.

As to what constitutes a highway, *see post*, p. 1222.

Statutes.

3 & 4 *G.* 4, *c.* 126, *s.* 10—*Fine for non-repair of turnpike road.*]—*All turnpike trusts have expired, and the turnpike roads have become main roads unless dismained by order of the county authority.* 41 & 42 *Vict. c.* 77, *s.* 13: *and see Pratt on Highways* (15th ed.), 11.

5 & 6 *W.* 4, *c.* 50 (*Highway Act*, 1835), *s.* 95—*Mode of proceeding if obligation to repair is disputed.*]—If, on the hearing of any such summons respecting the repair of any highway [*i.e., a summons under s.* 94 *to the surveyor or person chargeable with the repairs*], the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices and they are hereby required to direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœned, (*sic*), at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place wherein such highway shall be, against the inhabitants of the parish, or the party to be named in such order, for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be directed by the judge of the assize before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate made and levied in pursuance of this Act in the parish in which such highway shall be situate: Provided nevertheless, that it shall be lawful for the party against whom such indictment shall be so preferred at the quarter sessions as aforesaid, to remove such indictment by *certiorari* or otherwise into his Majesty's Court of King's Bench. [*An indictment against inhabitants of a parish may still be ordered under this section, notwithstanding* 41 & 42 *Vict. c.* 77, *s.* 10. *R.* v. *Morse* [1904] *W. N.* 114 (*K. B. D.*). *The justices at petty sessions cannot try the liability to repair if it is disputed. R.* v. *Arnould*, 8 *E. & B.* 550; 27 *L. J.* (*M. C.*) 92. *This section applies only to admitted highways. Ex parte Bartlett*, 30 *L. J.* (*M. C.*) 65: *R.* v. *Farrer*, *L. R.* 1 *Q. B.* 558; 35 *L. J.* (*M. C.*) 210. *As to incorporation of this section in the South Wales Highway Act*, 1860 (23 & 24 *Vict c.* 68), *see R.* v. *James*, 32 *L. J.* (*M. C.*) 211. *As to effect on this section of s.* 25 *of the Local Government Act*, 1894, *see Pratt, Highways* (15th ed.), 649. *The urban district council or town council has in urban districts become surveyor of highways, but is not liable to indictment under this section. R.* v. *Poole* (*Mayor, etc.*), 19 *Q. B. D.* 608. *The words "or any other party charged therewith" mean persons liable* ratione tenuræ, *etc., and do not apply to district councils. R.* v. *Biggleswade R. D. C.* [1900] 64 *J. P.* 442, *Wright*, J.

As to costs under this section, see post, pp. 1234, 1235.

25 & 26 *Vict. c.* 61 (*Highway Act*, 1862), *s.* 19—*Mode of proceeding if obligation to repair is disputed, and where the highway is within the jurisdiction of a rural district council.*]—When, on the hearing of any such summons respecting the repair of any highway [*i.e., summonses issued to the highway board and the waywardens under s.* 18 *of the Act*], the liability to repair is denied by the waywarden on behalf of his parish, or by any party charged therewith, the justices shall direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed, at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division or place wherein such highway is situate, against the inhabitants of the parish, or the party charged therewith, for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be paid by such party to the proceedings as the court before whom the case is tried shall direct, and if directed to be paid by the parish, shall be deemed to be expenses incurred by such parish in keeping its highways in repair, and shall be paid accordingly. [*This section was used where a highway board and waywardens had been appointed to take over between them the duties of a parish surveyor. Loughborough Highway Board* v. *Curzon*, 16 *Q. B. D.* 565; 17 *Q. B. D.* 344. *It applies only to admitted highways. R.* v. *Farrer, L. R.* 1 *Q. B.* 588. *Highway boards and waywardens are now in most, if not all, parishes abolished, and their powers transferred to rural district councils, which are also surveyors of highways.* 56 & 57 *Vict. c.* 73, *s.* 25 (*post*, p. 1213). *This section cannot be used against a rural district council. R.* v. *Biggleswade R. D. C.*, 64 *J. P.* 442: *see Pratt, Highways* (15th ed.), 615. *The liability of the inhabitants to be indicted appears not to be transferred to the parish council by* 56 & 57 *Vict. c.* 73, *s.* 6. *R.* v. *Shipley Parish Council*, 18 *Cox*, 531; 61 *J. P.* 488, *Mathew*, J. *As to costs under this section, see post*, p. 1234.

5 & 6 *W.* 4, *c.* 50, *s.* 96—*Levying and application of fines.*]—No fine, issue, penalty, or forfeiture for not repairing the highway, or not appearing to any indictment for not repairing the same, shall hereafter be returned into the Court of Exchequer, or other court, but shall be levied by and paid into the hands of such person residing in or near the parish where the road shall lie, as the justices or court imposing such fines, issues, penalties, or forfeitures, shall order and direct, to be applied towards the repair and amendment of such highway: and the person so ordered to receive such fine shall and is hereby required to receive, apply, and account for the same, according to the direction of such court, or in default thereof shall forfeit double the sum received; and if any fine, issue, penalty, or forfeiture, to be imposed on any such parish, township, or place, for not repairing the highway, or not appearing as aforesaid, shall hereafter be levied on any inhabitant of such parish, township, or place, then such inhabitant shall and may make his complaint to the justices at a special sessions for the highways; and the said justices are hereby empowered and authorized, by warrant under their hands, to make an order on the surveyor of the parish for the payment of the same, out of the money receivable by him for the highway rate, and shall within two months next after service of the said order on him pay unto such inhabitant the money therein mentioned. [*The section is here printed as it appears in the Statutes Revised* (2nd ed.), *vol.* 5, p. 743. *The fine, etc., is applicable only to repair of the highway, and if none is needed proceedings for levy of the fine will be stayed or the fine modified. R.* v. *Barnard Castle*, 10 *L. J.* (*M. C.*) 53; 5 *Jur.* (*O. S.*) 799: *R.* v. *Claxby*, 24 *L. J.* (*Q. B.*) 233; 1 *Jur.* (*N. S.*) 710.]

Sect. 98—*Costs.*]—It shall and may be lawful for the court before whom any indictment shall be preferred for not repairing highways to award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said court that the defence made to such indictment or presentment was frivolous or vexatious. [*As to costs under this section, see post*, p. 1284.]

Sect. 99—*Proceeding by presentment abolished.*]—From and after the commencement of this Act, it shall not be lawful to take or commence any legal proceeding, by presentment, against the inhabitants of any parish or other person, on account of any highway or turnpike road being out of repair. [*See R.* v. *Mawgan in Meneage*, 8 *A. & E.* 496; 7 *L. J.* (*M. C.*) 98; 3 *Nev. & P.* 502: *R.* v. *Denton*, 18 *Q. B.* 761; 21 *L. J.* (*M. C.*) 207; 9 *Dears.* 3. *It would seem that the remedy by indictment under* s. 95 *is substituted for presentment. R.* v. *Arnould*, 8 *E. & B.* 550, 556, *Coleridge*, J. *And see* s. 78 (3) *of the Local Government Act*, 1888 (51 *& 52 Vict. c.* 41), *post*, p. 1241.]

Sect. 107—*Certiorari.*]—Provided always that no rate or any proceeding to be had touching the conviction of any offender against this Act, or any order made, or any other matter or thing done or transacted in or relative to the execution of this Act, shall be vacated or quashed for want of form, or be removed or removable (except as herein mentioned, *i.e., in case of appeal, where the sessions grant a case*, s. 108: *R.* v. *Thomas*, 7 *E. & B.* 399, 405, *Coleridge*, J.) by *certiorari*, or any other writ or process whatsoever, into any of his Majesty's courts of record at Westminster. [*This section does not affect the power to remove by* certiorari *an indictment preferred by order of justices under* s. 95. *R.* v. *Sandon*, 3 *E. & B.* 540; 23 *L. J.* (*M. C.*) 129. *Where the indictment is against a body corporate, it must be removed into the High Court for trial; see ante*, pp. 11, 130.]

41 *& 42 Vict. c.* 77 (*Highways and Locomotives* (*Amendment*) *Act*, 1878), s. 10—*Mode of proceeding where county authority has made an order for the repair of a highway on a highway authority, and the highway authority disputes its liability to repair.*]—Where complaint is made to the county authority (*i.e., the county council*) that the highway authority of any highway area within their jurisdiction has made default in maintaining or repairing all or any of the highways within their jurisdiction, the county authority, if satisfied after due inquiry and report by their surveyor that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of the duty of the highway authority in the matter of such complaint. . . .

Where an order has been made by a county authority for the repair of a highway on a highway authority alleged to be in default, if such authority, within ten days after service on them of the order of the county authority, give notice to the clerk of the peace that they decline to comply with the requisitions of such order until their liability to repair the highway in respect to which they are alleged to have made default has been determined by a jury, it shall be the duty of the county authority either to satisfy the defaulting authority by cancelling or modifying in such manner as the authority may desire the order of the county authority, or else to submit to a jury the question of the liability of the defaulting authority to repair the highway.

If the county authority decide to submit the question to a jury, they shall direct a bill of indictment to be preferred to the next practicable assizes to be holden in and for their county, with a view to try the

liability of the defaulting authority to repair the highway. Until the trial of the indictment is concluded the order of the county authority shall be suspended. On the conclusion of the trial, if the jury find the defendants guilty, the order of the county authority shall forthwith be deemed to come into force; but if the jury acquit the defendants the order of the county authority shall forthwith become void.

The costs of the indictment, and of the proceedings consequent thereon, shall be paid by such parties to the proceedings as the court before whom the case is tried may direct. Any costs directed to be paid by the county authority shall be deemed to be expenses properly incurred by such authority, and shall be paid accordingly out of the county rate; and any costs directed to be paid by the highway authority shall be deemed to be expenses properly incurred by such authority in maintenance of the roads within their jurisdiction, and shall be paid out of the funds applicable to the maintenance of such roads.

[*This enactment does not repeal the procedure under ss.* 94, 95 *of the Highways Act*, 1835 (*ante*, p. 1211). *See R. v. Morse* [1904] *W. N.* 114, *K. B. D. The Public Health Act*, 1875 (38 *& 39 Vict. c.* 55, *s.* 144), *does not make an urban sanitary authority liable to indictment for non-repair of a highway. R. v. Poole* (*Mayor, etc., of*), 19 *Q. B. D.* 602; 56 *L. J.* (*M. C.*) 131. *But an indictment will lie under the above section* 10 *of* 41 *& 42 Vict. c.* 77, *against an urban sanitary authority acting as the highway authority of the district, for non-repair of a highway. R. v. Wakefield* (*Mayor, etc., of*), 20 *Q. B. D.* 810; 57 *L. J.* (*M. C.*) 52: *R. v. Crompton U. D. C.*, 20 *Cox*, 243. *Quære, whether the indictment should show on its face that all the preliminary steps required by the above section have been taken. Id. This decision appears to apply to rural district councils which are highway authorities under* 56 *& 57 Vict. c.* 73, *s.* 25, *infra. R. v. Biggleswade R. D. C.* [1900] 64 *J. P.* 442. *As to the proper form of an order under the section, and the consequences of variance from it, see R. v. Southport* (*Mayor, etc., of*), 65 *J. P.* 184. *As to proceedings where the county council neglect or refuse to make an order, see R. v. Dorset C. C.*, 67 *J. P. Rep.* 19.]

Sect. 38—*Interpretation.*]—"County authority" means the justices of a county in general or quarter sessions assembled: [*now the county council: see* 51 *&* 52 *Vict. c.* 41, *ss.* 3 (*infra*), 11 (*post*, p. 1240).

"Highway authority" means as respects an urban sanitary district the urban sanitary authority, and as respects a highway district the highway board, and as respects a highway parish the surveyor or surveyors or other officers performing similar duties. [*Now the rural district council: see* 56 *&* 57 *Vict. c.* 73, *s.* 25, *infra.*]

51 *&* 52 *Vict. c.* 41 (*Local Government Act*, 1888), *s.* 3.]—There shall be transferred to the council of each county on and after the appointed day the administrative business of the justices of the county in quarter sessions assembled, that is to say, all business done by the quarter sessions or any committee appointed by the quarter sessions, in respect of the several matters following, namely,—. . . (viii.) Bridges and roads repairable with bridges, and any powers vested by the *Highways and Locomotives* (*Amendment*) *Act*, 1878 (41 *&* 42 *Vict. c.* 77), in the county authority; . . . [*For s.* 11, *as to main roads and bridges carrying them, see post*, p. 1240.]

56 *&* 57 *Vict. c.* 73 (*Local Government Act*, 1894), *s.* 25.]—(1) As from the appointed day there shall be transferred to the district council of every rural district all the powers, duties, and liabilities of . . . any highway authority in the district, and highway boards shall cease to exist, and

rural district councils shall be the successors of the . . . highway authority, and shall also have as respects highways all the powers, duties, and liabilities of an urban sanitary authority under *ss.* 144 to 148 of the *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), and these sections shall apply in the case of a rural district and of the council thereof in like manner as in the case of an urban district and an urban authority. . . . [*As to effect of this section, see Pratt, Highways* (15th ed.), 650.]

(2) *Provision as to repair by district council of highway repairable* ratione tenurae, *and recovery of the costs by action against the person liable.* [*See Cuckfield Urban District Council* v. *Goring* [1898] 1 *Q. B.* 865: *Daventry R. D. C.* v. *Parker* [1900] 1 *Q. B.* 1: *Esher U. D. C.* v. *Marks*, 71 *L. J.* (*K. B.*) 309: *Bingley U. D. C.* v. *Ferrand*, 67 *J. P. Rep.* 370.]

(3) *Transfer to rural district councils of excluded parts of parishes within s.* 216 *of the Public Health Act*, 1875.

40 & 41 *Vict. c.* 14 (*Evidence Act*, 1877), *s.* 1—*Evidence.*]—On the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant shall be admissible witnesses and compellable to give evidence. [*See ante*, p. 392.]

24 & 25 *Vict. c.* 70 (*Locomotives Act*, 1861), *s.* 13.]—Nothing in this Act contained shall authorize any person to use upon a highway a locomotive engine which shall be so constructed or used as to cause a public or private nuisance; and every such person so using such engine shall, notwithstanding this Act, be liable to an indictment or action, as the case may be, for such use, where, but for the passing of this Act, such indictment or action could be maintained.

28 & 29 *Vict. c.* 83 (*Locomotives Act*, 1865), *s.* 12.]—Nothing in this Act contained shall authorize any person to use a locomotive which may be so constructed or used as to be a public nuisance at common law; and nothing herein contained shall affect the right of any person to recover damages in respect of any injury he may have sustained in consequence of the use of a locomotive.

59 & 60 *Vict. c.* 36 (*Locomotives on Highways Act*, 1896), *s.* 1.]—(1) The enactments mentioned in the schedule to this Act, and any other enactment restricting the use of locomotives on highways and contained in any public general or local and personal Act in force at the passing of this Act [14th August, 1896], shall not apply to any vehicle propelled by mechanical power if it is under three tons in weight unladen, and is not used for the purpose of drawing more than one vehicle (such vehicle without its locomotive not to exceed in weight unladen four tons), and is so constructed that no smoke or other visible vapour is emitted therefrom except from any temporary or accidental cause; and vehicles so exempted, whether locomotives or drawn by locomotives, are in this Act referred to as light locomotives.

Provided that (*a*) the council of any county or county borough shall have power to make bye-laws preventing or restricting the use of such locomotives upon any bridge within their area, where such council are satisfied that such use would be attended with damage to the bridge or danger to the public:

(*b*) A light locomotive shall be deemed to be a carriage within the meaning of any Act of Parliament, whether public, general, or local, and of any rule, regulation, or bye-law made under any Act of Parliament, and, if used as a carriage of any particular class, shall be deemed to be a carriage of that class, and the law relating to carriages of that class shall apply accordingly. [*See ante*, pp. 802, 855.]

(2) In calculating for the purposes of this Act the weight of a vehicle unladen, the weight of any water, fuel, or accumulators used for the purpose of propulsion shall not be included.

Schedule.]—The *Locomotives Act*, 1861 (24 & 25 *Vict. c.* 70), except so much of *s.* 1 as relates to tolls on locomotives, and *ss.* 7 *and* 13, *supra*. . . . The *Locomotives Act*, 1865 (25 & 26 *Vict. c.* 83). Part II. of the *Highways and Locomotives* (*Amendment*) *Act*, 1878 (41 & 42 *Vict. c.* 77). . . .

61 & 62 *Vict. c.* 29 (*Locomotives Act*, 1898).]—*Regulation and licensing of locomotives used on highways, other than light locomotives within the Act of* 1896.

3 *Edw.* 7, *c.* 36 (*Motor Car Act*, 1903)—*This Act amends the Act of* 1896, *and makes further provision for regulating the use of motor-cars on highways*—*s.* 15.]—Nothing in this Act shall affect any liability of the driver or owner of a motor-car by virtue of any statute or at common law.

Nuisance by Obstruction.

Indictment for obstructing a Common Highway. (*Common Law.*)

Commencement as ante, p. 1201]—and on divers and other days and times between that day and the day of the taking of this inquisition, in a certain street called Thames Street, situate in the parish of ——, in the city of London, being the King's common highway, used for all (*see R.* v. *Lyon, C. & Mar.* 217; *Ry. & M.* 151; 27 *R. R.* 530) the liege subjects of our lord the King, with their horses, coaches, carts, and carriages, to go, return, pass, repass, ride, and labour, at their free will and pleasure, unlawfully and injuriously did [put and place three empty drays, and did then and on the said other days and times there unlawfully and injuriously permit and suffer the said empty drays respectively to be and remain in and upon the King's common highway aforesaid for the space of several hours, to wit, for the space of five hours on each of the said days]: whereby the King's common highway aforesaid, then and on the said other days and times, for and during all the time aforesaid on each of the said days respectively, was obstructed and straitened, so that the liege subjects of our said lord the King could not then and on the said other days and times, go, return, pass, repass, ride, and labour with their horses, coaches, carts, and other carriages, in, through, and along the King's common highway aforesaid, as they ought and were wont and accustomed to do: to the great damage and common nuisance of all his Majesty's liege subjects going, returning, passing, repassing, riding, and labouring in, through, and along the King's common highway aforesaid; to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. *The locality should be clearly specified, and the termini of the road stated without ambiguity. R.* v. *Wright* [1834] 1 *A. & E.* 434. *See precedents of indictments for obstructing a highway*, 3 *Chit. Cr. L.* 607;—*by continuing a hedge across it, Cro. Circ. Comp.* 307;—*by erecting a gate across it*, 6 *Went.* 401, 405: *R.* v. *Botfield, C. & Mar.*

151;—*by building or continuing a building upon it*, 4 *Went.* 181, 191: *R.* v. *Pedly*, 1 *A. & E.* 822;—*by placing carts upon it for the sale of vegetables*, *Cro. Circ. Comp.* 305;—*by taking an unreasonable time in delivering beer to the cellar of a public-house, or depositing or sawing logs thereon*, *R.* v. *Jones*, 3 *Camp.* 230; 13 *R. R.* 797;—*by laying soil upon it*, *Cro. Circ. Comp.* 303;—*by laying rubbish upon it*, *Cro. Circ. Comp.* 315;—*by digging holes in it*, *Cro. Circ. Comp.* 303, 314;—*by digging a horsepond and erecting a cistern in it*, *Cro. Circ. Comp.* 304;—*by stopping a watercourse and thereby overflowing the highway*, *Cro. Circ. Comp.* 376;—*by digging trenches in order to lay down pipes for the supply of gas from mains to private houses*, *R.* v. *Longton Gas Co.*, 2 *E. & E.* 651; 29 *L. J.* (*M. C.*) 118;—*by exhibiting effigies at a window, and thereby attracting a crowd*, *R.* v. *L. Carlile*, 6 *C. & P.* 636: *R.* v. *Moore*, 3 *B. & Ad.* 184; 37 *R. R.* 383: *and see Walker* v. *Brewster*, *L. R.* 5 *Eq.* 25: *Bellamy* v. *Wells*, 39 *W. R.* 158: *Barber* v. *Penley* [1893] 2 *Ch.* 447: *Lowdens* v. *Keaveney* [1903] 2 *Ir. Rep.* 82: *Original Hartlepool Collieries Co.* v. *Gibb.*, 5 *Ch. D.* 713: *Att.-Gen.* v. *Brighton and Hove Co-operative Supply Association* [1900] 1 *Ch.* 276;—*by laying down a tramway in it*, *R.* v. *Train*, 2 *B. & S.* 640; 31 *L. J.* (*M. C.*) 169; 9 *Cox*, 180; 2 *B. & S.* 647, *n.*;—*by setting up telegraph posts on it*, *R.* v. *United Kingdom Telegragh Co., Ltd.*, 31 *L. J.* (*M. C.*) 166; 9 *Cox*, 174; 3 *F. & F.* 73;—*by digging up streets to insert telegraph or telephone wires, even by consent of the local authority, except under the licence or authority of the postmaster-general.* *Id.*

Misdemeanor at common law: fine or imprisonment without hard labour, or both. *See ante*, pp. 238, 240. *On conviction for obstructing a highway, the court may give judgment for prostration, but is not bound to do so if the obstruction has been removed or legalized.* *R.* v. *Incledon*, 13 *East*, 164, 166.

The trial of an indictment for obstructing a highway will not be postponed until after the trial of an action by the prosecutor against the defendant in respect of the same obstruction. *R.* v. *Bowles*, 2 *F. & F.* 371.

As to indictments for jointly obstructing a highway, see R. v. *Lynn*, 1 *C. & P.* 527. *As to grant of new trial on indictment for obstructing a highway, see ante*, p. 292.

Evidence.

The defendant and his wife are admissible as witnesses and compellable to give evidence on the trial of this indictment. 40 *&* 41 *Vict. c.* 14, *s.* 1 (*ante*, pp. 892, 1214).

Prove the way in question to be a common highway. (*See post*, p. 1222.) Old maps may be evidence of reputation, but are not so of the exact boundaries of the highway. *R.* v. *Berger* [1894] 1 *Q. B.* 823; 17 *Cox*, 761. (*See ante*, p. 352.) Prove the obstruction, as stated in the indictment; and prove that it was productive of inconvenience to persons passing through the street, either in carriages or on foot. Where a waggoner occupied one side of a public street in a city, before his warehouses, in loading and unloading his waggons, for several hours at a time, both day and night, and having one waggon at least usually standing before his warehouses, so that no carriages could pass on that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying upon the ground ready for loading; this was held to be a public nuisance, although it appeared that there was room for two carriages to pass on the opposite side of the street. *R.* v. *Russell*, 6 *East*, 427; 8 *R. R.* 506: *and see R.* v. *Jones*, 3 *Camp.* 230; 13 *R. R.* 797: *R.* v. *Cross*, 3 *Camp.* 224; 13 *R. R.* 794: *Harris* v. *Mobbs*, 3 *Ex. D.* 273: *Fritz* v. *Hobson*, 14 *Ch. D.* 542: *Att.-Gen.* v. *Brighton and Hove Co-operative Supply*

Association [1900] 1 *Ch.* 276. Where a highway runs between fences, the right of passage which the public have along it extends *primâ facie*, and unless there be evidence to the contrary, over the whole space between the fences. *Steel* v. *Prickett*, 2 *Stark.* (*N. P.*) 463; 20 *R. R.* 717: *R.* v. *Wright*, 3 *B. & Ad.* 681; 37 *R. R.* 520: *R.* v. *United Kingdom Electric Telegraph Co.*, *ubi supra*: *Locke-King* v. *Woking Urban District Council*, 14 *T. L. R.* 32; 62 *J. P.* 167: *Harvey* v. *Truro R. D. C.* [1903] 2 *Ch.* 638; 68 *J. P. Rep.* 51. The case of *Neeld* v. *Hendon U. D. C.*, 81 *L. T.* 405; 63 *J. P.* 724, turns on the fact that the strips were proved to be waste of a manor. Where the road runs over unfenced land, there is no such presumption. *Easton* v. *Richmond Highway Board*, *L. R.* 7 *Q. B.* 69; *and see Pratt on Highways* (15th ed.), pp. 36, 37. A permanent obstruction erected upon a highway without lawful authority, and which renders the way less commodious than before to the public, is a public nuisance at common law. *R.* v. *United Kingdom Electric Telegraph Co.*, *ubi supra*. Where, therefore, the defendants placed telegraph posts upon a highway and permanently kept them there, such posts being of such size and solidity as to obstruct the passage of carriages and horses, or foot passengers, upon the parts of the highway where they stood, the defendants were held liable to be found guilty upon an indictment for a nuisance. And it was also held, that it made no difference in the defendant's liability to conviction that the posts were not placed upon the hard or metalled part of the highway, or upon a footpath artificially formed upon it, or that sufficient space was left for the public traffic. *Id.* On an indictment for the continuance of a nuisance, viz., the continuance of a wall obstructing a highway, the record of the judgment on a former indictment for the same nuisance against the same defendant on which he was convicted is conclusive evidence that the *locus in quo* is a highway, and that the wall is a nuisance. *R.* v. *Maybury*, 4 *F. & F.* 90. Although an Act of Parliament authorizes alterations in a public highway, yet if those alterations are not made with reasonable care, and cause unnecessary danger to persons using the highway, the contractor executing the works may be indicted for obstructing the highway. *R.* v. *Burt*, 11 *Cox*, 399, *Hawkins*, J.

The use of locomotives and motor-cars on highways and other roads is regulated by 24 *&* 25 *Vict. c.* 70, and 28 *&* 29 *Vict. c.* 83, and by 41 *&* 42 *Vict. c.* 77, *part ii.*; 59 *&* 60 *Vict. c.* 36; 61 *&* 62 *Vict. c.* 29, and 3 *Edw.* 7, *c.* 36; but the two first-mentioned Acts in *ss.* 13 and 12 respectively (*ante*, p. 1214) forbid their being so constructed or used as to be a nuisance at common law; and it has been held that the use of locomotives and trucks on a highway does not amount to a nuisance by obstruction to the highway, unless such use creates a substantial obstruction, and occasions delay and inconvenience to the public substantially greater than would have been caused by horses and carts. *R.* v. *Chittenden*, 15 *Cox*, 725, *Hawkins*, J. Uninterrupted use of part of a street as a fair or market for rags has been held an answer to an indictment for obstruction. *R.* v. *Smith* [1802] 4 *Esp.* 111 (*Rag Fair case*), *Lord Ellenborough*, C.J.

Where a statute enacted, that the erection of a building within certain limits should be deemed a "common nuisance," and also gave a summary remedy, by proceedings before magistrates, it was held that the offender might be indicted for the nuisance. *R.* v. *Gregory*, 5 *B. & Ad.* 555; 3 *L. J.* (*M. C.*) 25. (*See ante*, pp. 3–5; *and R.* v. *Charlesworth*, 16 *Q. B.* 1012.)

Where the way is proved to be a highway, and to be obstructed, the only defence is the existence of statutory authority to obstruct it, or that it has been closed by order of justices under 5 *&* 6 *W.* 4, *c.* 50, *s.* 84, or in

London under *Michael Angelo Taylor's Act* (57 *G.* 3, *c. xxix.*), with the consents required by that Act and the *Local Government Acts* of 1888 and 1894. *See Pratt on Highways* (15th. ed.), *chap. vi.*; or that, if it is a street in a town, it has been closed under *s.* 66 of the *Towns Police Clauses Act*, 1847. *See R.* v. *Platts*, 49 *L. J.* (*Q. B.*) 848; 28 *W. R.* 915.

Upon the trial of an indictment for obstructing a highway, an agreement was approved by the judge that the prosecutor should consent to a verdict of "not guilty" if defendants restored the highway within seven years. The defendants did not carry out their part of the agreement, and an action was thereupon brought against them for specific performance or damages. It was held, however, that the action would not lie, as the consideration, the consenting to the verdict of "not guilty," was illegal. *Windhill Local Board* v. *Vint*, 45 *Ch. D.* 351; 59 *L. J.* (*Ch.*) 608.

In some cases the consent of the highway authority may be lawful, and an answer to an indictment for encroachment or obstruction. *See R.* v. *Burrell*, 10 *Cox*, 462 (*C. C. R.*).

Indictment for obstructing the Navigation of a Public River.
(*Common Law.*)

Gloucester, to wit:—The jurors for our lord the King upon their oath present, that the river Severn, that is to say, a certain part of the said river lying and being in the county of Gloucester, is [and from the time whereof the memory of man is not to the contrary, hath been] an ancient river, and King's ancient and common highway for all the liege subjects of our lord the King and his predecessors, with their ships, barges, lighters, boats, wherries, and other vessels, to navigate, sail, row, pass, repass, and labour at their free will and pleasure, without any impediment or obstruction whatsoever. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., on the first day of June, in the year of our Lord ——, at the parish of ——, in the county aforesaid, unlawfully, wilfully, and injuriously did erect, fix, put up, place, and set in the said river and King's ancient and common highway, near a certain place called Guy's Sharl, a certain snare, trap, machine, and engine, commonly called putts, for the taking and catching of fish, and composed of wood, wooden stakes, and twigs; and that he the said J.S., on the said first day of June, in the year last aforesaid, and on divers other days and times between that day and the day of the taking this inquisition at the parish aforesaid, in the county aforesaid, in the said river and King's ancient and common highway there, the said snare, trap, machine, and engine, called putts, unlawfully, wilfully, and injuriously did continue, and still doth continue, so erected, fixed, put, placed, and set in the said river and King's ancient and common highway as aforesaid; by means whereof the navigation and free passage of, in, through, along, and upon the said river Severn and King's ancient and common highway, on the day and year aforesaid, and on the said other days and times, hath been, and still is, greatly straitened, obstructed, and confined, so that the liege subjects of our said lord the King, navigating, sailing, rowing, passing, repassing, and labouring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, along, and upon the said river and King's ancient and common highway there, on the same day and year aforesaid, and on the said other days and times, could not, nor yet can go, navigate, sail, row, pass, repass, and labour with their ships,

barges, lighters, boats, wherries, and other vessels, upon and about their lawful and necessary affairs and occasions, in, through, along, and upon the said river and King's ancient and common highway there, in so free and uninterrupted a manner as of right they ought, and before have been used and accustomed to do; to the great damage and common nuisance of all the liege subjects of our said lord the King, navigating, sailing, rowing, passing, repassing, and labouring with their ships, barges, lighters, boats, wherries, and other vessels, in, through, along, and upon the said river Severn and King's ancient and common highway there; to the great obstruction to the trade and navigation of and upon the said river, to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. [*The words in brackets are not essential; see post*, p. 1221.]

Misdemeanor: fine, or imprisonment without hard labour, or both (*see ante*, pp. 238, 240). *Also, to divert a part of a public river, whereby the current of it is weakened, and rendered incapable of carrying vessels of the same burthen as it could before, is a common nuisance.* 1 *Hawk. c.* 75, *s.* 11. *See R.* v. *Grosvenor*, 2 *Stark.* (*N. P.*) 511; 20 *R. R.* 732, *an indictment for erecting a wharf in the Thames to the injury of navigation: R.* v. *Ward*, 4 *A. & E.* 384: *Att.-Gen.* v. *Terry*, *L. R.* 9 *Ch. App.* 423, 426 (*disapproving R.* v. *Russell*, 6 *B. & C.* 566; 30 *R. R.* 432; 5 *L. J.* (*K. B.*) 221): *R.* v. *Tindall*, 6 *A. & E.* 143; 1 *Nev. & P.* 719; 6 *L. J.* (*M. C.*) 97: *R.* v. *Morris*, 1 *B. & Ad.* 441: *and R.* v. *Randall*, *C. & Mar.* 496 (*ante*, p. 1185). *If a ship or other vessel sink by accident in a river, although it obstruct the navigation, yet the owner is not indictable, as for a nuisance, for not removing it. R.* v. *Watts*, 2 *Esp.* 675; 5 *R. R.* 766. *As to the remedy in such cases, see the Crystal* [1894] *App. Cas.* 508: *Barraclough* v. *Brown* [1897] *App. Cas.* 615.

Evidence.

The defendant and his wife are admissible as witnesses and compellable to give evidence on the trial of this indictment. 40 *&* 41 *Vict. c.* 14, *s.* 1 (*ante*, pp. 892, 1214).

Prove that the river in question is public and navigable in that part of it which was obstructed (*see R.* v. *Betts*, 16 *Q. B.* 1022: *Simpson* v. *Att.-Gen.* [1904] *App. Cas.* 476); and prove the obstruction stated in the indictment, in the same manner as under the last precedent. Upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths therein, for loading ships with coals, the jury were directed to acquit the defendant, if they thought the abridgment of the right of passage occasioned by these staiths was for a public purpose, and occasioned a public benefit; and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and the judge pointed out to the jury that, by reason of the staiths, the coals were supplied better and at a cheaper rate than they otherwise could be, which was a public benefit; and it was held that this direction was right. *R.* v. *Russell* (*ubi supra*), *Lord Tenterden*, C.J., *dissentiente.* But the opinion of the majority was dissented from in *R.* v. *Ward*, 4 *A. & E.* 384; in *R.* v. *Betts*, 16 *Q. B.* 1022, and in *Att.-Gen.* v. *Terry* (*ante*, p. 1185); *and see Mayor, etc., Norwich* v. *Norfolk Ry. Co.*, 4 *E. & B.* 397, 440, and the cases collected (*supra*).

The building of a bridge, or of a wall or embankment, partly in the bed of a navigable river, does not *necessarily* constitute a nuisance; the question whether in fact it is so or not in the particular instance is for a jury; and where the verdict of a jury negatives any actual obstruction, that is in effect an acquittal. *R.* v. *Betts*, 16 *Q. B.* 1022: *see R.* v.

Charlesworth, Id. 1012. Where the judge at the trial asked the jury whether they thought the erection would be "a material nuisance;" in which case they were to find a verdict of guilty: but told them that if they thought the "nuisance" was so slight, uncertain and rare, that the defendant ought not to be made criminally liable for it, they should acquit him; and the jury saying that they considered the erection, "although a nuisance, was not sufficiently so to render the defendant criminally liable," he directed an acquittal: the court held that the charge was to be understood as meaning, not that a party may legally commit a small nuisance, but that an obstruction might be so insignificant as not to constitute a nuisance; and that the jury must be understood as finding that the obstruction in question was so insignificant; and so that there was not a misdirection which would warrant a new trial. *R.* v. *Russell*, 3 *E. & B.* 942; 23 *L. J.* (*M. C.*) 173: *and see R.* v. *Tindall*, 6 *A. & E.* 143, 152; 6 *L. J.* (*M. C.*) 97. It is a defence to an indictment for obstructing a public navigable river to prove that the obstruction was erected under statutory authority. *Jolliffe* v. *Wallasey L. B., L. R.* 9 *C. P.* 62, 82: *Lyon* v. *Fishmongers Co.*, 1 *App. Cas.* 662.

Where the workmen of the defendant, in working his colliery, stacked the refuse in such a manner that it fell into and obstructed a navigable river, and the defendant was indicted for a nuisance in causing such obstruction, it was held, that the fact of his not having personally superintended the works, of his having given express orders to the workmen that the refuse should be deposited in a particular place where it would not do any harm, and that it was not to be thrown into the river, would not relieve him from liability upon the indictment. *R.* v. *Stephens*, *L. R.* 1 *Q. B.* 702; 35 *L. J.* (*Q. B.*) 251; 7 *B. & S.* 710; 10 *Cox*, 340. *Cf. Chisholm* v. *Doulton*, 22 *Q. B. D.* 736 (*ante*, pp. 33–35).

NON-REPAIR OF HIGHWAYS.

Indictment against a Parish for not repairing a Highway. (*a*) (*Common Law*).

Middlesex to wit:—The jurors for our lord the King upon their oath present, that [from the time whereof the memory of man is not to the contrary] there [was and yet] is a certain common and ancient King's highway, leading from the town of Hatfield, in the county of Hertford, towards and unto the city of London, used by and for all the liege subjects of our lord the King and his predecessors, with their horses, coaches, carts, and other carriages, to go, return, pass, repass, ride and labour at their free will and pleasure; and that a certain part of the said common and ancient King's highway called —— lane, situate in the parish of Fryern Barnet, in the county of Middlesex, extending from a certain field there called ——, unto a certain bridge called —— bridge, containing in length forty yards, and in breadth eight yards, on the first day of June, in the year of our Lord ——, and continually afterwards until the day of the taking of this inquisition, at the parish aforesaid, in the county last aforesaid, was and is yet very ruinous, miry, deep, broken,

(*a*) This precedent is retained notwithstanding the changes in the law as to highways affected by the *Local Government Acts of* 1888 *and* 1894 (*ante*, p. 1213), because the procedure under *ss.* 94, 95 of the *Highway Act*, 1835 (*ante*, p. 1210), is not impliedly repealed by subsequent legislation. *R.* v. *Morse* [1904] *W. N.* 114 (*K. B. D.*); *and see the precedents*, 3 *Chit. Cr. L.* 576, *et seq.*

and in great decay, for want of due reparation and amendment of the same, so that the liege subjects of our said lord the King, during the time last aforesaid, could not go, return, pass, repass, ride and labour with their horses, coaches, carts, and other carriages, in, through and along the King's common highway aforesaid, as they ought and were wont and accustomed to do, without great danger of their lives, and the loss of their goods; to the great damage and common nuisance of all his Majesty's liege subjects going, returning, passing, repassing, riding and labouring, in, through and along the King's common highway aforesaid; to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown, and dignity: * And that the inhabitants of the said parish of Fryern Barnet, in the said county of Middlesex, the common highway as aforesaid, so as aforesaid being in decay, ought to repair and amend, when and so often as it should or shall be necessary.

The question has been raised, but not decided, whether in the case of indictments by order of justices under 5 & 6 *W.* 4, *c.* 50, *s.* 95, *or* 41 & 42 *Vict. c.* 77, *s.* 10, *it is necessary to set out the preliminary proceedings. It is safer to set them out. R.* v. *Biggleswade R. D. C.* 64: 64 *J. P.* 442, *Wright*, J.: *R.* v. *Mayor, etc., of Poole,* 19 *Q. B. D.* 810.

An indictment against a parish for not repairing a horse and footway is the same as the above, only substituting for the word "highway" *the words* "pack and prime way," *and for the words* "with their horses, coaches, carts," *etc., in the commencement, substituting the words* "on horseback and on foot, to go, return, pass, repass, ride, labour and drive their cattle at their free will and pleasure;" *and for the words* "with their horses, coaches, carts, and other carriages," *near the end of the count, substituting the words* "with their horses and cattle."

If there be other parts of the highway out of repair, within the same parish, insert other counts specifying them.

The indictment usually states the highway to have been so immemorially, but this is unnecessary; it is sufficient to allege that it is a common public highway, without showing how it became so, and the words in brackets are not essential. Aspindall v. *Brown,* 3 *T. R.* 265: *R.* v. *Turweston,* 16 *Q. B.* 109; 20 *L. J.* (*M. C.*) 46. *Although usual, it is unnecessary to show the* termini *of the way;* 2 *Wms. Saund.* 158 (*c*): *R.* v. *Haddock, Andr.* 137, 145: *R.* v. *St. Weonard's,* 6 *C. & P.* 582; *yet perhaps it is safer to do so.* 1 *Hawk c.* 76, *ss.* 229, 233. *If stated, they must be stated correctly, for a variance between the indictment and evidence in this respect would be fatal, unless amended. R.* v. *Great Canfield,* 6 *Esp.* 136: *R.* v. *St. Weonard's, supra. If the highway be described as leading from the township of A. unto the town of B., the* termini *A. and B. are excluded; and therefore, if the offence was committed in the township of A., the defendant must be acquitted. R.* v. *Botfield, C. & Mar.* 151. *Where a public footway led from A. to the gate of a churchyard, and communicated through that gate by a public path which in one part of it formed an acute angle with the church, it was held that it might be described as a footway leading from A. towards and unto the church. R.* v. *Marchioness of Downshire,* 4 *A. & E.* 232; 5 *Nev. & M.* 662. *Where the highway was described as leading from the village of T. to the village of E., and the evidence was that it led from the village of T. into a turnpike road from A. to B., and then, after passing along it for some distance, branched off to the village of E., it was held well described. R.* v. *Turweston,* 16 *Q. B.* 109; 20 *L. J.* (*M. C.*) 46. *Where the indictment stated the way to be a carriage-way leading from the town of A., in the county of B., towards and unto the village of E., in the same county, and the part charged to be out of repair was a portion of a lane called F. lane, and it appeared in evidence that, to go from the town of A. to the village of E. with a carriage, a person*

must go four miles along the C. turnpike road, then all along F. lane, and then cross the W. turnpike road, and for a short distance go along a road which goes from the W. turnpike road to the village of E.: it was held, that the road was not misdescribed. R. v. *Steventon*, 1 *C. & K.* 55. *Where an indictment charged the obstruction of a footway from A. to C., and it appeared that the way was a carriage-way from A. to B., and a footway from B. to C., the obstruction being between B. and C., this was held, if a misdescription, amendable under* 14 *&* 15 *Vict. c.* 100, *s.* 1 (*ante*, p. 52). *R.* v. *Sturge*, 3 *E. & B.* 734; 23 *L. J.* (*M. C.*) 172. *The indictment, however, must show with certainty the part of the road which is out of repair, how many yards in length, how many in breadth, etc.* 1 *Hawk. c.* 76, *ss.* 234, 235; *but see* 2 *Wms. Saund.* 158 (*d*); *and that it is within the parish; see R.* v. *Hartford*, 1 *Cowp.* 111: *R.* v. *Gamlingay*, 3 *T. R.* 513: *R.* v. *Knight*, 7 *B. & C.* 413: *R.* v. *Upton-on-Severn*, 6 *C. & P.* 133; *and if the parish be situate part in one county and part in another, the indictment must be against the whole parish, although the road out of repair were in a part of the parish lying in one county only; R.* v. *Clifton*, 5 *T. R.* 498; 2 *R. R.* 657: sed contra *R.* v. *Weston*, 4 *Burr.* 2507; *but the venue must nevertheless be laid in the county where that part of the road out of repair was situate. In R.* v. *Landulph*, 1 *M. & Rob.* 393, *it was held that where two parishes are separated by a river, the* medium filum aquæ *is the presumptive boundary between them. But this view was doubted in Bridgwater Trustees* v. *Bootle, L. R.* 2 *Q. B.* 4, 7. *Where a public way crosses the bed of a river, which washes over it at every tide, and leaves a deposit of mud, the parish is not bound to make it good. R.* v. *Landulph* (*ubi supra*). *It has been held that the liability of the inhabitants of a parish to indictment has not been transferred to the parish council by that Act; R.* v. *Shipley Parish Council*, 18 *Cox*, 530; 61 *J. P.* 488; *but still exists. R.* v. *Morse* [1904] *W. N.* 114 (*K. B. D.*) *As to the liability to indictment of district councils, including borough councils, see ante*, p. 1213.

Misdemeanor: fine. As to the levying and application of such fine, see ante, p. 1211; 5 *&* 6 *W.* 4, *c.* 50, *s.* 96; *and cases there cited.*

Plea of General Issue.

And J. S. and J. N., two of the inhabitants of the said parish of Fryern Barnet, by A. B., their attorney, for themselves and the rest of the inhabitants of the said parish, come into court here, and having heard the said indictment read, say they are not guilty of the said premises in the said indictment above specified and charged upon them; and of this they put themselves upon the country, etc. (*See ante*, p. 179.)

Evidence for the Prosecution under the General Issue.

The parishioners of the defendant parish and their wives may be compelled to give evidence for the prosecution. 40 *&* 41 *Vict. c.* 14, *s.* 1 (*ante*, pp, 392, 1214).

1. The prosecutor must prove that the road or street in question is a public highway—that is to say, a way open and common to all persons. 1 *Hawk. c.* 76, *s.* 1; *see* 3 *Chit. Cr. L.* 565, *et seq.*: *R.* v. *Richards*, 8 *T. R.* 634; 5 *R. R.* 489: *Rugby Charity Trustees* v. *Merryweather*, 11 *East* 376, *n*; 5 *Taunt.* 125: *R.* v. *Lloyd*, 1 *Camp.* 260: *R.* v. *Barr*, 4 *Camp.* 16: *R.* v. *St. Benedict's, Cambridge*, 4 *B. & Ald.* 447: *R.* v. *Mellor*, 1 *B. & Ad.* 32: *R.* v. *Paul*, 2 *M. & Rob.* 307. A highway may be so by prescription—*i.e.*, user as a highway for the time of legal memory—or by dedication and acceptance. Highways are not within the *Prescription Act*, 1832 (2 *&* 3 *W.* 4, *c.* 71), and proof of common law prescription is in practice never now given, proof of dedication

being simpler. *See Mann* v. *Brodie*, 10 *App. Cas.* 378, 386. Once the way is proved to be a highway, mere disuse for however long does not deprive the public of their right of way. *Harvey* v. *Truro R. D. C.* [1903] 2 *Ch.* 638: *R.* v. *Edwards* [1847] 11 *J. P.* 602. Where a footway was laid out under an inclosure award, it was held that user by wheeled traffic for forty or fifty years was in its inception illegal, and could not be legalized by length of time. *Sheringham U. D. C.* v. *Halsey* [1904] 68 *J. P. Rep.* 395. If the *termini* be set out in the indictment, they must be proved as laid. *R.* v. *Great Canfield* (*ante*, p. 1221): *R.* v. *St. Weonard's* (*ante*, p. 1221). A misdescription of the *termini* may, however, be amended under 14 & 15 *Vict. c.* 100, *s.* 1 (*ante*, p. 52), if the variance be not calculated to prejudice the defence. *R.* v. *Sturge*, 3 *E. & B.* 734; 23 *L. J.* (*M. C.*) 172. As to the admissibility and effect of maps, *see ante*, pp. 352, 1216. A road or street may *in law* be a public highway, though it be not a *thoroughfare*; it is a question of fact for the jury in each case whether it is so or not. *Bateman* v. *Bluck*, 18 *Q. B.* 870; 21 *L. J.* (*Q. B.*) 406: *Bourke* v. *Davis*, 44 *Ch. D.* 110, 123. But although the lawful stoppage of access to *one* end of a highway does not make it cease to be a highway (*Wood* v. *Veal*, 5 *B. & Ald.* 454: *R.* v. *Downshire* (*Marquis*), 4 *Ad. & E.* 698), a highway ceases to be such where the access to it at *both* ends has become impassable by reason of other highways leading to it having been legally stopped up. *Bailey* v. *Jamieson*, 1 *C. P. D.* 329. A road dedicated to and used by the public becomes (subject to 5 & 6 *W.* 4, *c.* 50, *s.* 23) a highway which the parish must repair, although neither such dedication nor such use have been adopted or acquiesced in by the parish, and although the parish may in fact never have repaired the road. *R.* v. *Leake*, 5 *B. & Ad.* 469; 2 *Nev. & M.* 583: *R.* v. *Newbold*, 11 *Cox*, 231: *see Roberts* v. *Hunt*, 15 *Q. B.* 17: *R.* v. *Lordsmere*, 15 *Q. B.* 689; 89 *L. J.* (*M. C.*) 215. The absence of repair by the parish is, however, a circumstance (to be weighed with the other evidence in the case) going to prove that the road is not a public one. *R.* v. *Leake*: *R.* v. *Newbold* (*ubi supra*). Public user of a road for many years is evidence from which the jury may infer a dedication, though it may not be clear in whom the ownership of the soil is vested. *R.* v. *East Mark*, 11 *Q. B.* 877; 11 *L. J.* (*Q. B.*) 177: *see Poole* v. *Huskinson*, 11 *M. & W.* 827: *R.* v. *Petrie*, 4 *E. & B.* 737. A public user, even for less than twenty years, *may* be sufficient evidence for this purpose, if clearly shown to have been acquiesced in by the owner of the soil. *R.* v. *Chorley*, 12 *Q. B.* 515. Such user, if uninterrupted and with the knowledge and consent of the owner, is sufficient evidence of intention to dedicate. *Leckhampton Quarries Co.* v. *Ballinger*, 68 *J. P. Rep.* 464, *Eady*, J. The *Highway Act*, 1835 (5 & 6 *W.* 4, *c.* 50), does not apply retrospectively to roads completely public by dedication before the Act, but only to roads then made, and in progress of dedication. *R.* v. *West Mark*, 2 *M. & Rob.* 305. Where a road has been dedicated to the public, but the conditions have not yet been fulfilled which, under the 23rd section of that Act, make it repairable by the parish, the owner of the soil is not liable for its repair. *R.* v. *Wilson*, 18 *Q. B.* 348: *see Roberts* v. *Hunt*, 15 *Q. B.* 17. A road newly formed, or continued under an award made under an Inclosure Act, is not repairable by the parish until it has been declared by justices in special sessions to be fully and sufficiently formed, completed, and repaired, under 41 *G.* 3, *c.* 109, *s.* 9: *R.* v. *Hatfield*, 4 *A. & E.* 156; even though the parish had in fact repaired it before and after the award, which was made eighteen years ago. *R.* v. *East Hagbourne, Bell*, 135; 8 *Cox*, 135 (*C. C. R.*). There is no such inconsistency between the powers and duties of commissioners of sewers to keep up a sea or river wall, and a right of way enjoyed by the public along such a wall, as to

prevent such a right of way being acquired:—evidence of long and uninterrupted user may establish the right of way in such a case as well as in the ordinary case of a right of way claimed and used over the land of an individual. *Greenwich District Board of Works* v. *Maudslay*, *L. R.* 5 *Q. B.* 397; 39 *L. J.* (*Q. B.*) 205.

There cannot in point of law be a dedication to a *part* of the public, but it seems that there may be a dedication partial as to the *use* of the road by the whole public; *e.g.*, that it shall be used on foot only; or for all purposes except carrying coals; or that it shall continue subject to such use of portions of it as the occupiers of adjoining houses had been accustomed to make. *See Marquis of Stafford* v. *Coyney*, 7 *B. & C.* 257: *Le Neve* v. *Vestry of Mile End Old Town*, 8 *E. & B.* 1054: *Morant* v. *Chamberlin*, 6 *H. & N.* 541. So a foot road may be dedicated to and accepted by the public as a highway, subject to the inconvenience of being occasionally ploughed up, and there is no legal objection to such a limited dedication of a way. *Mercer* v. *Woodgate*, *L. R.* 5 *Q. B.* 26; 39 *L. J.* (*M. C.*) 21. There cannot in point of law be a dedication to the public for a limited time. *R.* v. *Lordsmere*, 15 *Q. B.* 689; 19 *L. J.* (*M. C.*) 220, *Byles*, J. There must be acceptance by the public. *Att.-Gen.* v. *Biphosphated Guano Co.*, 11 *Ch. D.* 327: *Cubitt* v. *Maxse*, *L. R.* 8 *C. P.* 715; 42 *L. J.* (*C. P.*) 278.

Where a highway is supported by a wall, and such wall becomes dangerous by reason of non-repair, the inhabitants of the place in which such highway is situate, if liable to repair the highway, can be convicted upon an indictment for non-repair, it being a question for the jury whether the walls form part of the highway or not. *R.* v. *Lordsmere*, 16 *Cox*, 65 (*C. C. R.*). *Cf. Kent County Council* v. *Sandgate U. D. C.*, 61 *J. P.* 517 (*C. A.*); 79 *L. T.* 425: *Att.-Gen.* v. *Staffordshire County Council* [1905] 1 *Ch.* 336.

A parish cannot be convicted for not rebuilding a sea wall washed away by the sea, over the top of which the alleged highway used to pass. *R.* v. *Paul*, 2 *M. & Rob.* 307. So, where part of a highway had, at the time when the indictment was preferred, been destroyed by the encroachments of the sea, and the surface of the existing road was in good repair up to the point from which it had been destroyed, at which point the road was terminated by a perpendicular cliff, caused by successive encroachments; it was held that there was no obligation on the parish to provide an available carriage-way from that point, in the line of the former road, down to the beach. *R.* v. *Hornsea*, *Dears.* 291; 23 *L. J.* (*M. C.*) 59: *see also R.* v. *Bamber*, 5 *Q. B.* 279; 1 *Dav. & M.* 367; 13 *L. J.* (*M. C.*) 13 (*post*, p. 1231). Where, however, part of a highway which ran along the slope of a hill several hundred feet above the level of a valley beneath, was carried away into the valley by a landslip and its place filled up with débris, but the line of the part of the highway so carried away was known and admitted, and there was evidence that it was practicable to form a road along the old track of a similar character to the adjoining parts of the old road at a cost of 341*l.*, it was held that there was no proof of such destruction of the highway as to exempt the parish from their liability to repair it. *R.* v. *Greenhow*, 1 *Q. B. D.* 703; 45 *L. J.* (*M. C.*) 141.

The record of a former conviction of the parish or of a former judgment against them on a presentment for non-repair of the same road is, where not guilty alone is pleaded, conclusive evidence against the defendants (in the absence of fraud or want of notice) that the highway is in the parish, and that the parish was liable to repair it. *R.* v. *St. Pancras*, *Peake* (3rd ed.), 286: *R.* v. *Whitney*, 7 *C. & P.* 208: *R.* v. *Haughton*,

1 *E. & B.* 501; 6 *Cox*, 101. And a conviction on an indictment against an adjoining parish, for non-repair of a piece of road in continuation of the way in question, was held admissible in evidence to prove that the way in question was a highway. *R.* v. *Brightside Bierlow*, 13 *Q. B.* 933; 19 *L. J.* (*M. C.*) 50.

2. He must prove that that part of the road in question which is out of repair, is within the parish charged by the indictment, and any local description given of the part out of repair must be proved as laid. (*See ante*, pp. 67, 298.) A previous conviction for non-repair has been held conclusive that the highway is within the parish. *R.* v. *Nether Hallam*, 6 *Cox*, 435. Want of certainty in such description cannot be taken advantage of under the general issue. *R.* v. *Hammersmith*, 1 *Stark.* (*N. P.*) 357.

3. He must prove the part of the road so described to be out of repair, as stated in the indictment. *See R.* v. *Stretford*, 2 *Ld. Raym.* 1169. The liability either at common law or by statute is general, to repair and maintain the highway, leaving the person liable to find out the best or an adequate means of discharging the liability. *See Att.-Gen.* v. *Staffordshire County Council* [1905] 1 *Ch.* 336, and cases there cited.

4. It is not necessary to prove the liability of the parish to repair; for the law presumes that until the contrary is shown. *R.* v. *Great Broughton*, 5 *Burr.* 2700: *R.* v. *Leake*, 5 *B. & Ad.* 469. And this primary liability of the inhabitants of the parish was held not to be taken away even by a statute which imposed on a canal company the liability to repair the same highway, out of tolls granted to them for that purpose. *R.* v. *Brightside Bierlow*, 13 *Q. B.* 933; 19 *L. J.* (*M. C.*) 50. In the case of highways created since 1835, the liability of the parish, etc., to repair must be proved. As to the effect of the transfer to rural district councils and parish councils of the control of highways, etc., under the *Local Government Act*, 1894, *see R.* v. *Shipley Parish Council*, 18 *Cox*, 531; 61 *J. P.* 488; *and see R.* v. *Morse* (*ante*, p. 1220, *n.*).

Evidence for the Parish, under the General Issue.

The parishioners of the defendant parish and their wives are competent and compellable witnesses. 40 *&* 41 *Vict. c.* 14, *s.* 1 (*ante*, p. 1214).

Under the general issue, the parish may prove that the road in question is not a common highway, or that it is in good and sufficient repair, or that the part out of repair is not within the parish. 2 *Wms. Saund.* 158 (*a*), *in notis*: *R.* v. *Norwich*, 1 *Str.* 177, 181. As to rebutting the presumption of dedication, *see Neeld* v. *Hendon U. D. C.* [1899] 63 *J. P.* 724; 81 *L. T.* 481, explained in *Harvey* v. *Truro R. D. C.* [1903] 2 *Ch.* 638. As to the presumption with reference to ownership of ditches, *see R.* v. *Waring* [1899] 63 *J. P.* 788: *Simcox* v. *Yardley R. D. C.* [1905] 69 *J. P. Rep.* 66; and of the soil of the highway, *see Mappin Bros.* v. *Liberty & Co.* [1903] 1 *Ch.* 118. They cannot prove the liability of particular persons, *ratione tenuræ*, or the like, or the liability of a particular part of the parish by custom, to repair the road in question; for those defences must be made the subject of a special plea in all cases; *R.* v. *St. Andrew's, Holborn*, 1 *Mod.* 112; *Keb.* 301 (as to which *see R.* v. *Weston*, 4 *Burr.* 2511, *Mansfield*, L.C.J.); *Anon.*, 1 *Vent.* 256; 1 *Hawk. c.* 76, *s.* 9; 2 *Wms. Saund.* 159 (*a*), *n.* (10); *R.* v. *Sheffield*, 2 *T. R.* 106: *R.* v. *Penderryn, Id.* 513: *R.* v. *Hatfield*, 4 *B. & Ald.* 75: *R.* v. *Netherthong*, 2 *B. & Ald.* 179; unless the parish have been relieved of their liability by a public statute. *R.* v. *St. George, Hanover Square*, 3 *Camp.* 222:

The inhabitants of a parish are not bound to repair a way used by the

public and repaired by the parish for twenty years if there be no owner who could dedicate it, and the repairs by the parish be shown to have been begun and continued under a mistaken notion of the liability to repair. *R.* v. *Edmonton*, 1 *M. & Rob.* 24. *See R.* v. *Leake* (*ante*, p. 1225).

After verdict for the defendants for the non-repair of a highway, the court in one case refused to grant a new trial on the ground of the improper rejection of evidence, but suspended the judgment, in order that another indictment might be preferred. *R.* v. *Sutton*, 5 *B. & Ad.* 52; 2 *Nev. & M.* 57; 2 *L. J.* (*M. C.*) 75. See further as to the grant of a new trial in such cases, *ante*, p. 292.

Plea that others, ratione tenuræ, *are bound to repair.*

And J. S. and J. N., two of the inhabitants of the said parish of Fryern Barnet, by A. B., their solicitor, for themselves and the rest of the inhabitants of the said parish (excepting one A. C.), come in to court here, and having heard the said indictment read, say, that our lord the King ought not further to prosecute the said indictment against the inhabitants of the parish aforesaid (excepting the said A. C. as aforesaid); because they say, that as to the said part of the said highway in the said indictment described to be ruinous, miry, deep, broken, and in great decay, the said A. C., by reason of his tenure of certain lands and tenements called ——, lying and being in the said parish, ought to repair and amend the said part of the said highway so alleged to be ruinous, miry, deep, broken, and in decay as aforesaid, when and so often as there should be occasion [as the said A. C., and all those who held the said lands and tenements for the time being, from the time whereof the memory of man is not to the contrary, hitherto were used and accustomed, and of right ought to do]. And this they, the said J. S. and J. N., are ready to verify: wherefore they pray judgment, and that they and the rest of the inhabitants of the said parish of Fryern Barnet (excepting the said A. C. as aforesaid) by the court here may be dismissed and discharged from the said premises in the said indictment above specified. *See the precedents, Cro. Circ. Comp.* 322, 391; 4 *Went.* 162, 171, 176, 184; 6 *Went.* 411.

It is usual, but not necessary, to allege the prescription as in the above precedents between the brackets. 2 *Wms. Saund.* 159 (*c*), *n.* (9). *It is usual, also, after stating the liability to repair,* ratione tenuræ, *to add a special traverse of the liability of the parish to repair; but this is improper, and probably demurrable, as being a traverse of a conclusion of law. See* 1 *Saund.* 23, *n.* (5); 2 *Wms. Saund.* 159 (*a*), *n.* (10). *See, however, R.* v. *Eccles field*, 1 *B. & Ald.* 348 (*post*, p. 1227).

An individual cannot be bound by prescription to repair a highway, unless it be in respect of the tenure of his land, taking of toll or other profit. 2 *Wms. Saund.* 158 (*f*), *n.* (9).

It seems that a parish cannot be liable by prescription to repair a highway situate in another parish. R. v. *Ashby Folville, L. R.* 1 *Q. B.* 213; 35 *L. J.* (*M. C.*) 154. *Nor can a parish get rid of its liability to repair, and throw the liability to indictment upon an individual, by reason of any agreement between the individual and others. R.* v. *Liverpool* (*Mayor, etc.*), 3 *East*, 86: *R.* v. *Beeby*, 8 *L. J.* (*M. C.*) 38. *It is therefore necessary, in all cases where the parish in which the road is situate throws the liability to repair upon an individual or upon another parish, etc., to state in the plea the consideration for such liability; merely stating a prescription will not be sufficient, except in the case of a corporation sole or aggregate, who may be bound by a prescription or usage, without consideration; R.* v. *St. Giles, Cambridge*, 5 *M. & Sel.*

260; 17 *R. R.* 320: *R.* v. *Ashby Folville, L. R.* 1 *Q. B.* 213; 35 *L. J.* (*M. C.*) 154; *and except, also, where the liability is thrown upon a district or township in the same parish, there an immemorial custom for the district to repair all the roads within it may be pleaded, without expressly stating any consideration for it, for the consideration appears sufficiently upon the face of it. R.* v. *Eccleşfield,* 1 *B. & Ald.* 348; 19 *R. R.* 335: *and R.* v. *W. R. of Yorkshire,* 4 *B. & Ald.* 623; 23 *R. R.* 421. *To an indictment against the inhabitants of the parish of A. for the non-repair of a highway within the parish, there was a plea that the inhabitants of the parish of G. from time immemorial, and in consideration of levying and receiving certain rates in respect of certain lands in the parish of A. adjacent to the highway, had repaired and ought to repair the highway so often as there should be occasion. Replication, that the agreement in the plea mentioned was duly determined by notice. On demurrer to the replication the plea was held bad, since the alleged consideration was insufficient to support the liability of G., because it could not be enforced, and because it could not from its nature be immemorial, and the repairs must have been done by G. under some arrangement between the two parishes which might be, and had been, put an end to. R.* v. *Ashby Folville, ubi supra. See also R.* v. *Ardsley* (*post*, p. 1233).

Form of Replication.

And hereupon N. W. [*the clerk of the court*], who prosecutes for our said lord the King in this behalf, says, that by reason of anything in the said plea above pleaded in bar alleged our said lord the King ought not to be precluded from prosecuting the said indictment against the said inhabitants of the said parish of Fryern Barnet: because he says,* that the said A. C. ought not to repair and amend the said part of the said highway so alleged to be ruinous, miry, deep, broken and in decay as aforesaid, by reason of his said tenure, in manner and form as in and by the said plea is above supposed and alleged; and this he the said N. W. prays may be inquired of by the country. And the said J. S. and J. N., for themselves and the rest of the inhabitants of the parish of Fryern Barnet aforesaid (excepting the said A. C.), do the like. Therefore let a jury, etc., etc.

Evidence.

In order to support this plea, the defendants must prove that A. C. is the occupier of the lands and tenements mentioned in the plea: for it is the occupier who is liable, whether he be owner or not. *R.* v. *Watts,* 1 *Salk.* 357: *R.* v. *Watson,* 2 *Ld. Raym.* 856: *R.* v. *Bucknell,* 7 *Mod.* 55: *R.* v. *Barker,* 25 *Q. B. D.* 213; 59 *L. J.* (*M. C.*) 106 (*post*, p. 1231). Prove also, either that these lands were formerly granted to be holden by the service of repairing this part of the highway in question, or that A.C., or those who occupied the land before him, were always used and accustomed to repair it, from which circumstance such a grant will be presumed. A grant from the Crown may be a legal origin of an obligation to repair *ratione tenuræ; Esher U. D. C.* v. *Marks,* 71 *L. J.* (*K. B.*) 309; and prescription is not the only way of proving the obligation. But in cases where prescription is relied on the liability must exist from time out of memory; and therefore, if it appear that the tenement in respect of which the liability is charged originated within time of memory, the plea will not be supported. *R.* v. *Hayman, M. & M.* 401; 31 *R. R.* 742. Evidence of reputation is admissible to prove the liability *ratione tenuræ.*

R. v. *Sutton*, 8 *A. & E.* 516: *R.* v. *Bedfordshire*, 4 *E. & B.* 535 (*overruling R.* v. *Wavertree*, 2 *M. & Rob.* 353): *R.* v. *Cotton*, 3 *Camp.* 444; 14 *R. R.* 780. Where the occupier of land is bound, *ratione tenuræ*, to repair a highway, and the land is afterwards divided among several occupiers, each occupier is liable for the repair of the whole, and he may have his remedy over against the others for contribution. *R.* v. *Bucklugh* (*Duchess*), 1 *Salk.* 358; 2 *Wms. Saund.* 159, *n.* An indictment for the non-repair of a highway in parish A., alleging the liability by reason of the tenure of lands in A., is not supported by proof of a liability to repair a way extending through A. and other parishes, by reason of the tenure of a farm made up of lands in A. and the other parishes. *R.* v. *Mixen*, 2 *M. & Rob.* 382.

The record of an acquittal upon a former indictment against the parish, with respect to the same piece of highway, is no evidence for the defendants; for it might have proceeded upon other grounds than the non-liability of the parish to repair. *R.* v. *St. Pancras*, *Peake* (3rd ed.), 286. So, the record of a former conviction, although conclusive against the parish upon the plea of not guilty; *Id.*: *R.* v. *Whitney*, 7 *C. & P.* 208: *R.* v. *Haughton*, 1 *E. & B.* 501; 22 *L. J.* (*M. C.*) 89; unless fraud or want of notice can be shown; 2 *Wms. Saund.* 160 (*a*), *n.*; yet is not, it should seem, evidence against them, when they plead specially that an individual or corporation, etc., are bound to repair. But the record of a judgment after verdict against the parish upon such a plea would, it would seem, be conclusive evidence against the parish, upon their pleading the same plea to any subsequent indictment. *See R.* v. *Eardisland*, 2 *Camp.* 494.

Plea that a particular Division of the Parish is bound to repair.

And J. S. and J. N., two of the inhabitants of a certain district or township called A. in the said parish of Fryern Barnet, by A. B., their solicitor, for themselves and the rest of the inhabitants of the said district or township, came into court here, and having heard the said indictment read, say, that our lord the King ought not further to prosecute the said indictment, so far as respects the inhabitants of the district or township aforesaid; because they say that the said parish of Fryern Barnet is, and, from time whereof the memory of man is not to the contrary, hitherto hath been, divided into three districts or townships called A., B., and C,; and that the inhabitants respectively of the several districts or townships of A. and C. have, from time whereof the memory of man is not to the contrary, hitherto been used and accustomed to repair and amend the several and respective highways situate and lying in their said respective districts or townships independently of each other; and that so much of the said highway in the said indictment mentioned as leads from —— to —— lies within the said district or township of A., and so much of the said highway as leads from —— to —— lies within the said district or township of B., and so much of the said highway as leads from —— to —— lies within the said district or township of C. (*see R.* v. *Bridekirk*, 11 *East*, 304; 10 *R. R.* 514); and that the said part of the said highway in the said indictment described to be ruinous, miry, deep, broken and in great decay, lies in that part of the said parish of Fryern Barnet called the district or township of C.; and by reason of the premises aforesaid the inhabitants of the said district or township of C. ought to repair and amend the part of the said highway last aforesaid, independently of the inhabitants of the said district or township of A., in the said parish; and this they the said J. S.

and J. N. are ready to verify; wherefore, for themselves and the rest of the inhabitants of the said district or township of A., they pray judgment, and that they and the rest of the said inhabitants of the said district or township by the court here may be dismissed and discharged from the premises in the said indictment above specified. *See* 2 *Wms. Saund.* 160, *n.* (10); *Pratt on Highways* (15th ed.), 61. *The inhabitants of B. should in this case plead a similar plea, and the inhabitants of C. should, it seems, plead the general issue. If the plea alleges that the particular district has been accustomed to repair all the roads within it,* which otherwise would be repairable by the parish at large, *it must show not only that the road in question is within the particular district, but also that it is one which, but for the custom, would be repairable by the parish. R.* v. *Eastrington*, 5 *A. & E.* 765; 6 *L. J.* (*M. C.*) 17; *and see R.* v. *Eccleafield* (*ante*, p. 1227). *It is necessary that the prescription should be pleaded: for if judgment were given against the parish, whether after verdict on the general issue, or by default, it would be conclusive evidence afterwards that the whole parish is bound to repair; R.* v. *St. Pancras, Peake* (3rd ed.), 286: *R.* v. *Whitney*, 7 *C. & P.* 208; *unless fraud could be shown; Id.; or unless the defence in the former case were managed by the district in which the road lay, and the other districts had no notice of the prosecution, in which case the court would give leave to the other districts to plead the prescription to the subsequent indictment. R.* v. *Townshend*, 2 *Doug.* 421; 2 *Wms. Saund.* 160 (*a*), *n.* (10): *and see R.* v. *Eardisland*, 2 *Camp.* 494. *See the precedents, Cro. Circ. Comp.* 392; 6 *Went*, 394, 410, 411; *and see particularly R.* v. *Eccleafield* (*ante*, p. 1227). *Where an indictment charged that the inhabitants of the township of Bondgate in Auckland, Newgate in Auckland, and the borough of Auckland, in the parish of St. Andrew, Auckland, were immemorially liable to repair a highway in the town of Bishop Auckland, in the parish of St. Andrew, Auckland, and no consideration was laid for such liability, the indictment was held bad in arrest of judgment. But it was held to be no objection that the three townships were charged conjointly. R.* v. *Bishop Auckland*, 1 *A. & E.* 744.

Form of Replication.

Commencement as ante, p. 1227, *to the asterisk, and then thus*] :—that the inhabitants respectively of the several districts or townships of A. and C. have not, from time whereof the memory of man is not to the contrary, hitherto been used or accustomed to repair and amend the several respective highways situate and lying in their said respective districts or townships, independently of each other; and this he the said N. W. prays may be inquired of by the country, *etc.* (*See ante*, p. 168.) *Or the prosecutor may traverse the fact of the part of the road out of repair being within the district of C.*

Evidence.

Prove that the districts of A. and C. have been accustomed, as far as aged witnesses can recollect, each to repair the highways within its own district. The liability is an exception to the *primâ facie* liability of the parish as a whole. *R.* v. *Barnoldswick*, 4 *Q. B.* 499; 12 *L. J.* (*M. C.*) 44. Proof of a highway extinguished, as such, sixty years before, by an Inclosure Act, but since used by the public, and repaired by the district charged, is not sufficient to support the indictment. *R.* v. *West Mark*, 2 *M. & Rob.* 305. That the way is out of repair is impliedly admitted by the plea, and that the part in question lies within the district of C. is impliedly admitted by the above replication.

Proof of immemorial exemption of a township from highway rate, without proof that it has repaired its own highways, is not sufficient to establish usage charging it with its own highways and exempting it from the highway rate. *R.* v. *Rollet, L. R.* 10 *Q. B.* 469.

Proof of a previous conviction of the inhabitants of a hamlet for non-repair is evidence of the customary liability. *R.* v. *Lordsmere*, 16 *Cox*, 65 (*C. C. R.*); *and see ante*, p. 1224.

Quære whether, on an indictment against inhabitants of a district, charging them with liability to repair a highway *out of* the district, it is necessary to prove a specific consideration for such liability, or whether consideration may be inferred from the fact of repair without other evidence. *Semble*, it may. *R.* v. *Denton*, 18 *Q. B.* 761; 21 *L. J.* (*M. C.*) 207, *n.* 2; 1 *Dears*, 3: *but see R.* v. *Ardsley* (*post*, p. 1233).

As to the repair of roads and streets in towns governed by local improvements Acts, incorporating the *Towns Improvement Clauses Act*, 1847, *see Slater* v. *Mayor, etc., of Ashton-under-Lyne*, 18 *Q. B.* 398.

Indictment against an Individual for not repairing ratione tenuræ. (*a*)

Same as the precedent ante, p. 1220, *to the asterisk, and then thus*]:—and that A. C., late of the parish of Fryern Barnet, in the county aforesaid, esquire, by reason of his tenure of certain lands and tenements called ——, lying and being in the said parish, ought to repair and amend that part of the highway aforesaid, so as aforesaid being ruinous, miry, deep, broken and in decay, when and so often as there shall be occasion [as the said A. C., and all those who held the said lands and tenements for the time being, from time whereof the memory of man is not to the contrary, hitherto were used and accustomed, and of right ought to do, and the said A. C. still of right ought to do], and that the said A. C. hath not yet done the same, *etc.* *See the precedents, Cro. Circ. Comp.* 319; 4 *Went.* 190. *Although usual, it is not necessary to allege a prescription, as in the above precedent between the square brackets.* 2 *Wms. Saund.* 158 (*e*), *n.* (9). *If land adjoining a highway not enclosed be afterwards enclosed by the owner (not being done by virtue of a writ of* ad quod damnum [*now disused; see Glen on Highways* (2nd ed.), 416, 417; *Pratt on Highways* (14th ed.)] *or other legal proceedings), he thereby renders himself liable during the continuance of the enclosure to repair that part of the highway adjoining the land so enclosed*; 2 *Wms. Saund.* 161, *n.* (12); *and he may be indicted for allowing it to be out of repair. The indictment must set out the special matter. And these or the like considerations for the liability to repair must be stated in all cases where the indictment is against an individual, or against another parish than that in which the road is situate. To state a prescription alone is not sufficient, except in the case of a corporation sole or aggregate, which may be bound to repair by prescription or usage, without consideration.* *R.* v. *St. Giles, Cambridge*, 5 *M. & Sel.* 260; 17 *R. R.* 320; 1 *Hawk. c.* 76, *s.* 8.

General Issue.

"And the said A. C., by A. B., his solicitor, comes into court here, and having heard the said indictment read, says, that he is not guilty of the said premises in the said indictment above specified and charged upon him; and of this he puts himself upon the country, *etc.*"

(*a*) Instead of trying liability *ratione tenuræ* by indictment, it is now more usual to try it by civil proceedings under 56 & 57 *Vict. c.* 73, *s.* 25 (2). *See Esher U. D. C.* v. *Marks*, 71 *L. J.* (*K. B.*) 309; 66 *J. P.* 248, *and note ante*, p. 1214.

Evidence.

A. C. and his wife are admissible witnesses and compellable to give evidence. 40 & 41 *Vict. c.* 14, *s.* 1 (*ante*, pp. 392, 1214).

Prove the liability of A. C. to repair the part of the highway in question *ratione tenuræ*, as directed *ante*, p. 1227. If it appear that the tenement in respect of which the liability is charged originated within the time of legal memory, the defendant must be acquitted. *R.* v. *Hayman*, *M. & M.* 401; 31 *R. R.* 742: *see R.* v. *Sheffield Canal Co.*, 13 *Q. B.* 913; 19 *L. J.* (*M. C.*) 44: *R.* v. *Ramsden*, *E. B. & E.* 949; 27 *L. J.* (*M. C.*) 296. Prove that A. C. is the occupier of the lands, for an owner of lands who is not the occupier of them cannot be charged *ratione tenuræ* with the repair of a common highway. *R.* v. *Barker*, 25 *Q. B. D.* 213; 59 *L. J.* (*M. C.*) 105: *Daventry R. D. C.* v. *Parker* [1900] 1 *Q. B.* 1. And prove the highway to be out of repair, as directed *ante*, p. 1225.

The defendant may prove, under the general issue, either that the road is not out of repair, or that, instead of his being bound to repair it, the parish at large, or some district of it, by prescription or custom, or some individual *ratione tenuræ*, is bound to repair it; a special plea is not necessary in such a case. 2 *Wms. Saund.* 159, *n.* (10). If he plead specially, after pleading the liability of the parish, district, or person, he must conclude with a special traverse of his own liability. *Id.* 159 (*a*), *n.* (10).

An infant, whose guardian in socage is in possession of the property, is not such owner or occupier of the land as to be chargeable *ratione tenuræ* for the non-repair of a bridge or highway; the guardian must be charged. *R.* v. *Sutton*, 3 *A. & E.* 597; 5 *Nev. & M.* 353; 4 *L. J.* (*K. B.*) 215. But it seems that infancy would not exempt if there were no other person against whom the performance of the repairs could be enforced. *Id.*

Where, on an indictment in the common form for not repairing a highway, alleging the defendant's liability *ratione tenuræ*, it was found by a special verdict that the defendant's land adjoined the sea; that anciently a highway went over this land, and that the defendant's predecessors had repaired it, etc.; that within living memory the sea had encroached, and that the ancient highway was covered by the sea; that the defendant's predecessors had from time to time gradually removed the ancient highway as the sea encroached, and appropriated other parts of the estate for the site of a highway, so as to keep a highway along the sea-coast, and that they had always repaired such highway; that the highway mentioned in the indictment passed over a different part of the estate from that formerly occupied by any part of the ancient road; that the sea had, shortly before the finding of the indictment, made an encroachment and washed away part of the highway alleged to be out of repair, and washed away large quantities of the earth, so that the residue of the road was too narrow for passage, and was made to stand at the edge of a precipitous bank of about seventy feet; it was held, that the defendant was entitled to judgment. *R.* v. *Bamber*, 5 *Q. B.* 279; 13 *L. J.* (*M. C.*) 13; 1 *Dav. & M.* 367. Where a highway repairable *ratione tenuræ* is, under statutory powers, as under a Turnpike Act, so altered in its nature and course as to be practically destroyed, the liability to repair *ratione tenuræ* ceases. *R.* v. *Barker*, 25 *Q. B. D.* 213; 59 *L. J.* (*M. C.*) 105: *Heath* v. *Weaverham Overseers* [1894] 2 *Q. B.* 108. Payment under *s.* 35 of the *Highway Act*, 1862, of a composition in respect of liability to repair *ratione tenuræ*, does not extinguish a previous exemption from highway rates. *N. E. Ry.* v. *Dalton Overseers* [1900]

App. Cas. 345. Liability to repair *ratione tenuræ* and exemption from highway rate often co-exist. *R.* v. *Browne* [1845] 13 *Q. B.* 654. But liability to repair a highway *ratione tenuræ* can exist with or without exemption from other burdens, and the existence of any such exemption is in each case a matter of fact to be proved by the person claiming it. *Bingley U. D. C.* v. *Ferrand*, 67 *J. P. Rep.* 370.

Where the defendant was charged with a liability to repair a highway by reason of his tenure of land called Saw-pit Field, evidence of the conviction of a former owner and occupier of the Saw-pit Field, for the non-repair of the same highway (on a presentment preferred against him, alleging his liability to repair it *ratione tenuræ*, to which he pleaded guilty): together with evidence of the subsequent repair of the highway by the occupiers of the same lands, and of the sale of them, with public notice that they were subject to such liability; was held sufficiently to prove the liability charged: and some of the judges thought that the conviction was an *estoppel* on the defendant, although not pleaded. *R.* v. *Blakemore*, 2 *Den.* 410; 21 *L. J.* (*M. C.*) 60: *see R.* v. *St. Pancras* (*ante*, p. 1224).

The liability to repair a highway *ratione clausuræ* is only on the *occupier* of the lands inclosed, and not on the owner. *R.* v. *Ramsden*, *E. B. & E.* 949; 27 *L. J.* (*M. C.*) 296. As to this form of liability, *see Pratt*, *Highways* (15th ed.), 78: *Glen*, *Highways* (2nd ed.), 141.

Indictment against a particular District of a Parish for not Repairing.
(*Common Law.*)

Same as the precedent ante, p. 1220, *to the asterisk, except that instead of saying*, "situate, lying, and being in the parish of Fryern Barnet," *you say*, "situate, lying, and being in a certain district or township called C., in the parish of Fryern Barnet," *etc.*; *and then thus*]:—and that the inhabitants of the said district or township of C., in the said parish of Fryern Barnet, in the county aforesaid, have, from time whereof the memory of man is not to the contrary, hitherto been used and accustomed to repair and amend that part of the highway aforesaid, so as aforesaid being ruinous, miry, deep, broken and in decay, when and so often as there should be occasion, and that the said inhabitants of the said district or township aforesaid have not yet done the same, *etc.* *See the precedents*, 4 *Went.* 157, 160, 178, 184; *Cro. Circ. Comp.* 320; *and see* 2 *Wms. Saund.* 158 (*f*), *n.* (9): *R.* v. *Eccleafield*, 1 *B. & Ald.* 348; 19 *R. R.* 335. *Whether an indictment may be sufficient which only alleges that the defendants the common highway aforesaid, so as aforesaid being in decay, etc., from time whereof, etc.*, ought to *repair and still ought to repair, etc., quære: see R.* v. *Tryddyn*, 21 *L. J.* (*M. C.*) 108. *Or the liability of the township may be set out specially, as in the plea ante*, p. 1228. *See R.* v. *Netherthong*, 2 *B. & Ald.* 179; *and vide infra.*

General Issue.

"And J. S. and J. N., two of the inhabitants of the said district or township called C., in the said parish of Fryern Barnet, by A. B., their solicitor, for themselves and the rest of the inhabitants of the said district or township, come into court here, and having heard the said indictment read say, that they are not guilty of the said premises in the said indictment above specified and charged upon them: and of this they put themselves upon the country, *etc.*"

Evidence.

Prove the liability of the township of C. to repair the part of the highway in question, by proving that the township has been used and accustomed to do so heretofore. (*See ante*, p. 1222.) Townships are now in most, if not all, cases poor-law parishes, and might be combined by justices under 27 & 28 *Vict. c.* 101, *s.* 7, into highway parishes. Under the *Local Government Act*, 1894, highway parishes have now, in all cases, been included in urban or rural districts, and no separate highway rate is levied for townships or parishes in such districts. *See Pratt on Highways* (15th ed.), 650. It is now well established that a township may be liable, to the same extent and in the same way as if it were a parish, to maintain its highways. *R.* v. *Ardsley*, 3 *Q. B. D.* 255, 257. Prove the highway to be out of repair, as directed *ante*, p. 1225.

The defendants, under the general issue, may prove either that the road is in repair, or that, instead of their district being bound to repair it, the parish at large, or some other district in the parish (*see R.* v. *Ardsley*, *ubi supra*), or some individual *ratione tenuræ*, is bound to repair it. A special plea is not necessary in such a case. 2 *Wms. Saund.* 159, *n.* (10). If a special plea is put in, it must, after pleading the liability of the parish, district, or person, conclude with a special traverse of the liability of the district indicted. *Id.* 159 (*a*), *n.* (10). *See the precedents*, 4 *Went.* 161, 166; 6 *Went.* 414. If the indictment charge the district or township with the repair of all roads within it generally, a special plea would be necessary; for such a prescription makes the township, for all legal purposes, as to the repair of roads, a parish, and they must plead, etc., in the same manner as a parish would under the same circumstances. *R.* v. *Hatfield*, 4 *B. & Ald.* 75; 22 *R. R.* 631: *R.* v. *Lordsmere*, 16 *Cox*, 65 (*C. C. R.*). And where the indictment charges the district or township with the repair of all the highways within it generally, and there is no special plea that some individuals *ratione tenuræ* are bound to repair the highway in question, evidence of repairs to such highway by individuals is inadmissible. *R.* v. *Hatfield*, *ubi supra*. Evidence of a previous conviction of the inhabitants of a particular district in a parish for the non-repair of one of the highways in such district is admissible to prove that the district is liable by immemorial custom to repair all the highways within its limits, for the repair of which the inhabitants of the whole common law parish would be otherwise *primâ facie* liable. *Id.* Upon the trial of an indictment against the township of A. for the non-repair of a highway within it, it appeared that A. was one of seven townships forming the parish of D. The parish itself had never repaired any highway, nor levied highway rates, nor appointed surveyors, each township having appointed its own surveyors and levied its own highway rates. With the exception of the highway in question, and one other, each of the seven townships had from time immemorial repaired its own highways. The highway in question had always been repaired by the adjoining township of W., but there was no evidence of any consideration for such repair. It was held that A. was liable, for it must be presumed that the repairs had been done by W. under some arrangement between the two townships, and such arrangement, in the absence of sufficient consideration, was not binding on W. *R.* v. *Ardsley*, 3 *Q. B. D.* 255; 47 *L. J.* (*M. C.*) 65.

25 & 26 *Vict. c.* 61, *s.* 32, does not subject places formerly extra-parochial to the common law liability to indictment for non-repair of highways. *R.* v. *Central Wingland*, 2 *Q. B. D.* 349; 46 *L. J.* (*M. C.*) 282.

Costs of highway indictments.]—The power to award costs on highway indictments rests wholly on statute. There are three enactments giving such power, which vary in terms, and are below considered seriatim.

1. *Where an indictment is directed by justices under s.* 95 *of the Highway Act,* 1835 (5 & 6 *W.* 4 c. 50, *ante,* p. 1210), *it is, as a general rule, the duty of the court before which the indictment is tried to order payment of the costs of the prosecution out of the highway rate. See R.* v. *Surrey JJ.,* 1 *Bail. Ct. Cas.* 70; 21 *L. J.* (*M. C.*) 195.

The right attaches when the defendant is convicted (*R.* v. *Yarkhill, C. & P.* 218), *or pleads guilty* (*R.* v. *Haslemere,* 3 *B. & S.* 313; 32 *L. J.* (*M. C.*) 30 (*overruling R.* v. *Linton,* 1 *Russ. Cr.* (6th ed.) 823: *R.* v. *Aston Ingham, Id.*: *R.* v. *Vowchurch,* 2 *C. & K.* 393: *R.* v. *Stainhall,* 1 *F. & F.* 363: *R.* v. *Langley,* 2 *F. & F.* 170)), *and even where the defendant pleads and the jury finds that another is liable to repair* ratione tenuræ (*R.* v. *Surrey JJ.,* 21 *L. J.* (*M. C.*) 195; 1 *Bail. Ct. Cas.* 70); *but not where the jury fail to agree on a verdict* (*R.* v. *Heytesbury,* 8 *L. T.* (*N. S.*) 315), *nor where the justices' order can be proved to be invalid, or the conduct of the prosecutor is successfully attached. R.* v. *Surrey JJ.,* 21 *L. J.* (*M. C.*) 196.

Thus it does not attach unless the way is a highway; R. v. *Chedworth,* 9 *C. & P.* 285: *R.* v. *Paul,* 2 *M. & Rob.* 307: *R.* v. *Heanor,* 6 *Q. B.* 745; 14 *L. J.* (*M. C.*) 38: *R.* v. *Downholland,* 15 *L. J.* (*M. C.*) 25; 2 *New Sess. Cas.* 177; *and is the highway set out in the justices order. R.* v. *Fifehead,* 3 *Cox,* 59. *Nor where, the justices having ordered a prosecution as to a general highway, the indictment at the trial is restricted, by amendment, to a highway for horses, as to which the justices had no power to order a prosecution, the liability to repair the highway as a highway for horses not being in dispute. R.* v. *Lee,* 1 *Q. B. D.* 198; 45 *L. J.* (*M. C.*) 54.

The powers as to costs given by 5 & 6 *W.* 4, *c.* 50, *s.* 95, *cannot be exercised by the High Court when the indictment has been removed by* certiorari. *R.* v. *Ipstones, L. R.* 8 *Q. B.* 216; 37 *L. J.* (*M. C.*). 37.

Where the indictment is not removed by certiorari, *but is tried in the ordinary way on the crown side at the assizes, the amount of the costs, where ordered by the judge of assize to be paid under s.* 95, *must be ascertained by the clerk of assize during the continuance of the commission. R.* v. *Clark,* 5 *Q. B.* 887; 13 *L. J.* (*M. C.*) 91.

5 & 6 *W.* 4, *c.* 50, *s.* 95 (*ante,* p. 1210), *extends not only to rates made or levied at the time of the judge's order for payment, but to the highway rate in general; and if there be not sufficient funds in the hands of the surveyors at that time, they must make a rate for the purpose. And the order binds, not only the surveyors in office at the time, but their successors, until the costs be paid. R.* v. *Eyton,* 8 *E. & B.* 890.

The costs provided for by s. 95 *are not within any of the words of s.* 103, *and therefore cannot be recovered by distress under the proceedings directed by that section; but a mandamus will issue to compel the taking of the proper steps. R.* v. *Arnould,* 8 *E. & B.* 550; 27 *L. J.* (*M. C.*) 52.

An order for costs under this section is enforceable by mandamus and not by distress. R. v. *Eyton,* 8 *E. & B.* 390; *Pratt on Highways* (15th ed.), 315.

2. *Under s.* 98 *of the Highway Act,* 1835 (5 & 6 *W.* 4, *c.* 50), *the court before which any indictment shall be preferred for not repairing highways may order the defendant to pay the costs of the prosecution if satisfied that the defence is frivolous or vexatious. This enactment applies even where the indictment is removed by* certiorari (*R.* v. *Pembridge,* 3 *Q. B.* 901; 12 *L. J.* (*Q. B.*) 47; *R.* v. *Preston* (*No.* 2), 7 *Dowl.* 593), *and empowers the court of trial to make the defendant pay costs on an indictment under* 5 & 6 *W.* 4, *c.* 50, *s.* 95. *Where a plea of guilty is made at the earliest opportunity, the defence cannot be treated as frivolous or vexatious. R.* v. *Denton,* 34 *L. J.* (*M. C.*) 13; 10 *Cox,* 61:

R. v. *Langley*, 2 *F.* & *F.* 170. *An order for costs under s.* 98 *may be enforced by distress or attachment. R.* v. *Pembridge, ubi supra; and see Pratt on Highways* (15th ed.), 309.

3. *Where the indictment is directed by justices under s.* 19 *of the Highway Act*, 1862 (24 & 25 *Vict. c.* 61), *ante*, p. 1211, *the costs of the prosecution are to be paid by such party to the proceedings as the court may direct, and if directed to be paid by the parish are to be treated as part of the expense of keeping the highway in repair, and to be paid accordingly. The court under this section has a discretion to direct by which party the costs are to be paid. But costs cannot be given under this section where the jury find the alleged highway not to be a highway, and the section does not alter the law of costs as laid down in s.* 95 *of the Highway Act*, 1835 (*ante*, p. 1210). *R.* v. *Buckland*, 6 *B.* & *S.* 397; 34 *L. J.* (*M. C.*) 178; 10 *Cox*, 116; *Pratt on Highways* (15th ed.), 367.

NON-REPAIR OF BRIDGES.

Common Law.

At common law and under the early statutes (*post*, p. 1236) the primary liability for the repair of a bridge falls on the inhabitants of the county, city, or town corporate within which the bridge lies (*see* 2 *Chit. Cr. L.* 588 *a*), unless they can prove under a special plea sufficient to throw the burden on the inhabitants of a parish (*R.* v. *Hendon*, 4 *B.* & *Ad.* 628; 2 *L. J.* (*M. C.*) 55; 38 *R. R.* 333), or township (*R.* v. *Yorkshire* (*W. R.*), 4 *B.* & *Ald.* 623; 23 *R. R.* 421), or district of the county (such as a hundred; *R.* v. *Oswestry*, 6 *M.* & *Sel.* 361; 18 *R. R.* 398), as being bound to repair it by immemorial usage (*R.* v. *Sutton*, 3 *A.* & *E.* 597; 4 *L. J.* (*K. B.*) 215); or upon some individual or body corporate or politic bound to repair it *ratione tenuræ* (*R.* v. *Kerrison*, 1 *M.* & *Sel.* 435; 14 *R. R.* 491) or by prescription (*R.* v. *Yorkshire* (*W. R.*), 7 *East*, 588; 8 *R. R.* 688), or by the terms on which they have received statutory powers to interfere with public rights. *R.* v. *Kerrison*, 3 *M.* & *Sel.* 526; 16 *R. R.* 342. The liability of the inhabitants of a county appears to be transferred to the county council by 51 & 52 *Vict. c.* 41, *s.* 79 (2) (*post*, p. 1241): but that of the inhabitants of a borough, parish, or township to be unaltered. *R.* v. *Poole* (*Mayor, etc.*), 19 *Q. B. D.* 602; 56 *L. J.* (*M. C.*) 131; 16 *Cox*, 323. The pleas and evidence are the same, *mutatis mutandis*, with the pleas and evidence in the case of an indictment for not repairing a highway. (*See ante*, pp. 1220–1233.) The liability extends to bridges built by private individuals prior to 43 *G.* 3, *c.* 59, if of utility to and used by the county. *R.* v. *Wilts*, 6 *Mod.* 307: *R.* v. *Yorkshire* (*W. R.*), 5 *Burr.* 2594: *R.* v. *Yorkshire* (*W. R.*), 2 *East*, 342; 6 *R. R.* 439: *R.* v. *Bucks*, 12 *East*, 192; 11 *R. R.* 347: *R.* v. *Salop*, 13 *East*, 95; 12 *R. R.* 307: *R.* v. *Kent*, 13 *East*, 220: *R.* v. *Devon*, 14 *East*, 477; 13 *R. R.* 285: *R.* v. *Oxfordshire*, 16 *East*, 223: *R.* v. *Same*, 4 *B.* & *C.* 194: *R.* v. *Same*, 1 *B.* & *Ad.* 297, *n.*: *R.* v. *Kent*, 2 *M.* & *Sel.* 513; 15 *R. R.* 330: *R.* v. *Isle of Ely*, 15 *Q. B.* 827; *Burn's Justice* (30th ed.), *tit.* "*Bridges*;" *Pratt on Highways* (15th ed.), 84. A bridge always open to the public, but only used in time of flood, has been held to be a public bridge. *R.* v. *Devon, Ry.* & *M.* 144. Where a bridge has been built on a public highway before 1803, the county can

only avoid its common law liability by proving that it has been cast on some other person. *Att.-Gen.* v. *West Riding of Yorkshire County Council*, 67 *J. P. Rep.* 103; 1 *Loc. Govt. Rep.* 223: *Yorkshire (W. R.)* v. *R.*, 2 *Dow (H. L.)* 1; 3 *Eng. Rep.* 767. As to the liability of the county to repair a bridge built by a private individual and used by the public, and the evidence necessary to support such liability, *see R.* v. *Southampton*, 17 *Q. B. D.* 424; 19 *Q. B. D.* 590. In that case it was held that there must be evidence of acceptance by the county: hereon *see Pratt on Highways* (15th ed.), 90. Bridges built since 43 *G.* 3, *c.* 59, cannot become county bridges except under that Act, or under 33 & 34 *Vict. c.* 73, *s.* 12, or 41 & 42 *Vict. c.* 77, *s.* 21, or 51 & 52 *Vict. c.* 41, *ss.* 6, 11 (*post*, p. 1240). *And see New Windsor (Mayor, etc.)* v. *Taylor* [1899] *App. Cas.* 41; 68 *L. J. (Q. B.)* 87. As to partial dedication of a bridge, *see R.* v. *Northampton*, 2 *M. & Sel.* 262; 15 *R. R.* 241.

As to what is a bridge, and what a culvert, and so part of the highway, *see R.* v. *Oxfordshire*, 1 *B. & Ad.* 289; 35 *R. R.* 302: *R.* v. *Whitney*, 3 *A. & E.* 69; 7 *C. & P.* 208; 4 *L. J.* (*M. C.*) 86: *R.* v. *Derbyshire*, 2 *Q. B.* 745; 2 *G. & D.* 97; 11 *L. J.* (*M. C.*) 51: *R.* v. *Lancaster*, 32 *J. P.* 711. A footbridge formed by three planks, nine or ten feet long, and a hand-rail, which carried a public footpath over a small stream, was held not to be such a bridge as the county was bound to repair. *R.* v. *Southampton*, 18 *Q. B.* 841; 21 *L. J.* (*M. C.*) 201. Where a county bridge, which had been washed away, was, after 43 *G.* 3, *c.* 59, built wider than before, and without notice to the county surveyor, by the parish, partly with the old materials, and in the same line of passage over the river, it was held that this was not a new bridge within the meaning of the Act, and that the county was still liable to repair it. *R.* v. *Devon*, 5 *B. & Ad.* 383; 2 *L. J.* (*M. C.*) 74; 2 *Nev. & M.* 212: *see R.* v. *Adderbury East*, *Dav. & M.* 324; 13 *L. J.* (*M. C.*) 9. The county is not compellable to widen a bridge; *R.* v. *Devon*, 4 *B. & C.* 670; 28 *R. R.* 440; but if a county bridge is accidentally destroyed, the county is liable to rebuild it. *R.* v. *Yorkshire (W. R.)*, 5 *Burr.* 2594. The *Locomotives Act*, 1861 (24 & 25 *Vict. c.* 70, *s.* 7), does not apply to public bridges repairable by the inhabitants of a county so as to relieve them from their common law liability to repair, or to render the owner of a locomotive liable to an indictment for non-repair of a county bridge damaged by such locomotive. *R.* v. *Kitchener*, *L. R.* 2 *C. C. R.* 88; 43 *L. J.* (*M. C.*) 9. The transfer of part of a county to another county transfers the liabilities as to bridges within the transferred portion, unless the liability rested on statute or prescription. *R.* v. *Brecon.shire*, 15 *Q. B.* 813: *Re Staffordshire and Derbyshire County Councils*, 54 *J. P.* 566. Where a borough, incorporated by charter with a *non-intromittant* clause, was enlarged, under 2 & 3 *W.* 4, *c.* 64, *s.* 35 (*rep.*), and 5 & 6 *W.* 4, *c.* 76, *s.* 7 (*rep.*), by the addition of a parish within the same county, containing a bridge which until that time the county had repaired, it was held that this transfer of the new district did not of itself, without evidence that the borough had been used to maintain any bridges, render the borough liable to repair such bridge. *R.* v. *New Sarum*, 7 *Q. B.* 941; 15 *L. J.* (*M. C.*) 15: *see* 45 & 46 *Vict. c.* 50, *s.* 119 (*post*, p. 1240).

Statutes.

22 *H.* 8, *c.* 5, *s.* 1—*Jurisdiction of quarter sessions.*]— . . . The justices of the peace in every shire of this realm, franchise, city, or borough, or four of them at the least whereof one to be of the quorum, shall have power and authority to inquire, hear and determine in the King's general

sessions of the peace of all manner of anoysances (*nuisances*) of bridges broken in the highways to the damage of the King's liege people; and to make such process and pains upon every presentment afore them for the reformation of the same again such as owen (*ought*) to be charged for the making or amending of such bridges as the King's justices of his bench use commonly to do, or as it shall seem by their discretion to be necessary and convenient for the speedy amendment of such bridges.

Sect. 2.]—And where in many parts of this realm it cannot be known and proved what hundred, riding, wapentake, city, borough, town or parish, nor what person certain or body politic ought of right to make such bridges decayed, by reason whereof such decayed bridges for lack of knowledge of such as owen (*ought*) to make them for the most part lyen long without any amendment, to the great annoyance of the King's subjects; for the remedy thereof, be it enacted by authority aforesaid, that in every such case the said bridges, if they be without city or town corporate, shall be made by the inhabitants of the shire or riding within which the said bridge decayed shall happen to be: and if it be within any city or town corporate then by the inhabitants of every such city or town corporate wherein such bridges shall happen to be; and if part of any such bridges so decayed happen to be in one shire, riding, city, or town corporate, and the other part thereof in another shire, riding, city or town corporate, or if part be within the limits of any city or town corporate and part without, or part within one riding and part within another, that then in every such case the inhabitants of the shires, ridings, cities or towns corporate shall be charged and chargeable to amend, make and repair such part and portion of such bridges so decayed as shall lie and be within the limits of the shire, riding, city or town corporate, wherein they be inhabited at the time of the same decay. [*This section is declaratory of the common law. R.* v. *Yorkshire* (*W. R*), 7 *East*, 588; 8 *R. R.* 688, *affirmed* 2 *Dow* (*H. L.*) 1; 3 *Eng. Rep.* 767. *But quære as to highways not then existing. R.* v. *Southampton*, 17 *Q. B. D.* 424, 436. *The Isle of Ely is a riding within this section. R.* v. *Isle of Ely*, 15 *Q. B.* 827; 19 *L. J.* (*M. C.*) 223. *A town is not liable within this section for a bridge not within its limits, unless a consideration for the liability can be proved. R.* v. *Machynlleth and Pennegoes*, 2 *B. & C.* 166; 25 *R. R.* 334. *A county of a city created by charter has the same liabilities as to bridges as a county at large, and the county at large from which the county of a city is carved is not liable for the bridges within the city. R.* v. *Southampton*, 17 *Q. B. D.* 424, 438.]

Sect. 3—*Rating by justices and collection of rates.*]—*Superseded by* 51 *&* 52 *Vict. c.* 41.

Sect. 4.]—*Sending process into other shires.*

Sect. 5.]—*Bridges in the Cinque Ports.*

Sect. 7.]—Forasmuch that albeit bridges decayed were amended and repaired according to the tenour of this Act, yet nevertheless if speedy remedy for the ways next adjoining to every of the ends of such bridges should not be had and made, the King's subjects should take little or none avail or commodity in many parties (*sic*) of this realm by the making of the bridges: in consideration whereof be it enacted . . . that such part and portion of the highways in every part of this realm as well within franchise or without as lie next adjoining to any ends of any bridges

within this realm distant from any of the said ends by the space of 300 feet, be made, repaired and amended as often as need shall require. . . . [*Justices to have the same jurisdiction to inquire, hear, and determine nuisances to such highways as they have under the Act as to bridges. Sect.* 7 *does not apply to the roads at the ends of bridges built since* 1835. *See* 5 & 6 *W.* 4, *c.* 50, *s.* 21. *The liability to repair a bridge includes liability to maintain the approaches for a space of* 300 *yards. R.* v. *Mayor, etc., of Lincoln,* 8 *A. & E.* 65; 47 *R. R.* 484. *This liability falls on the highway authority,* i.e., *in main roads on the county council, unless placed elsewhere by a particular statute or by prescription. Att.-Gen.* v. *Oxford Canal Navigation,* 72 *L. J. Ch.* 285 (*C. A.*): *Nottingham County Council* v. *Manchester, etc., Rail. Co.,* 71 *L. T.* 430. *The liability is primâ facie on the inhabitants, and if they wish to exonerate themselves they must specially plead and prove liability in another by prescription or tenure. Yorkshire* (*W. R.*) v. *R.,* 2 *Dow* (*H. L.*) 1; 3 *Eng. Rep.* 767. *Cf. Nottingham County Council* v. *Manchester, etc., Rail. Co., ubi supra: Att.-Gen.* v. *Yorkshire* (*W. R.*) *County Council,* 67 *J. P. Rep.* 103. *The* 300 *yards' limit imposed by this section applies to county bridges and bridges reparable by prescription or, semble,* ratione tenuræ, *but is not to be presumed to apply to bridges constructed by individuals or companies under special Acts. Hertfordshire County Council* v. *New River Co.* [1904], 2 *Ch.* 513, *Eady,* J.]

1 *Anne, c.* 12, *s.* 1.]—*Recites and continues* 22 *H.* 8, *c.* 5, *with modifications by ss.* 2, 3, *as to mode of assessment of costs of repair and their collection from towns and parishes. See Pratt on Highways* (15th ed.), 849.

Sect. 4—*Fines for non-repair.*]—And whereas upon presentments and indictments for not repairing such bridges and the highways at the end of such bridges, the fines imposed and set upon such presentments and indictments and other fines and issues for not repairing, building, and amending such bridges and the highways at the end of such bridges, are returned into the Court of Exchequer or other courts, be it therefore further enacted by the authority aforesaid, that no fine, issue, penalty, or forfeiture shall hereafter be returned into the Court of Exchequer or other court, but shall be levied and paid into the hands of the treasurer or treasurers so as aforesaid appointed by the said justices (*now the county treasurer*) to be accounted for by the said treasurer, and to be applied by the said justices towards the building, repairing, or amending such bridges and the highways at the end of such bridges, and to no other end or purpose whatsoever. [*Cf.* 5 & 6 *W.* 4 *c.* 50, *s.* 21, *post,* p. 1239].

Sect. 5—*Place of trial—No certiorari.*]—And . . . all matters concerning the repairing and amending of the bridges and highways hereinbefore mentioned shall be determined in the county where they lie and not elsewhere, and . . . no presentment or indictment for not repairing such bridges or the highways at the end of such bridges shall be removed by *certiorari* out of the said county into any other court. [*This section applies only to* certiorari *at the instance of the defendants*; *R.* v. *Cumberland,* 6 *T. R.* 194; 3 *R. R.* 149; *and seems not to prevent a change of venue. R.* v. *Wilts.,* 6 *Mod.* 307; *Cas. temp. Holt,* 339: *R.* v. *Southampton,* 17 *Q. B. D.* 424; 19 *Q. B. D.* 595.]

Sect. 8—*Saving as to individual liability to repair.*]—Provided always that this Act nor anything therein contained shall excuse or discharge any particular persons, estates, or places from repairing any bridge which they have heretofore (1702) usually repaired.

Sect. 9.]—And . . . all the penalties and forfeitures incurred by this Act shall be applied towards the repairing the said bridges and highways at the end of the same.

43 *G.* 3, *c.* 59 (*Bridges Act*, 1803), *s.* 5—*Bridges built after 24th June*, 1803.]—And for the more clearly ascertaining the description of bridges hereafter to be erected, which inhabitants of counties shall and may be bound or liable to repair and maintain, be it further enacted that no bridge hereafter to be erected or built in any county by or at the expense of any individual or private person or persons, body politic or corporate shall be deemed or taken to be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner under the direction or to the satisfaction of the county surveyor, or person appointed by the justices of the peace at their general quarter sessions assembled (*now by the county council*), or by the justices of the peace of the county of Lancaster at their annual general sessions; and which surveyor or person so appointed is hereby required to superintend and inspect the erection of such bridge when thereunto requested by the party or parties desirous of erecting the same: and in case the said party or parties shall be dissatisfied the matter shall be determined by the said justices respectively at their next general quarter sessions or at their annual general sessions in the county of Lancaster. [*See R.* v. *Derbyshire*, 3 *B. & Ad.* 147; 1 *L. J.* (*M. C.*) 15: *R.* v. *Same*, 2 *Q. B.* 745: *R.* v. *Oxfordshire*, 1 *B. & Ad.* 289, 297; 35 *R. R.* 302: *R.* v. *Lancashire*, 2 *B. & Ad.* 813; 1 *L. J.* (*M. C.*) 3: *R.* v. *Gloucestershire*, *C. & Mar.* 506. *See R.* v. *Southampton*, 18 *Q. B.* 841; 21 *L. J.* (*M. C.*) 201.]

Sect. 7.]—Provided always . . . that nothing herein contained shall extend to any bridges or roads which any person or persons, bodies politic or corporate, is, are, or shall be liable to maintain or repair by reason of tenure or by prescription, or to alter or affect the right to repair such bridges or roads.

5 & 6 *W.* 4, *c.* 50 (*Highways Act*, 1835), *s.* 21—*Highways adjoining bridges built after Aug.* 31, 1835.]—If any bridge shall hereafter (after Aug. 31, 1835) be built, and such bridge shall be liable by law to be repaired by or at the expense of any county or part of any county, then and in such case all highways leading to, passing over, and next adjoining to such bridge shall be from time to time repaired by the parish, body politic or corporate (*or trustees of a turnpike road*), who were by law before the erection of the said bridge bound to repair the said highway: Provided, nevertheless, that nothing herein contained shall extend to exonerate, or discharge any county or part of a county from repairing or keeping in repair the walls, banks, or fences of the raised causeways and raised approaches to any such bridge or the land arches thereof. [*As to effect of this section, see R.* v. *Southampton*, 17 *Q. B. D.* 424: *and as to hundred bridges, R.* v. *Chart and Longbridge*, *L. R.* 1 *C. C. R.* 237; 39 *L. J.* (*M. C.*) 107. *See also* 51 & 52 *Vict. c.* 41, *s.* 11, *post*, p. 1240.]

33 & 34 *Vict. c.* 73, *s.* 12—*Bridges in disturnpiked roads.*]—Where a turnpike road shall have become an ordinary highway, all bridges which were previously repaired by the trustees of the turnpike road shall become county bridges and shall be kept in repair accordingly: Provided that for the purposes of this Act such bridges shall be treated as if they were bridges built subsequently to the passing of the *Highway Act*, 1835. [*See* 5 & 6 *W.* 4, *c.* 50, *s.* 21, *supra.*]

41 & 42 *Vict. c.* 77 (*Highways, etc., Amendment Act*, 1878), *s.* 21.]—Any bridge erected before the passing of this Act (16th August, 1878) in any county without such superintendence as is provided in *s.* 5 of the *Bridges Act*, 1803 (*ante*, p. 1239), and which is certified by the county surveyor or other person appointed in that behalf by the county authority to be in good repair and condition, shall, if the county authority see fit so to order, become and be deemed to be a bridge which the inhabitants of the county shall be liable to maintain and repair.

45 & 46 *Vict. c.* 50 (*Municipal Corporations Act*, 1882), *s.* 119—*Bridges in boroughs.*]—(1) Every bridge which is either wholly or in part in a borough, and which the borough and not the county in which it is situate is legally bound to maintain or repair, shall as to the whole of the bridge if it is wholly in the borough or as to such part only as is in the borough be maintained, widened, repaired, improved, or rebuilt under the sole management and control of the (borough) council.

(2) For that purpose the council shall have all the powers which the justices of a county have with respect to a county bridge, but the notices required in the case of a county bridge shall not be required in the case of a borough bridge. . . . [*See R.* v. *Dorset*, 45 *L. T.* (*N. S.*) 308: *R.* v. *Southampton*, 17 *Q. B. D.* 424; 19 *Q. B. D.* 590.]

51 & 52 *Vict. c.* 41 (*Local Government Act*, 1888), *s.* 3.]—There shall be transferred to the council of each county . . . the administrative business of the justices of the county in quarter sessions assembled, that is to say, all business done by the quarter sessions or any committee appointed by the quarter sessions in respect of the several matters following, namely: . . .

(viii.) Bridges and roads repairable with bridges, and any powers vested by the *Highways and Locomotives Amendment Act*, 1878 (41 & 42 *Vict. c.* 77), in the county authority.

Sect. 6—*Power of county council to purchase and take over bridges and to maintain, repair, and improve such bridges.*]—*As to this section, see Bury St. Edmunds (Mayor, etc.)* v. *West Suffolk County Council* [1898] 2 *Q. B.* 246.

Sect. 11—*Bridges in main roads.*]—(1) Every road in a county which is for the time being a main road within the meaning of the *Highways and Locomotives Amendment Act*, 1878 (41 & 42 *Vict. c.* 77), inclusive of every bridge carrying such road, if repairable by the highway authority, shall after the appointed day be wholly repaired by the council of the county in which the road is situate. . . . [*As to the nature and extent of the liability created by this sub-section, see Att.-Gen.* v. *Staffordshire County Council* [1905] 1 *Ch.* 336; 69 *J. P. Rep.* 97.]

(2) (3) *Empower urban authorities to claim the right to retain the powers and duties of maintaining and repairing main roads within their districts, in which event the road vests in the urban authority, and the county council contributes a sum agreed, or settled by arbitration.*

Sect. 34 (2)—*Bridges in a county borough.*]—On the appointed day there shall be transferred to the mayor, aldermen, and burgesses of each county borough "all such bridges and approaches thereto or parts thereof situate within the borough as were previously repairable by the county or any hundred therein." . . . [*The cost of repair is payable out of the borough fund.*]

Sect. 78 (3)—*Presentments.*]— . . . a presentment by a grand jury in relation to any such powers, duties, or liabilities (*arising as to business transferred* (*inter alia*) *under s.* 3 (viii.), *supra*), shall cease to be made otherwise than by way of indictment.

Sect. 79 (2)—*Transfer to county council of liabilities of inhabitants.*]—All duties and liabilities of the inhabitants of a county shall become and be duties and liabilities of the council of such county. [*This seems to transfer liability to indictment from the inhabitants to the council. See Pratt on Highways* (15th ed.), 591; *Glen on Highways* (2nd ed.), 106.]

Indictment for not repairing a Bridge.

Middlesex, to wit:—The jurors for our lord the King upon their oath present, that [from time whereof the memory of man is not to the contrary], there was and yet is a certain common public stone bridge, commonly called D. Bridge, situate and being in the several parishes of B. and C., in the county of M., in the King's common highway leading from the town of H., in the county of H., towards and unto the city of London, used by and for all the liege subjects of our said lord the King and his predecessors, on foot, and with their horses, coaches, carts, and other carriages, to go, return, pass, repass, ride, and labour, at their free will and pleasure; and that the said bridge, on the first day of June, in the year of our Lord ——, and continually afterwards until the day of the taking of this inquisition, at the several parishes of B. and C. aforesaid, in the county aforesaid, was and yet is very ruinous, broken, dangerous, and in great decay, for want of upholding, maintaining, amending, and repairing the same, so that the liege subjects of our said lord the King upon and over the said bridge, with their horses, coaches, carts, and other carriages, could not during the time last aforesaid, nor yet can go, return, pass, repass, ride, and labour, as they before used and were accustomed to do, and still of right ought to do, without great danger of their lives, and the loss of their goods; to the great damage and common nuisance of all the liege subjects of our said lord the King, upon and over the said bridge, going, returning, passing, repassing, riding, and labouring; and against the peace of our lord the King, his crown and dignity: And that the said bridge is not within any city or town corporate: and that it cannot be known and proved that any hundred, riding, wapentake, city, borough, or parish, or any person certain, or any body politic or corporate, ought of right to make, rebuild, repair, or amend the said bridge; and that *the county council of the administrative county of Middlesex* (*see infra*) aforesaid ought to make, rebuild, repair, and amend the said bridge, when and so often as it should or shall be necessary; against the form of the statutes in such case made and provided. *See also the precedent, Cro. Circ. Comp.* 313; 6 *Went.* 427; 2 *Chit. Cr. L.* 593 *b.*

The words in brackets are unnecessary (*see ante*, p. 1222). *The liability to indictment formerly resting on the inhabitants of the county appears to be transferred to the council of the administrative county in which the bridge lies. See note to* 51 *&* 52 *Vict. c.* 41, *s.* 79 (2) (*supra*). *But the matter has not been judicially decided, and it is prudent to add a second count on the same lines as the first, but with the substitution of the words "the inhabitants of the whole county of Middlesex," for the alleyation as to the county council.*

Misdemeanor: fine.

Costs.]—*The costs of a frivolous defence to an indictment for non-repair of a county bridge cannot be given under* 5 & 6 *W.* 4, *c.* 50, *which does not apply to county bridges* (*see sect.* 5), *or to hundred bridges. R. v. Chart and Longbridge, L. R.* 1 *C. C. R.* 237; 39 *L. J.* (*M. C.*) 107). *But they may be obtained on the certificate of the judge that the defence was frivolous under* 13 *G.* 3, *c.* 78, *s.* 64, *which is incorporated into* 43 *G.* 3, *c.* 58, *s.* 1, *and for this purpose is not repealed by* 5 & 6 *W.* 4, *c.* 50. *R. v. Merionethshire,* 6 *Q. B.* 343; 13 *L. J.* (*M. C.*) 158. *The provision of* 13 *G.* 3, *c.* 78, *s.* 24, *as to presentments of highways, which by* 43 *G.* 3, *c.* 59, *s.* 1, *is incorporated into that Act, was not repealed as to bridges by* 5 & 6 *W.* 4, *c.* 50: *R. v. Brecknshire,* 15 *Q. B.* 813; 18 *L. J.* (*M. C.*) 123. *But such presentments must now be by way of indictment.* 51 & 52 *Vict. c.* 41, *s.* 78 (3), *supra.*

Sect. 3.

Inciting Infants to Betting or Wagering or to Borrowing Money.

Statutes.

55 & 56 *Vict. c.* 4 (*Betting and Loans* (*Infants*) *Act,* 1892), *s.* 1—*Sending documents to an infant inviting him to bet.*—(1) If any one, for the purpose of earning commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to make any bet or wager, or to enter into or take any share or interest in any betting or wagering transaction, or to apply to any person or at any place, with a view to obtaining information or advice for the purpose of any bet or wager, or for information as to any race, fight, game, sport, or other contingency upon which betting or wagering is generally carried on, he shall be guilty of a misdemeanor, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

(2) If any such circular, notice, advertisement, letter, telegram, or other document as in this section mentioned, names or refers to any one as a person to whom any payment may be made, or from whom information may be obtained, for the purpose of or in relation to betting or wagering, the person so named or referred to shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he had not consented to be so named, and that he was not in any way a party to, and was wholly ignorant of, the sending of such document.

Sect. 2—*Sending to infants circulars inviting to borrow money.*]—(1) If any one, for the purpose of earning interest, commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to borrow money, or to enter into any transaction involving the borrowing of money, or to apply to any person or at any place with a

view to obtaining information or advice as to borrowing money, he shall be guilty of a misdemeanor, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

(2) If any such document as above in this section mentioned sent to an infant purports to issue from any address named therein, or indicates any address as the place at which application is to be made with reference to the subject-matter of the document, and at that place there is carried on any business connected with loans, whether making or procuring loans or otherwise, every person who attends at such place for the purpose of taking part in or who takes part in or assists in the carrying on of such business shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he was not in any way a party to and was wholly ignorant of the sending of such document.

Sect. 3—*Presumption of knowledge of infancy.*]—If any such circular, notice, advertisement, letter, telegram, or other document as in the preceding sections or either of them mentioned is sent to any person at any university, college, school, or other place of education, and such person is an infant, the person sending or causing the same to be sent shall be deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age.

63 & 64 *Vict. c.* 51 (*Money Lenders Act*, 1900), *s.* 5—*Presumption of knowledge of infancy.*]—Where in any proceeding under *s.* 2 of the *Betting and Loans* (*Infants*) *Act*, 1892, it is proved that the person to whom the document was sent was an infant the person charged shall be deemed to have known that the person to whom the document was sent was an infant, unless he proves that he had reasonable ground for believing the infant to be of full age.

55 & 56 *Vict. c.* 4, *s.* 4—*Soliciting infant to make affidavit in connection with loan.*]—If any one, except under the authority of any court, solicits an infant to make an affidavit or statutory declaration for the purpose of or in connection with any loan, he shall be liable, if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine, and if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds.

Sect. 6—*Defendant and wife or husband of defendant a competent witness.*]—In any proceeding against any person for an offence under this Act such person and his wife or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case. [*This enactment seems to be superseded by the Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *ante*, p. 392, *et seq.*]

Sect. 4—Poaching.

Taking game by night after two previous convictions.

Statutes.

9 *G.* 4, *c.* 69 (*Night Poaching Act*, 1828), *s.* 1.]—[*Whereas the practice of going out by night, for the purpose of destroying game, has very much increased of late years, and has in very many instances led to the commission of murder, and of other grevious offences; and it is expedient to make more effectual provisions than now by law exist for repressing such practice* (*rep.*).]—If any person shall, by night, unlawfully take or destroy any game or rabbits in any land, whether open or enclosed, or shall by night unlawfully enter or be in any land, whether open or enclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game, such offender shall, upon conviction thereof before two justices of the peace, be committed, for the first offence, to the common gaol or house of correction, for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance, or in Scotland by bond of caution, himself in ten pounds, and two sureties in five pounds each, or one surety in ten pounds, for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second time, and shall be thereof convicted before two justices of the peace, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance or bond as aforesaid, himself in twenty pounds, and two sureties in ten pounds each, or one surety in twenty pounds, for his not so offending again for the space of two years next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time, he shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be *transported beyond seas* for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in Scotland, if any person shall so offend a first, second, or third time, he shall be liable to be punished in like manner as is hereby provided in each case.

Sect. 2—*Arrest of night poachers and punishment of assaults.*]—*Ante*, p. 865.

Sect. 4—*Limitation of proceedings.*]— . . . The prosecution for every offence punishable upon indictment, or otherwise than upon summary conviction, by virtue of this Act, shall be commenced within twelve calendar months after the commission of such offence. [*Rep. as to*

summary proceedings in England, 47 & 48 *Vict.* c. 43, s. 4. *For cases on this section, see* p. 97.]

Sect. 8—*Conviction—Evidence.*]—On every conviction under this Act for a first or second offence, the convicting justices shall return the same to the next quarter sessions for the county, riding, division, city, or place wherein such offence shall have been committed: and the record of such conviction, or any copy thereof, shall be evidence in any prosecution to be instituted against the party thereby convicted for a second or third offence: and the clerk of the peace shall immediately on such return make, or cause to be made, a memorandum of such conviction in a register to be kept by him of the names and places of abode of the persons so convicted, and shall state whether such conviction be the first or second conviction of the offending party. [*See ante*, p. 360.]

Sect. 9—*Three or more persons armed taking game, etc.*]—If any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or enclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanor, and, being convicted thereof before the justices of gaol delivery [or of the court of great sessions (*abolished*)] of the county or place in which the offence shall be committed, shall be liable, at the discretion of the court, to be transported beyond seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years; and in Scotland any person so offending shall be liable to be punished in like manner. [*See ante*, p. 235, *et seq.*]

Sect. 12—"*Night*" *defined.*]—Provided always that, for the purpose of this Act, the night shall be considered and is hereby declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise. [*The computation seems to be by the actual time of sunset at the place, and not by Greenwich mean time, under* 43 & 44 *Vict.* c. 9, s. 1 (*ante*, p. 620); *see Gordon* v. *Cann*, 68 *L. J.* (*Q. B.*) 434; 63 *J. P.* 284: *Curtis* v. *Marsh*, 3 *H. & N.* 866.]

Sect. 13—"*Game*" *defined.*]—For the purposes of this Act, the word "*game*" shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.

7 & 8 *Vict.* c. 29 (*Night Poaching Act*, 1844), s. 1—*Taking game or rabbits on highways, etc.*]—All the pains, punishments, and forfeitures imposed by the said Act (9 *G.* 4, c. 69), upon persons by night unlawfully taking or destroying any game or rabbits in any land open or enclosed, as therein set forth, shall be applicable to and imposed upon any person by night unlawfully taking or destroying any game or rabbits on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates, from any such land into any such public road, highway, or path, in the like manner as upon any such land, open or enclosed; and it shall be lawful for the owner or occupier of any land adjoining either side of that part of such road, highway, or path, where the offender shall be, and the gamekeeper or servant of such owner or occupier, and any person assisting such gamekeeper or servant, and for all the persons authorized by the said Act to apprehend any offender against the provisions thereof, to seize and apprehend any person offending against the said Act or this

Act; and the said Act, and all the powers, provisions, authorities, and jurisdictions therein or thereby contained or given, shall be as applicable for carrying this Act into execution, as if the same had been herein specially set forth. [*This enactment seems to override the decision in R.* v. *Meadham*, 2 *C. & K.* 633.]

Indictment under 9 *G.* 4, *c.* 69, *s.* 1 (*ante*, p. 1244).

Commencement as ante, p. 434]—on the first day of June in the year ——, by night, to wit, about the hour of eleven in the night of the same day, did unlawfully take and destroy certain game and rabbits, to wit, one pheasant and two rabbits, in certain land ("*any land whether open or enclosed*") in the occupation of J. N., situate at the parish of B., in the county of M. [*or* did unlawfully enter certain land in the occupation of of J. N., situate, etc., and was then by night unlawfully in the said land with a certain gun ("*gun, engine, or other instrument*"), for the purpose, by night as aforesaid, of therein taking and destroying game]; against the form, etc. [*as ante*, p. 465]. And the jurors aforesaid do further present, that heretofore, and before the committing of the offence by the said J. S. hereinbefore charged and stated, to wit, on the, etc. [*Here state two former convictions under s.* 1. *Previous convictions under s.* 9 *will not suffice. R.* v. *Lines* [1902] 1 *K. B.* 199; 71 *L. J.* (*K. B.*) 125; 20 *Cox*, 142; 66 *J. P.* 24.] *This precedent has been altered from that appearing in previous editions in consequence of the ruling of Hawkins, J., in R.* v. *Woodfield* (*post*, p. 1247). *If the offence was committed on any public road, highway, or path, or the sides thereof, or at any opening, outlet, or gate from any land into any such road, etc., state it accordingly.* 7 & 8 *Vict. c.* 29, *s.* 1, *supra.*

Where the indictment, in setting out the second of the two former convictions, stated that the defendant afterwards, to wit, on the 27th November, 1858, was duly convicted before, etc., for that he, within six calendar months next before, etc., to wit, on the 24th November, in the year aforesaid, in the night of the same day, at, etc., by night unlawfully did enter and be in and upon certain enclosed land in, etc., with certain instruments [*not stating what they were*], *for the purpose of killing, taking, and destroying game thereon*, this being his second offence, *contrary, etc., and was then adjudged to be imprisoned for six calendar months, etc., this was held a sufficient statement of such conviction. Cureton* v. *R.*, 1 *B. & S.* 208; 30 *L. J.* (*M. C.*) 149.

Misdemeanor: penal servitude for not more than seven nor less than three years, or imprisonment, with or without hard labour, not exceeding two years. 9 *G.* 4, *c.* 69, *s.* 1; 20 & 21 *Vict. c.* 3 (*ante*, p. 235); 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

Evidence.

Prove the two former convictions under *s.* 1 by the production of the originals, or by examined copies (*see ante*, p. 345, *and* 9 *G.* 4, *c.* 69, *s.* 8, *ante*, p. 1245), or in the manner prescribed by 14 & 15 *Vict. c.* 99, *s.* 13 (*ante*, p. 360), or by 34 & 35 *Vict. c.* 112, *s.* 18 (*ante*, p. 361). A conviction for an offence under *s.* 9 (*ante*, p. 1245) cannot be treated as a conviction under *s.* 1 so as to enable the court to deal with the prisoner as for a third offence under *s.* 1. *R.* v. *Lines* [1902] 1 *K. B.* 199; 71 *L. J.* (*K. B.*) 125; 20 *Cox*, 142 (*C. C. R.*). As to what is a sufficient averment of a previous conviction, *see R.* v. *Merry*, 2 *Cox*, 240: *Fletcher* v. *Calthrop*, 6 *Q. B.* 880; 14 *L. J.* (*Q. B.*) 95: *Cureton* v. *R.*, *ubi supra.* Prove the identity of the defendant. And prove the third offence, as stated in the indictment.

In *R.* v. *Woodfield*, 16 *Cox*, 314, *Hawkins*, J., refused to allow evidence to be given of the previous convictions, until the jury had found the prisoner guilty of the third offence. The offence must have been committed in the night-time—that is, some time between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise; 9 *G.* 4, *c.* 69, *s.* 12 (*and see ante*, pp. 620, 1245); but a variance between the hour stated and that proved will not be material. It must also appear that the offence was committed within twelve calendar months before the prosecution. *See the evidence under the next precedent.*

Indictment under 9 *G.* 4, *c.* 69, *s.* 9 (*ante*, p. 1245).

Surrey, to wit:—The jurors for our lord the King upon their oath present, that J. S., W. S., E. G., and divers other persons to the jurors aforesaid unknown, to the number of three and more together, on the first day of November, in the year of our Lord ——, about the hour of eleven in the night of the same day, being then, by night as aforesaid, respectively armed with guns and other offensive weapons ("*any gun, cross-bow, fire-arms, bludgeon, or other offensive weapon*"), did then together, by night as aforesaid, and armed as aforesaid, unlawfully enter ("*enter or be in*") certain land ("*any land whether opened or enclosed*") in the occupation of J. N., situate at the parish of B., in the county of S., for the purpose therein of destroying game ("*game or rabbits*"); against the form [*as ante*, p. 465]. *Add a count charging that the defendants* "were by night as aforesaid, and armed as aforesaid, together unlawfully in the said land for the purpose," etc. *A count for assaulting a gamekeeper may also be added if necessary: see ante*, p. 865; *and R.* v. *Handley*, 5 *C. & P.* 565.

This offence is of a local nature, and the indictment must describe the land by name or occupation; R. v. *Ridley, R. & R.* 515; *or ownership. R.* v. *Riley*, 3 *C. & K.* 116. *It is not, however, necessary to state both the name and the occupation of the land; but, if both be stated, both must be proved, and a variance will be fatal* (*R.* v. *Owen*, 1 *Mood. C. C.* 118), *unless amended under* 14 *&* 15 *Vict. c.* 100, *s.* 1 (*ante*, p. 52). *R.* v. *Sutton*, 13 *Cox*, 648, *Lindley*, J. *In R.* v. *Crick*, 5 *C. & P.* 508, *decided before the passing of that Act, the words "a certain cover in the parish of A." were held too general a description. The indictment need not specify whether the land was open or enclosed. R.* v. *Andrews*, 2 *M. & Rob.* 37: *R.* v. *Morris*, 5 *Cox*, 205. *Nor is it necessary to name a certain close; if the land described comprehend several closes, and the offence be committed on any part of such land, it is sufficient. R.* v. *Uezzell*, 2 *Den.* 274; 3 *C. & K.* 150; 20 *L. J.* (*M. C.*) 192; 5 *Cox*, 188. *As to the proper mode of describing the arming, see R.* v. *Goodfellow*, 1 *Den.* 81; 1 *C. & K.* 724. *The indictment must show that the entry and the arming were by night; where, therefore, an indictment stated that the defendants, on, etc., did by night enter divers closes, and were then and there in the said closes armed, etc., the judgment was arrested, because the word "night" was confined to the first branch of the sentence, and the words "then and there" referred only to the day and place before stated. Davies* v. *R.*, 10 *B. & C.* 89; 5 *Man. & Ry.* 78: *see Cureton* v. *R.*, 1 *B. & S.* 208; 30 *L. J.* (*M. C.*) 149; 8 *Cox*, 481. *In R.* v. *Kendrick*, 7 *C. & P.* 184, *it was held that the indictment is sufficient if it alleges that the defendants were together in the land by night, armed, for the purpose of destroying game, without a distinct averment, in the earlier part of it, that the defendants*

being armed, did together unlawfully enter, etc. But in a subsequent case, R. v. Wilks, 7 C. & P. 811, Parke, B., intimated that it would be advisable to introduce such an averment in future; and the above indictment has been framed in compliance with this suggestion.

Misdemeanor: penal servitude for not more than fourteen and not less than three years, or imprisonment, with or without hard labour, not exceeding two years. 9 *G.* 4, *c.* 69, *s.* 9; 20 *&* 21 *Vict. c.* 3 (*ante*, p. 235); 54 *&* 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235). *A court of quarter sessions has no jurisdiction over this offence.* 9 *G.* 4, *c.* 69, *s.* 9 (*ante*, p. 1245; *and see* p. 126).

Evidence.

Prove that the defendants, with others, to the number of three or more, entered and were, in the night-time (that is to say, some time between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise; 9 *G.* 4, *c.* 69, *s.* 12, *ante*, p. 1245), in certain land in the occupation of J. N., and situate as described in the indictment. As to variances between statement and proof of the position of the land, *see ante*, pp. 298, 299.

Prove that they entered the land for the purpose of taking and destroying game (that is, hares, pheasants, partridges, grouse, heath or moor game, black game or bustards; 9 *G.* 4, *c.* 69, *s.* 13, *ante*, p. 1245) or rabbits there. Upon an indictment on 57 *G.* 3, *c.* 90 (*rep.*), for having entered a close, etc., with intent then and there illegally to destroy game, etc., the jury found that the defendant was in pursuit of game, but could not say whether in the close mentioned in the indictment or not; and the defendant having been convicted, the judges held the conviction wrong, because the entry with intent to kill was confined by the indictment to the close specified, and it was therefore necessary to prove the intent as to that close. *R.* v. *Barham*, 1 *Mood. C. C.* 151: *see R.* v. *Capewell*, 5 *C. & P.* 549: *R.* v. *Gainer*, 7 *C. & P.* 231: *Fletcher* v. *Calthrop*, 6 *Q. B.* 880; 14 *L. J.* (*M. C.*) 95: *sed quære; see per Hill*, J., *Cureton* v. *R.*, 1 *B. & S.* 208; 30 *L. J.* (*M. C.*) 149. Where people are out at night in pursuit of game, intending to take it when they can find any, they are in pursuit of game in every field through which they pass. If they are out with a general intent to take game, there is an intent to take it in any field they may pass through where game may be expected to be found. *R.* v. *Higgs*, 10 *Cox*, 527, *Willes*, J.: *R.* v. *Sutton*, 13 *Cox*, 648, *Lindley*, J. And therefore where the prisoners were charged with being by night, armed, in a certain close for the purpose of destroying game therein, and the evidence was that they passed through the close without doing anything in it, and that after being lost sight of for two hours, they were found three miles off with game in their possession, it was held that there was evidence that they were in the close mentioned in the indictment for the purpose of destroying game. *R.* v. *Higgs*, *ubi supra*. The intent is proved by circumstances from which the jury may infer it, as that the land was a preserve for game, or that the defendants discharged guns there, or had nets or dogs; *R.* v. *Turner*, 3 *Cox*, 304; or that they actually took game or rabbits there, which is the best possible evidence of the intent. All who are at the place, each acting his part with the common intent of taking game in the land mentioned in the indictment, are equally guilty, though some of them only are bodily on the land; if, therefore, some (though less than three) enter the land described in the indictment (whether it be open land, or consist of one or more closures or enclosures) armed, and others be watching on the outside of the land to give an alarm if necessary, they may equally

be convicted with those who actually enter the land, on an indictment charging them all with having entered the land armed. *R.* v. *Passey*, 7 *C. & P.* 282: *R.* v. *Lockett*, *Id.*, 300: *R.* v. *Andrews*, 2 *M. & Rob.* 37: *R.* v. *Whittaker*, 1 *Den.* 310; 2 *C. & K.* 636; 17 *L. J.* (*M. C.*) 127: *R.* v. *Scotton*, 5 *Q. B.* 493: *R.* v. *Uezzell*, 2 *Den.* 274; 3 *C. & K.* 150; 20 *L. J.* (*M. C.*) 192. *See now* 7 & 8 *Vict. c.* 29, *s.* 1 (*ante*, p. 1245). But not so if, some of them being on the land in question, another is poaching independently of them on adjoining land. *R.* v. *Nickless*, 8 *C. & P.* 757, *Patteson*, J. And where the indictment charged that the prisoners were with others on Redborough-hill Brake, and one only was seen there, the others being in a wood separated therefrom by a high road, *Patteson*, J., held the indictment not proved. *R.* v. *Dowsell*, 6 *C. & P.* 398. The sending in of a dog to drive hares into a net set in the fence, is not an entering of the land within the statute. *R.* v. *Nickless*, *supra*; *see R.* v. *Pratt*, 4 *E. & B.* 860; *Dears.* 502. It is not necessary, in order to prove that the defendants were on the land unlawfully, to negative any permission to them by the owner or tenant of the land to be there. *R.* v. *Wood*, *Dears. & B.* 1; 25 *L. J.* (*M. C.*) 96.

"*Armed*," *etc.*]—Prove that the defendants, or some or one of them, were armed with a gun or other offensive weapon, as stated in the indictment. *See ante*, p. 1247. A stick or bludgeon is not an offensive weapon, unless the jury find that the defendant took it with him for the purpose of offence. *R.* v. *Palmer*, 1 *M. & Rob.* 70: *R.* v. *Fry*, 2 *M. & Rob.* 42: *R.* v. *Turner*, 8 *Cox*, 304: *R.* v. *Williams*, 14 *Cox*, 59. Large stones are offensive weapons, if the jury are satisfied that they were of a description capable of inflicting serious injury if used offensively, and that they were brought and used by the defendants for that purpose. *R.* v. *Grice*, 7 *C. & P.* 803. Indeed any instrument, however innocent in its ordinary use, may be an offensive weapon, if brought out by the poachers for offensive purposes, although they may also intend to use it for other purposes. *R.* v. *Sutton*, 13 *Cox*, 648, *Lindley*, J. The words of the statute are "*any* of such persons being armed," etc.: and if one of the party be armed with the knowledge of the rest, it will support the allegation that they were all armed; *R.* v. *Smith*, *R. & R.* 368: *R.* v. *Goodfellow*, 1 *Den.* 81; 1 *C. & K.* 724; and it is not necessary that any of the party should be actually armed at the moment they are discovered, if there be evidence to satisfy the jury that they were armed on the land. Upon an indictment on the repealed statute, for being *found* armed, it appeared that the flash of a gun was seen in a wood, but before the defendants were discovered, they had abandoned their arms, and were found creeping away upon their knees; the judges held that they were armed within the meaning of that statute. *R.* v. *Nash*, *R. & R.* 386. It would be within the *words* of this statute if one of the party was armed without the knowledge of his companions; but the contrary was decided upon the repealed statute; *R.* v. *Southern*, *R. & R.* 444; and it may be doubtful how far such a case would come within the intention of the legislature in this particular Act. Where the indictment charged that the defendants A. and B., together with another person, entered certain land, "the said A. and B. then and there being armed," it was held that this allegation was not supported by proof that the third person was armed, and that A. and B. were not so. *R.* v. *Davis*, 8 *C. & P.* 759: *but see R.* v. *Goodfellow*, 1 *Den.* 81; 1 *C. & K.* 724, *contra*.

Lastly, it must be proved that the offence was committed within twelve calendar months next before the prosecution. 9 *G.* 4, *c.* 69, *s.* 4 (*ante*, p. 1245). *See the cases collected ante*, p. 97.

Sect. 5.

Refusing to execute a public office.

Common Law.

It is a misdemeanor indictable at common law to refuse to serve a public office. 2 *Chit. Cr. L.* 266: *R.* v. *Bower*, 1 *B. & C.* 585; 2 *D. & R.* 842; 25 *R. R.* 476: *R.* v. *Denison*, 2 *Ld. Kenyon*, 259. As to refusal of sheriff to serve, *R.* v. *Woodrow*, 2 *T. R.* 731; *and see ante*, p. 148. As to refusal to serve the offices of high constable or parish constable, *see R.* v. *Bower*, *ubi supra*: *R.* v. *Mosley*, 3 *A. & E.* 488; 4 *L. J.* (*M. C.*) 106: *R.* v. *Brain*, 3 *B. & Ad.* 614; 1 *L. J.* (*M. C.*) 53. In the case of municipal office, a fine on non-acceptance is now provided in the case of county councils by 51 & 52 *Vict. c.* 41, *s.* 75, in the case of town councils by 45 & 46 *Vict. c.* 50, *s.* 34, in the case of metropolitan borough councils by 62 & 63 *Vict. c.* 14, *ss.* 7 (1), 34, and in the case of the councils of urban and rural districts and of parishes by 56 & 57 *Vict. c.* 73, *s.* 48. But the fact of there being such a fine seems not to have been conclusive at common law against liability to indictment. *R.* v. *Denison*, *ubi supra*: *R.* v. *Bower*, *ubi supra*.

Indictment for refusing to serve the Office of Overseer of the Poor.

Middlesex, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the —— day of ——, in the year of our Lord ——, and long before, was and still is a substantial householder in the parish of B., in the county of M., and an inhabitant and resident in the said parish, and a fit and able person to execute the office of overseer of the poor for the said parish; and that the said J. S. on the day and year aforesaid, by warrant under the hands and seals of A. C., esquire, and J. P., clerk, two of the justices of our said lord the King assigned to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county (both of the said justices then dwelling in [*or* near] the parish aforesaid, in the county aforesaid), was lawfully nominated and appointed to be one of the overseers of the poor of the said parish, according to the direction of the statute in such case made and provided; whereof the said J. S. afterwards, to wit, on the day and year aforesaid, had notice. Nevertheless, the said J. S., not regarding his duty in that behalf, but contriving and intending to render the said warrant of appointment of no effect, afterwards, to wit, on the day and year aforesaid, unlawfully, wilfully, obstinately, and contemptuously did refuse, and from thence continually until the day of the taking of this inquisition, unlawfully, wilfully, obstinately, and contemptuously hath refused, and still doth refuse, to take upon himself and execute the said office of overseer of the poor of the said parish; contrary to his duty in that behalf, to the great damage of the said parish and the parishioners thereof, in delay of the provision for and care of the poor of the said parish, in contempt of our lord the King and his laws, to the evil example of all others in the like case offending; against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. (*See the precedents*, 4 *Went.*

388, 439.) *In stating the appointment, let the terms of the warrant be particularly attended to.*

The precedents of indictments for refusing to serve as high constable or parish constable (see Archbold, Cr. Pl. (22nd ed.), pp. 1182, 1884) *are omitted as being of no practical utility, since high constables have not been appointed since* 32 & 33 *Vict. c.* 47, *and parish constables, other than the regular police, are now appointed only under* 35 & 36 *Vict. c.* 92.

Misdemeanor: fine and imprisonment. R. v. *Jones,* 2 *Str.* 1146: *and see* 1 *Russ. Cr.* (6th ed.) 428.

Evidence.

Produce the warrant and prove it. Prove that the defendant had notice of it, as mentioned in the indictment. And prove that he had notice of his appointment (*see R.* v. *Harpur,* 5 *Mod.* 96), and that he had actually refused to execute the office, or that he did not afterwards execute it, from which his refusal to execute it will be implied.

Upon an indictment against a defendant, for refusing to serve the office of overseer, it was held that he was a substantial householder (*i.e.*, a person occupying as a tenant and not as a servant) within the *Poor Relief Act,* 1601 (43 *Eliz. c.* 2), and liable to serve such office, although he occupied a house and paid rent and taxes in the parish by means of a clerk only, and slept in another parish. *R.* v. *Poynder,* 1 *B. & C.* 178; 2 *D. & R.* 258: *and see R.* v. *Hall,* 1 *B. & C.* 123; 2 *D. & R.* 241; 25 *R. R.* 321: *R.* v. *Mosley,* 3 *A. & E.* 488: *Stephenson* v. *Langston,* 1 *Hagg. Consist. Rep.* 379; 18 *G.* 2 *c.* 15.

For the defence it may be proved that the defendant is disqualified to serve, or exempt from serving. (*a*) The following persons are disqualified

(*a*) Immunity from service in a parochial office exists in favour of the following classes of persons:—

1. Peers and members of parliament. *Gibson,* 215: *Stephenson* v. *Langston,* 1 *Hagg. Consist. Rep.* 380.
2. Sheriffs. *Stephenson* v. *Langston,* 1 *Hagg. Consist. Rep.* 380, *n.*
3. Acting justices of the peace. *See R.* v. *Gayer,* 1 *Burr.* 245; 1 *Ld. Raym.* 492: *R.* v. *Pateman,* 2 *T. R.* 777, 779.
4. Officers of the Supreme Court. 1 *Rolle Rep.* 368: *Prouse's case, Cro. Car.* 389: *Poordage's case,* 1 *Mod.* 22; 2 *Keb.* 578: *Ex parte Jefferies,* 6 *Bing.* 195: *and see Gerard's case,* 2 *W. Bl.* 1123.
5. Officers of the navy, army, or marines, even if on half-pay. *See R.* v. *Gayer,* 1 *Burr.* 245.
6. Persons in the regular militia. 45 & 46 *Vict. c.* 49, *s.* 41. Non-commissioned officers and privates in the local militia. 52 *G.* 3, *c.* 38, *s.* 197.
7. Men in the army reserve (45 & 46 *Vict. c.* 48, *s.* 7), the royal naval volunteers (22 & 23 *Vict. c.* 40, *s.* 7), the royal naval coast volunteers (16 & 17 *Vict. c.* 78, *s.* 8), or the royal naval volunteer reserve (3 *Edw.* 7, *c.* 6, *s.* 1).
8. The postmaster-general and officers of the post-office. 7 *W.* 4 & 1 *Vict. c.* 33, *s.* 5.
9. Commissioners or officers of customs (39 & 40 *Vict. c.* 36, *s.* 9) or of inland revenue (53 & 54 *Vict. c.* 21, *s.* 8).
10. Income tax commissioners if certified. 5 & 6 *Vict. c.* 35, *s.* 35.
11. Clergymen. *Lee's case,* 1 *Ventr.* 105; 1 *Mod.* 282; 2 *Keb.* 693: *Chambers's case, Andr.* 353.
12. Protestant dissenting ministers who do not follow any trade or occupation for a livelihood except that of a schoolmaster. 52 *G.* 3. *c.* 155, *s.* 9. *See* 1 *W.* 4, *c.* 18, *s.* 11 (*rep.*); 31 & 32 *Vict. c.* 72, *s.* 9; 34 & 35 *Vict. c.* 48: *Kenward* v. *Knowles* [1744] *Willes,* 463.
13. Roman Catholic clergy who have taken the prescribed oaths. 31 *G.* 3, *c.* 32, *s.* 8.
14. Aldermen of London. 2 *Hawk. c.* 10, *s.* 40. They would be exempt as justices.
15. Practising barristers and solicitors. 2 *Hawk. c.* 10, *s.* 39; 1 *Rolle Rep.* 368.

from serving as overseers: Assistant overseers (29 & 30 *Vict. c.* 113, *s.* 10); masters of workhouses and relieving officers (13 & 14 *Vict. c.* 101. *s.* 18); persons directly or indirectly concerned in a contract for the supply of goods for the workhouse or the relief of the poor of the union in which the parish is (12 & 13 *Vict. c.* 103, *s.* 6); undischarged bankrupts (46 & 47 *Vict. c.* 52, *s.* 32), and persons convicted of felony, fraud, or perjury (4 & 5 *W.* 4, *c.* 76, *s.* 48), or on indictment for corrupt practices at elections (46 & 47 *Vict. c.* 51, *ss.* 4–6; 47 & 48 *Vict. c.* 70, *ss.* 2, 3, 36).

Sect. 6.

SENDING UNSEAWORTHY SHIP TO SEA.

Statute.

57 & 58 *Vict. c.* 60 (*Merchant Shipping Act*, 1894), *s.* 457—*Sending unseaworthy ship to sea a misdemeanor.*]—(1) If any person sends or attempts to send, or is party to sending or attempting to send a British ship to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered, he shall, in respect of each offence, be guilty of a misdemeanor, unless he proves either that he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in such an unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving that proof he may give evidence in the same manner as any other witness. [*As to limits of owner's liability, see Massey* v. *Morriss* [1894] 2 *Q. B.* 412.]

(2) If the master of a British ship knowingly takes the same to sea in such an unseaworthy state that the life of any person is likely to be thereby endangered, he shall, in respect of each offence, be guilty of a misdemeanor, unless he proves that her going to sea in such an unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving that proof he may give evidence in the same manner as any other witness. [*See R.* v. *Freeman*, *Ir. Rep.* 9 *C. L.* 527. *As to present law relating to evidence by the defendant, see ante*, p. 392, *et seq.*]

(3) A prosecution under this section shall not, except in Scotland, be instituted otherwise than by, or with the consent of, the Board of Trade, or of the governor of the British possession in which the prosecution takes place.

16. Practising members of the College of Physicians. 32 *H.* 8, *c.* 40, *s.* 1; 2 *Hawk. c.* 10, *s.* 44; *and see* 3 *H.* 8, *c.* 11; 5 *H.* 8, *c.* 6.

17. Practising members of the Royal College of Surgeons. 5 *H.* 8, *c.* 16; 32 *H.* 8, *c.* 42; 18 *G.* 2, *c.* 15: *R.* v. *Pond*, *Comyns*, 312: *R.* v. *Chapple*, 8 *Camp.* 91.

18. Registered medical practitioners. 21 & 22 *Vict. c.* 90, *s.* 35; *and see* 2 *Hawk. c.* 10, *ss.* 41–43.

19. Practising apothecaries free of the Company of Apothecaries in London, or if resident in the country, having served seven years' apprenticeship. 6 & 7 *W.* 3, *c.* 4; 30 & 31 *Vict. c.* 59.

20. Registered dentists. 41 & 42 *Vict. c.* 33, *s.* 30.

21. Registrars of births, deaths, and marriages. 7 *W.* 4 & 1 *Vict. c.* 22, *s.* 18.

22. Factory inspectors. 1 *Edw.* 7, *c.* 22, *s.* 118 (*b*).

23. Aliens who have not been naturalized. *R.* v. *Mierre*, 5 *Burr.* 2787; 33 & 34 *Vict. c.* 14, *s.* 7.

24. Persons who have a special exemption from the crown. *R.* v. *Clarke*, 1 *T. R.* 679.

(4) A misdemeanor under this section shall not be punishable upon summary conviction. [*This section is a re-enactment, with verbal alterations, of* 39 & 40 *Vict. c.* 80, *s.* 4 (*rep.*). *As to what constitutes seaworthiness, see Hedley* v. *Pinkney SS. Co.* [1894] *App. Cas.* 222.]

Sects. 680, 684—*Punishment, procedure, venue, etc.*]—*Ante*, p. 860.

SECT. 7.

CRUELTY TO ANIMALS.

The *Cruelty to Animals Acts* of 1849 (12 & 13 *Vict. c.* 92) and 1854 (17 & 18 *Vict. c.* 60) do not create any offence punishable on indictment. *Sect.* 2 of the Act of 1849 applies to cock-fighting. *Allen* v. *Small* [1904] 2 *Ir. Rep.* 705: *Budge* v. *Parsons*, 3 *B. & S.* 382. Where a gamekeeper shot a dog (which he found disturbing pheasants in a field over which the keeper's master had sporting rights), meaning not to kill it, but to injure it, if necessary, for the purpose of frightening it away, it was held that proof of the existence of such intent as above stated did not necessarily render the keeper liable to conviction under 12 & 13 *Vict. c.* 92, *s.* 2. *Armstrong* v. *Mitchell*, 67 *J. P. Rep.* 329.

The *Cruelty to Animals Act*, 1876 (39 & 40 *Vict. c.* 77), as appears from its preamble, was passed to amend the law relating to cruelty to animals, by extending it to the cases of animals which for medical, physiological, or other scientific purposes are subjected when alive to experiments calculated to inflict pain. For this purpose it enacts in *s.* 2, That a person shall not perform on a living animal any experiment calculated to give pain, except subject to the restrictions imposed by the Act, under a penalty not exceeding 50*l.* for the first offence, and not exceeding 100*l.* or imprisonment for not exceeding three months for a second or any subsequent offence. And in *s.* 6, That an exhibition to the general public, whether admitted on payment of money or gratuitously, of experiments on living animals calculated to give pain, shall be illegal, and shall subject the offender to a penalty not exceeding 50*l.* for the first offence, and not exceeding 100*l.* or imprisonment for not exceeding three months for a second or any subsequent offence. By *s.* 14, In England offences against this Act may be prosecuted and penalties under this Act recovered before a court of summary jurisdiction in manner directed by the *Summary Jurisdiction Acts*; but by *s.* 15, "In England, where a person is accused before a court of summary jurisdiction of any offence against this Act, in respect of which a penalty of more than five pounds can be imposed, the accused may, on appearing before the court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence, and not an offence punishable on summary conviction, and the offence may be prosecuted on indictment accordingly." (*Cf.* 42 & 43 *Vict. c.* 49, *s.* 17, *ante*, p. 6.) By *s.* 21, "A prosecution under this Act against a licensed person shall not be instituted except with the assent in writing of the secretary of state."

Sect. 8.

SENDING POSTAL PACKETS ENCLOSING DELETERIOUS, EXPLOSIVE, INFLAMMABLE, OBSCENE, OR INDECENT MATTER.

47 & 48 *Vict. c.* 76 (*Post Office Protection Act*, 1884), *s.* 4—*Prohibition of sending by post explosive, inflammable, or deleterious substances, or indecent prints, words, etc.*]—(1) A person shall not send or attempt to send a postal packet which either—(*a*) Encloses any explosive substance, any dangerous substance, any filth, any noxious or deleterious substance, any sharp instrument not properly protected, any living creature which is either noxious or likely to injure other postal packets in course of conveyance or an officer of the post office, or any article, or thing whatsoever, which is likely to injure either other postal packets in course of conveyance or an officer of the post office; or (*b*) Encloses any indecent or obscene print, painting, photograph, lithograph, engraving, book or card, or any indecent or obscene article, whether similar to the above or not; or (*c*) Has on such packet, or on the cover thereof, any words, marks, or designs of an indecent, obscene, or grossly offensive character.

(2) Any person who acts in contravention of this section shall be guilty of a misdemeanor, and shall be liable, on summary conviction, to a fine not exceeding ten pounds, and on conviction on indictment, to imprisonment, with or without hard labour, for a period not exceeding twelve months.

(3) The detention in the post office of any postal packet on the ground of its being in contravention of this section, shall not exempt the sender thereof from any proceedings which might have been taken if the same had been delivered in due course of post.

Sect. 12, *sub-s.* 5—*Evidence.*]—*Ante*, p. 508.

Sect. 16—*Saving clause as to liability.*]—*Ante*, p. 702.

Sect. 20—"*Postal packet*," *meaning of the term.*]—*Ante*, p. 508; *and see* 38 & 39 *Vict. c.* 22, *s.* 10 (*ante*, p. 508).

Sect. 9.

CORRUPT PRACTICES AND OTHER INDICTABLE OFFENCES AT PARLIAMENTARY ELECTIONS.

Common Law.

Treating appears to be indictable at common law. *Hughes* v. *Marshall*, 2 *Cr. & J.* 118; 5 *C. & P.* 150: *R.* v. *Hollis*, 20 *St. Tr.* 1225. In *R.* v. *Pitt*, 3 *Burr.* 1335; 1 *W. Bl.* 380, there is said to be no precedent of an indictment at common law for bribery at a parliamentary election; but in *R.* v. *Hollis*, *ubi supra*, will be found a precedent of an information, and in *R.* v. *Pitt*, 3 *Burr.* at 1338, Lord *Mansfield* said that bribery at parliamentary elections must undoubtedly always have been a crime at common law. In *R.* v. *Bent*, 1 *Den* 157; 2 *C. & K.* 179, it was held that fraudulent personation at a municipal election was not an offence at common law.

In *R.* v. *Clarke* [1900] 2 *Ir. Rep.* 304, *Palles*, C.B., refused to follow *R.* v. *Bent.*

Statutes.

46 & 47 *Vict.* c. 51—*Corrupt and Illegal Practices Prevention Act*, 1883.] —*This Act is temporary, and is annually continued by the Expiring Laws Continuance Act* (*see* 4 *Edw.* 7, c. 29).

Sect. 64—"*Election*" *and* "*indictment*" *defined.*]—In this Act, unless the context otherwise requires—The expression "election" means the election of a member or members to serve in parliament; . . . The expression "indictment" includes information. . . .

Sect. 1—"*Treating*" *defined.*]—(1) Any person who corruptly by himself or by any other person, either before, during, or after an election, directly or indirectly gives or provides, or pays wholly or in part the expense of giving or providing, any meat, drink, entertainment or provision to or for any person, for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at the election, or on account of such person or any other person having voted or refrained from voting, or being about to vote or refrain from voting at such election, shall be guilty of treating.

(2) And every elector who corruptly accepts or takes any such meat, drink, entertainment, or provision shall be guilty of treating.

Sect. 2—"*Undue influence*" *defined.*]—Every person who shall directly or indirectly, by himself or by any other person on his behalf, make use of or threaten to make use of any force, violence, or restraint, or inflict or threaten to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm, or loss upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall by abduction, duress, or any fraudulent device or contrivance impede or prevent the free exercise of the franchise of any elector, or shall thereby compel, induce or prevail upon any elector either to give or to refrain from giving his vote at any election, shall be guilty of undue influence.

Sect. 3—"*Corrupt practice*" *defined.*]—The expression "corrupt practice" as used in this Act means any of the following offences; namely, treating and undue influence, as defined by this Act, and bribery, and personation, as defined by the enactments set forth in Part III. of the third schedule to this Act [*post*, p. 1261], and aiding, abetting, counselling, and procuring the commission of the offence of personation, and every offence which is a corrupt practice within the meaning of this Act shall be a corrupt practice within the meaning of the *Parliamentary Elections Act*, 1868 (31 & 32 *Vict.* c. 125).

Sect. 6—*Punishment of person convicted on indictment of corrupt practices.*]—(1) A person who commits any corrupt practice other than personation, or aiding, abetting, counselling, or procuring the commission of the offence of personation, shall be guilty of a misdemeanor, and on conviction on indictment shall be liable to be imprisoned, with or without hard labour, for a term not exceeding one year, or to be fined any sum not exceeding two hundred pounds.

(2) A person who commits the offence of personation (*see post*, p. 1262), or of aiding, abetting, counselling, or procuring the commission of that offence, shall be guilty of felony, and any person convicted thereof on indictment shall be punished by imprisonment for a term not exceeding two years, together with hard labour.

(3) A person who is convicted on indictment of any corrupt practice shall (in addition to any punishment as above provided) be not capable during a period of seven years from the date of his conviction:—

(*a*) of being registered as an elector or voting at any election in the United Kingdom, whether it be a parliamentary election or an election for any public office within the meaning of this Act; or

(*b*) of holding any public or judicial office within the meaning of this Act, and if he holds any such office the office shall be vacated.

(4) Any person so convicted of a corrupt practice in reference to any election shall also be incapable of being elected to and of sitting in the House of Commons during the seven years next after the date of his conviction, and if at that date he has been elected to the House of Commons his election shall be vacated from the time of such conviction.

Sect. 33, *sub-s.* 7—*False declaration respecting election expenses.*]—If any candidate or election agent knowingly makes the declaration [*respecting election expenses*] required by this section falsely, he shall be guilty of an offence, and on conviction thereof on indictment shall be liable to the punishment for wilful and corrupt perjury; such offence shall also be deemed to be a corrupt practice within the meaning of this Act.

Sect. 38, *sub-s.* 8—*Bribery or treating by licensed person on licensed premises.*]—With respect to a person holding a licence or certificate under the *Licensing Acts* (in this section referred to as a licensed person) the following provisions shall have effect:—

(*a*) If it appears to the court by which any licensed person is convicted of the offence of bribery or treating that such offence was committed on his licensed premises, the court shall direct such conviction to be entered in the proper register of licences. . . .

["*Licensing Acts*" *is defined by s.* 64 *to mean the Licensing Acts* 1872 *to* 1874. *As to the register of licences, see* 35 *&* 36 *Vict. c.* 94, *s.* 36; 2 *Edw.* 7, *c.* 28, *s.* 9.]

Sect. 41, *sub-s.* 4—*Fraudulent withdrawal of election petition.*]—If any person makes any agreement or terms, or enters into any undertaking, in relation to the withdrawal of an election petition, and such agreement, terms, or undertaking is or are for the withdrawal of the election petition in consideration of any payment, or in consideration that the seat shall at any time be vacated, or in consideration of the withdrawal of any other election petition, or is or are (whether lawful or unlawful) not mentioned in the aforesaid affidavits [*i.e., the affidavits mentioned in the former part of this section*], he shall be guilty of a misdemeanor, and shall be liable on conviction on indictment to imprisonment for a term not exceeding twelve months, and to a fine not exceeding two hundred pounds.

Sect. 43—*Attendance of director of public prosecutions on trial of election petition, and prosecution by him of offenders.*]—(1) On every trial of an election petition the director of public prosecutions shall by himself, or by his assistant, or by such representative as hereinafter mentioned,

attend at the trial, and it shall be the duty of such director to obey any directions given to him by the election court with respect to the summoning and examination of any witness to give evidence on such trial, and with respect to the prosecution by him of offenders, and with respect to any person to whom notice is given to attend with a view to report him as guilty of any corrupt or illegal practice.

(2) It shall also be the duty of such director, without any direction from the election court, if it appears to him that any person is able to give material evidence as to the subject of the trial, to cause such person to attend the trial, and with the leave of the court to examine such person as a witness.

(3) It shall also be the duty of the said director, without any direction from the election court, if it appears to him that any person who has not received a certificate of indemnity has been guilty of a corrupt or illegal practice, to prosecute such person for the offence before the said court, or if he thinks it expedient in the interests of justice before any other competent court.

(4) Where a person is prosecuted before an election court for any corrupt or illegal practice, and such person appears before the court, the court shall proceed to try him summarily for the said offence, and such person, if convicted thereof upon such trial, shall be subject to the same incapacities as he is rendered subject to under this Act upon conviction, whether on indictment or in any other proceeding for the said offence; and further, may be adjudged by the court, if the offence is a corrupt practice, to be imprisoned, with or without hard labour, for a term not exceeding six months, or to pay a fine not exceeding two hundred pounds, and if the offence is an illegal practice, to pay such fine as is fixed by this Act for the offence;

Provided that, in the case of a corrupt practice, the court, before proceeding to try summarily any person, shall give such person the option of being tried by a jury.

(5) Where a person is so prosecuted for any such offence, and either he elects to be tried by a jury, or he does not appear before the court, or the court thinks it in the interests of justice expedient that he should be tried before some other court, the court, if of opinion that the evidence is sufficient to put the said person upon his trial for the offence, shall order such person to be prosecuted on indictment or before a court of summary jurisdiction, as the case may require, for the said offence; and in either case may order him to be prosecuted before such court as may be named in the order; and for all purposes preliminary and of and incidental to such prosecution the offence shall be deemed to have been committed within the jurisdiction of the court so named. [*See R.* v. *Ripley*, 17 *Cox*, 120 (*C. C. R.*), *post*, p. 1269.]

(6) Upon such order being made,

(*a*) If the accused person is present before the court, and the offence is an indictable offence, the court shall commit him to take his trial, or cause him to give bail to appear and take his trial for the said offence; and

(*b*) If the accused person is present before the court, and the offence is not an indictable offence, the court shall order him to be brought before the court of summary jurisdiction before whom he is to be prosecuted, or cause him to give bail to appear before that court; and

(*c*) If the accused person is not present before the court, the court shall as circumstances require issue a summons for his attendance, or a warrant to apprehend him and bring him before a court of

summary jurisdiction, and that court, if the offence is an indictable offence, shall, on proof only of the summons or warrant and the identity of the accused, commit him to take his trial, or cause him to give bail to appear and take his trial for the said offence, or if the offence is punishable on summary conviction, shall proceed to hear the case, or if such court be not the court before whom he is directed to be prosecuted, shall order him to be brought before that court.

(7) The director of public prosecutions may nominate, with the approval of the attorney-general, a barrister or solicitor of not less than ten years' standing to be his representative for the purpose of this section, and that representative shall receive such remuneration as the . . . Treasury may approve. There shall be allowed to the director and his assistant or representative, for the purposes of this section, such allowance for expenses as the . . . Treasury may approve.

(8) The costs incurred in defraying the expenses of the director of public prosecutions under this section (including the remuneration of his representative) shall, in the first instance, be paid by the . . . Treasury, and so far as they are not in the case of any prosecution paid by the defendant shall be deemed to be expenses of the election court; but if for any reasonable cause it seems just to the court so to do, the court shall order all or part of the said costs to be repaid to the . . . Treasury by the parties to the petition, or such of them as the court may direct.

Sect. 45—*Duty of director of public prosecutions to institute prosecutions for corrupt practices.*]—Where information is given to the director of public prosecutions that any corrupt or illegal practices have prevailed in reference to any election, it shall be his duty, subject to the regulations under the *Prosecution of Offences Act*, 1879 (42 & 43 *Vict. c.* 22), to make such inquiries and institute such prosecutions as the circumstances of the case appear to him to require. [*For these regulations see Statutory Rules and Orders Revised* (ed. 1904), *vol.* 4, *tit.* "*Criminal Procedure, E.*" pp. 7, 9.]

Sect. 50—*Trial in Central Criminal Court or at Royal Courts of Justice of indictment for corrupt practices at instance of attorney-general.*]—Where an indictment as defined by this Act (*see s.* 64, *ante*, p. 1255), for any offence under the *Corrupt Practices Prevention Acts* (*a*) or this Act is instituted in the high court or is removed into the high court by a writ of *certiorari* issued at the instance of the attorney-general, and the attorney-general suggests on the part of the crown that it is expedient for the purposes of justice that the indictment should be tried in the Central Criminal Court, or if a special jury is ordered, that it should be tried before a judge and jury at the royal courts of justice, the High Court may, if it think fit, order that such indictment shall be so tried upon such terms as the court may think just, and the High Court may make such orders as appear to the court necessary or proper for carrying into effect the order for such trial.

Sect. 51—*Limitation of time for prosecution.*]—(1) A proceeding against

(*a*) By *s.* 65, the enactments described in the third schedule to this Act (*post*, p. 1261) are in this Act referred to as the "*Corrupt Practices Prevention Acts.*" The enactments described in that schedule are 17 & 18 *Vict. c.* 102; 26 & 27 *Vict. c.* 29; 31 & 32 *Vict. c.* 125; 35 & 36 *Vict. c.* 33, *part* 3; and 42 & 43 *Vict. c.* 75, *so far as they are unrepealed*; and 30 & 31 *Vict. c.* 102, *ss.* 11, 49, 50. So far as those statutes relate to indictable offences and are still in force, they will be found set out in *schedule* 3, *part* 3 (*post*, p. 1261, *et seq.*), and in the series of enactments beginning with 17 & 18 *Vict. c.* 102, *s.* 10 (*post*, p. 1262), and ending with 35 & 36 *Vict. c.* 33, *s.* 24 (*post*, p. 1265).

a person in respect of the offence of a corrupt or illegal practice or any other offence under the *Corrupt Practices Prevention Acts* or this Act shall be commenced (*see ante*, p. 97) within one year after the offence was committed, or if it was committed in reference to an election with respect to which an inquiry is held by election commissioners shall be commenced within one year after the offence was committed, or within three months after the report of such commissioners is made, whichever period last expires, so that it be commenced within two years after the offence was committed, and the time so limited by this section shall, in the case of any proceeding under the *Summary Jurisdiction Acts* for any such offence, whether before an election court or otherwise, be substituted for any limitation of time contained in the last-mentioned Acts.

(2) For the purposes of this section the issue of a summons, warrant, writ, or other process shall be deemed to be a commencement of a proceeding, where the service or execution of the same on or against the alleged offender is prevented by the absconding or concealment or act of the alleged offender, but save as aforesaid the service or execution of the same on or against the alleged offender, and not the issue thereof, shall be deemed to be the commencement of the proceeding.

Sect. 52—*Verdict of guilty of illegal practice on indictment for corrupt practice.*]—Any person charged with a corrupt practice may, if the circumstances warrant such finding, be found guilty of an illegal practice [*as to what are illegal practices, see ss.* 7 *to* 12 *of this statute, and ss.* 1, 2 *of the Corrupt and Illegal Practices Prevention Act*, 1895 (58 *&* 59 *Vict. c.* 40)] (which offence shall for that purpose be an indictable offence), and any person charged with an illegal practice may be found guilty of that offence, notwithstanding that the act constituting the offence amounted to a corrupt practice, and a person charged with illegal payment, employment, or hiring, may be found guilty of that offence, notwithstanding that the act constituting the offence amounted to a corrupt or illegal practice.

Sect. 53—*Application of enactments of* 17 *&* 18 *Vict. c.* 102, *and* 26 *&* 27 *Vict. c.* 29, *relating to prosecutions for bribery—Evidence.*]—(1) *Sects.* 10, 12, *and* 13 of the *Corrupt Practices Prevention Act*, 1854 [17 *&* 18 *Vict. c.* 102, *post*, p. 1262], and *s.* 6 of the *Corrupt Practices Prevention Act*, 1863 [26 *&* 27 *Vict. c.* 29, *post*, p. 1263] (which relate to prosecutions for bribery and other offences under those Acts), shall extend to any prosecution on indictment for the offence of any corrupt practice within the meaning of this Act, and to any action for any pecuniary forfeiture for an offence under this Act, in like manner as if such offence were bribery within the meaning of those Acts, and such indictment or action were the indictment or action in those sections mentioned, and an order under the said *s.* 10 may be made on the defendant; but the director of public prosecutions or any persons instituting any prosecution in his behalf or by direction of an election court shall not be deemed to be a private prosecutor, nor required under the said sections to give any security.

(2) On any prosecution under this Act, whether on indictment or summarily, and whether before an election court or otherwise, and in any action for a pecuniary forfeiture under this Act, the person prosecuted or sued, and the husband or wife of such person, may, if he or she think fit, be examined as an ordinary witness in the case. (*See ante*, p. 392, *et seq.*)

(3) On any such prosecution or action as aforesaid it shall be sufficient to allege that the person charged was guilty of an illegal practice, payment, employment, or hiring within the meaning of this Act, as the case may be (*see R.* v. *Stroulger*, *post*, p. 1263), and the certificate of the

returning officer at an election that the election mentioned in the certificate was duly held, and that the person named in the certificate was a candidate at such election, shall be sufficient evidence of the facts therein stated.

Sect. 56—*Exercise of jurisdiction of high court.*]—(1) Subject to any rules of court, any jurisdiction vested by this Act in the High Court may, so far as it relates to indictments or other criminal proceedings, be exercised by any judge of the [King's] Bench Division. . . .

Sect. 57—*Director of public prosecutions and expenses of prosecutions.*]—(1) The director of public prosecutions in performing any duty under this Act shall act in accordance with the regulations under the *Prosecution of Offences Act*, 1879 [42 & 43 *Vict.* c. 22: *the regulations are printed in Statutory Rules and Orders Revised* (ed. 1904), *vol.* 4, *tit.* "*Criminal Procedure, E.*," pp. 7, 9], and subject thereto in accordance with the directions (if any) given to him by the attorney-general; and any assistant or representative of the director of public prosecutions in performing any duty under this Act shall act in accordance with the said regulations and directions, if any, and with the directions given to him by the director of public prosecutions.

(2) Subject to the provisions of this Act, the costs of any prosecution on indictment for an offence punishable under this Act, whether by the director of public prosecutions or his representative or by any other person, shall, so far as they are not paid by the defendant, be paid in like manner as costs in the case of a prosecution for felony are paid [*see ante*, p. 246].

Sect. 58—*Recovery of costs ordered to be paid by any person.*]—(2) Where any costs or other sums are, under the order of an election court or otherwise under this Act, to be paid by any person, those costs shall be a simple contract debt due from such person to the person or persons to whom they are to be paid, and if payable to the . . . Treasury shall be a debt to [his] Majesty, and in either case may be recovered accordingly [*see s.* 53, *ante*, p. 1259; 17 & 18 *Vict.* c. 102, *ss.* 10, 12, 13, *post*, pp. 1262, 1263].

Sect. 59—*Obligation of witness to answer and certificate of indemnity—Evidence.*]—(1) A person who is called as a witness respecting an election before any election court shall not be excused from answering any question relating to any offence at or connected with such election, on the ground that the answer thereto may criminate or tend to criminate himself or on the ground of privilege;

Provided that—

(*a*) A witness who answers truly all questions which he is required by the election court to answer shall be entitled to receive a certificate of indemnity under the hand of a member of the court, stating that such witness has so answered: and

(*b*) An answer by a person to a question put by or before any election court shall not, except in the case of any criminal proceeding for perjury in respect of such evidence, be in any proceeding, civil or criminal, admissible in evidence against him:

(2) Where a person has received such a certificate of indemnity in relation to an election, and any legal proceeding is at any time instituted against him for any offence under the *Corrupt Practices Prevention Acts* or this Act committed by him previously to the date of the certificate at or in relation to the said election, the court having cognizance of the case shall on proof of the certificate stay the proceeding, and may in their

discretion award to the said person such costs as he may have been put to in the proceeding :

(3) Nothing in this section shall be taken to relieve a person receiving a certificate of indemnity from any incapacity under this Act or from any proceeding to enforce such incapacity (other than a criminal prosecution) :

(4) This section shall apply in the case of a witness before any election commissioners, in like manner as if the expression "election court" in this section included election commissioners.

Sect. 60—*Submission of report of election court or commissioners to attorney-general.*]—An election court or election commissioners, when reporting that certain persons have been guilty of any corrupt or illegal practice, shall report whether those persons have or not been furnished with certificates of indemnity; and such report shall be laid before the attorney-general (accompanied in the case of the commissioners with the evidence on which such report was based) with a view to his instituting or directing a prosecution against such persons as have not received certificates of indemnity, if the evidence should, in his opinion, be sufficient to support a prosecution.

Third Schedule.—Part III.

Enactments defining the offences of Bribery and Personation.

The Corrupt Practices Prevention Act, 1854 (17 & 18 *Vict. c.* 102), *ss.* 2, 3 [*continued by the Expiring Laws Continuance Act*, 4 *Edw.* 7, *c.* 29].

Sect. 2.]—*Bribery.*—The following persons shall be deemed guilty of bribery, and shall be punished accordingly :—

(1) Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure or to endeavour to procure, any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter, or to or for any other person in order to induce any voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid on account of such voter having voted or refrained from voting at any election :

(2) Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, give or procure, or agree to give or procure, or offer, promise, or promise to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person in order to induce such voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid on account of any voter having voted or refrained from voting at any election :

(3) Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, make any such gift, loan, offer, promise, procurement, or agreement as aforesaid to or for any person, in order to induce such person to procure or endeavour to procure the return of any person to serve in parliament, or the vote of any voter at any election : [*As to former law, see Henslow* v. *Fawcett*, 3 *A. & E.* 51 : *Harding* v. *Stokes*, 2 *M. & W.* 233.]

(4) Every person who shall, upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procure or engage, promise, or endeavour to procure the return of any person to serve in parliament, or the vote of any voter at any election:

(5) Every person who shall advance or pay, or cause to be paid, any money to or to the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or who shall knowingly pay or cause to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election. Provided always, that the aforesaid enactment shall not extend or be construed to extend to any money paid or agreed to be paid for or on account of any legal expenses *bonâ fide* incurred at or concerning any election. [*As to the meaning of the section, see Cooper* v. *Slade*, 6 *H. L. C.* 746.]

Sect. 3—*Bribery.*]—The following persons shall also be deemed guilty of bribery, and shall be punishable accordingly:—

(1) Every voter who shall, before or during any election, directly or indirectly, by himself or by any other person on his behalf, receive, agree, or contract for any money, gift, loan, or valuable consideration, office, place, or employment, for himself or for any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting at any election:

(2) Every person who shall, after any election, directly or indirectly, by himself or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or refrain from voting at any election. [*See* 46 *&* 47 *Vict. c.* 51, *s.* 28.]

30 *&* 31 *Vict. c.* 102 (*Representation of the People Act*, 1867), *s.* 49—*Bribery.*]—Any person, either directly or indirectly, corruptly paying any rate on behalf of any ratepayer for the purpose of enabling him to be registered as a voter, thereby to influence his vote at any future election, and any candidate or other person, either directly or indirectly, paying any rate on behalf of any voter for the purpose of inducing him to vote or refrain from voting, shall be guilty of bribery, and be punishable accordingly; and any person on whose behalf and with whose privity any such payment as in this section is mentioned is made, shall also be guilty of bribery, and punishable accordingly.

35 *&* 36 *Vict. c.* 33 (*Ballot Act*, 1870), *s.* 24—*Personation.*]—A person shall for all purposes of the laws relating to parliamentary and municipal elections be deemed to be guilty of the offence of personation who, at an election for a county or borough, or at a municipal election, applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person, or who, having voted once at any such election, applies at the same election for a ballot paper in his own name. . . . [*As to extension of this enactment to other elections, see post*, p. 1271].

OTHER ENACTMENTS REFERRED TO IN 46 & 47 VICT. C. 51.

17 *&* 18 *Vict. c.* 102 (*Corrupt Practices Prevention Act*, 1854), *s.* 10—*Costs and expenses of prosecution—Indictment for bribery or undue influence*

not triable at quarter sessions.]—It shall be lawful for any criminal court, before which any prosecution shall be instituted for any offence against the provisions of this Act, to order payment to the prosecutor of such costs and expenses as to the said court shall appear to have been reasonably incurred in and about the conduct of such prosecution: Provided always, that no indictment for bribery or undue influence shall be triable before any court of quarter sessions. [*See* 46 & 47 *Vict.* c. 51, *s.* 53, *ante*, p. 1259; *Id.*, *s.* 58, *ante*, p. 1260.]

Sect. 12—*In case of private prosecutions, if judgment be given for defendant, he shall recover costs from prosecutor.*]—In case of any indictment or information by a private prosecutor for any offence against the provisions of this Act, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant by reason of such indictment or information, such costs to be taxed by the proper officer of the court in which such judgment shall be given. [*See* 46 & 47 *Vict.* c. 51, *s.* 53, *ante*, p. 1259; *Id.*, *s.* 58, *ante*, p. 1260. *This section applies to an indictment by a private prosecutor for a corrupt practice at a municipal election. R.* v. *Law* [1900] 1 *Q. B.* 605; 69 *L. J.* (*Q. B.*) 348; 19 *Cox*, 452.]

Sect. 13—*Prosecutor not to be entitled to costs unless he shall have entered into a recognizance to conduct prosecution and pay costs.*]—It shall not be lawful for any court to order payment of the costs of a prosecution for any offence against the provisions of this Act, unless the prosecutor shall, before or upon the finding of the indictment or the granting of the information, enter into a recognizance, with two sufficient sureties, in the sum of two hundred pounds (to be acknowledged in like manner as is now required in cases of writs of *certiorari* awarded at the instance of a defendant in an indictment), with the conditions following; that is to say, that the prosecutor shall conduct the prosecution with effect, and shall pay to the defendant or defendants, in case he or they shall be acquitted, his or their costs. [*See* 46 & 47 *Vict.* c. 51, *s.* 53, *ante*, p. 1259.]

26 & 27 *Vict.* c. 29 (*Corrupt Practices Prevention Act*, 1862), *s.* 6—*Form of indictment—Evidence.*]—In any indictment or information for bribery or undue influence, and in any action or proceeding for any penalty for bribery, treating, or undue influence, it shall be sufficient to allege that the defendant was at the election at or in connection with which the offence is intended to be alleged to have been committed, guilty of bribery, treating, or undue influence (as the case may require); and in any criminal or civil proceedings in relation to any such offence, the certificate of the returning officer in this behalf shall be sufficient evidence of the due holding of the election, and of any person therein named having been a candidate thereat. [*See* 46 & 47 *Vict.* c. 51, *s.* 53 (*ante*, p. 1259). *As to proof of register of voters, see Reed* v. *Lamb*, 6 *H. & N.* 75: *R.* v. *Clarke*, 1 *F. & F.* 654.

Where the defendant was indicted under 46 & 47 *Vict.* c. 51, *for "corrupt practices" at a parliamentary election, without setting out the nature of such corrupt practices as "bribery," "undue influence," etc., it was held that after verdict, no objection could be taken to the indictment for want of certainty, although the majority of the judges were of opinion that if the objection had been taken by way of motion to quash the indictment, it must have prevailed. R.* v. *Stroulger*, 17 *Q. B. D.* 327; 55 *L. J.* (*M. C.*) 137; *and Pollock*, B., *quashed an indictment so framed. R.* v. *Norton*, 16 *Cox*, 59.]

30 & 31 *Vict.* c. 102 (*Representation of the People Act*, 1867), *s.* 11—*Voting*

by elector who has been employed for reward within six months of an election, a misdemeanor.]—No elector who, within six months before or during any election for any county or borough, shall have been retained, hired, or employed for all or any of the purposes of the election for reward by or on behalf of any candidate at such election as agent, canvasser, clerk, messenger, or in other like employment, shall be entitled to vote at such election, and if he shall so vote he shall be guilty of a misdemeanor.

Sect. 50—*Returning officer, his deputy, partner, or clerk, acting as agent, a misdemeanor.*]—No returning officer for any county or borough, nor his deputy, nor any partner or clerk of either of them, shall act as agent for any candidate in the management or conduct of his election as a member to serve in parliament for such county or borough; and if any returning officer, his deputy, the partner or clerk of either of them, shall so act, he shall be guilty of a misdemeanor. [*See also* 35 & 36 *Vict. c.* 33, *s.* 11, *post*, p. 1266.]

6 & 7 *Vict. c.* 18 (*Parliamentary Registration Act*, 1843), *s.* 81.]—In all elections whatever of a member or members to serve in parliament for any county, riding, parts or division of a county, or for any city or borough, in England or Wales, no inquiry shall be permitted at the time of polling as to the right of any person to vote, except only as follows; (that is to say) that the returning officer or his respective deputy shall, if required on behalf of any candidate, put to any voter at the time of his tendering his vote, and not afterwards, the following questions or either of them:

1. Are you the same person whose name appears as A. B. on the register of voters now in force for the county of [or for the riding, parts or division of the county of] or for the city [or borough] of [as the case may be]?

2. Have you already voted, either here or elsewhere at this election for the county of [or for the riding, parts or division of the county of] or for the city [or borough] of [as the case may be]?

And if any person wilfully make a false answer to either of the questions aforesaid he shall be deemed guilty of a misdemeanor, and shall and may be indicted and punished accordingly; and the returning officer or his deputy . . . shall, if required on behalf of any candidate at the time aforesaid, administer an oath to any voter in the following form:

You do swear [or affirm as the case may be] that you are the same person whose name appears as A. B. on the register of voters now in force for the county of [or for the riding, parts or division of the county of], or for the city [or borough] of [as the case may be], and that you have not before voted, either here or elsewhere, at the present election for the county of [or for the riding, parts or division of the county of] or for the city [or borough] of [as the case may be].

So help you God.

[*As to persons entitled to administer the oath, see* 35 & 36 *Vict. c.* 33, *s.* 10. (*a*) *As to form of indictment, cf. R. v. Bowler, C. & Mar.* 559: *R. v. Ellis, Id.*, 564: *R. v. Spalding, Id.*, 568, *decided upon similar provisions contained in s.* 58 *of the Reform Act*, 1832 (2 *W.* 4, *c.* 45), *in which cases judgment was arrested on the ground that the fact that the defendants appeared and voted was stated in the indictments by way of recital only, and not by express averment: and cf. R. v. Lucy, Id.*, 511; *and see ante*, p. 1071.]

(*a*) This enactment is continued annually by the *Expiring Laws Continuance Act*.

35 & 36 *Vict. c.* 33 (*Ballot Act*, 1872), *s.* 24—*Definition of personation—Institution of prosecution—Costs of prosecution.*]—The following enactments shall be made with respect to personation at parliamentary and municipal elections:

A person shall for all purposes of the laws relating to parliamentary and municipal elections be deemed to be guilty of the offence of personation (*ante*, pp. 1256, 1262), who at an election for a county or borough, or at a municipal election, applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person, or who having voted once at any such election applies at the same election for a ballot paper in his own name. [*Provisions as to punishment rep.* 45 & 47 *Vict. c.* 51, *s.* 66, *and replaced by s.* 3 *of that Act, ante*, p. 1255]. It shall be the duty of the returning officer to institute a prosecution against any person whom he may believe to have been guilty of personation, or of aiding, abetting, counselling, or procuring the commission of the offence of personation by any person, at the election for which he is returning officer, and the costs and expenses of the prosecutor and the witnesses in such case, together with compensation for their trouble and loss of time, shall be allowed by the court in the same manner in which courts are empowered to allow the same in cases of felony.

[*This section supersedes* 6 & 7 *Vict. c.* 18, *ss.* 83, 84, *but not ss.* 85–89. *For cases on former law, see R. v. Hague*, 4 *B. & S.* 715; 33 *L. J.* (*M. C.*) 81 (*parliamentary elections*): *R. v. Thompson*, 2 *M. & Rob.* 255: *R. v. Bent*, 1 *Den.* 157; 2 *C. & K.* 179: *R. v. Haslam*, 1 *Den.* 73: *R. v. Goodman*, 1 *F. & F.* 502 (*municipal elections*). *For precedents of indictments under this section, see R. v. Fox*, 16 *Cox*, 166: *R. v. Turner*, 12 *Cox*, 318. *Two witnesses are necessary to prove the offence.* 6 & 7 *Vict. c.* 18, *s.* 88 (*ante*, p. 409).

If a person applies for a ballot paper in a name other than his own, or the name by which he is generally known, but in a name which appears on the register of voters, and which was inserted therein by the overseers in the belief that it was the name of the applicant, and for the purpose of putting him on the register, he is entitled to vote and is not guilty of the offence of personation within this section. R. v. Fox, 16 *Cox*, 166, *Hawkins*, J. *It is not necessary to state in an indictment for personation or to prove at the trial that the presiding officer at the booth where the offence was committed was duly appointed. R. v. Garvey*, 16 *Cox*, 252 (*Ir. C. C. R.*): *cf. R. v. Thompson*, 2 *M. & Rob.* 355: *R. v. Turner*, 12 *Cox*, 313. *On a trial for personation at the election of a municipal councillor, judicial notice will be taken of the municipal charter. R. v. Turner, ubi supra.*]

OTHER ENACTMENTS RELATING TO OFFENCES AT PARLIAMENTARY ELECTIONS.

35 & 36 *Vict. c.* 33 (*a*) (*Ballot Act*, 1872), *s.* 3—*Offences in respect of nomination papers, ballot papers, and ballot boxes—Attempts to commit such offences—Form of indictment.*]—Every person who—(1) Forges or fraudulently defaces or fraudulently destroys any nomination paper, or delivers to the returning officer any nomination paper, knowing the same to be forged; or (2) Forges, or counterfeits, or fraudulently defaces, or fraudulently destroys any ballot paper or the official mark on any ballot paper; or (3) Without due authority supplies any ballot paper to any person; or (4) Fraudulently puts into any ballot box any paper other than the ballot paper which he is authorized by law to put in; or (5) Fraudulently

(*a*) This enactment is continued annually by the *Expiring Laws Continuance Act.*

takes out of the polling station any ballot paper; or (6) Without due authority destroys, takes, opens, or otherwise interferes with any ballot box or packet of ballot papers then in use for the purposes of the election, shall be guilty of a misdemeanor, and be liable, if he is a returning officer or clerk in attendance at a polling station, to imprisonment for any term not exceeding two years, with or without hard labour, and if he is any other person, to imprisonment for any term not exceeding six months, with or without hard labour.

Any attempt to commit any offence specified in this section shall be punishable in the manner in which the offence itself is punishable.

In any indictment or other prosecution for an offence in relation to the nomination papers, ballot boxes, ballot papers, and marking instruments at an election, the property in such papers, boxes, and instruments may be stated to be in the returning officer at such election, as well as the property in the counterfoils.

[*As to the mode of securing the production of ballot papers, etc., for the purpose of a prosecution, see* 35 *&* 36 *Vict. c.* 33, *Sched.* 1, *Part I., rules* 40 *&* 41, *and Sched.* 1, *Part II., rule* 64 (*b*) (*a*), *and R.* v. *Beardsall*, 1 *Q. B. D.* 452; 45 *L. J.* (*M. C.*) 157; 13 *Cox*, 193.]

Sect. 11 (*a*)—*Extension of s.* 50 *of* 30 *&* 31 *Vict. c.* 102.]—*Sect.* 50 *of the Representation of the People Act*, 1867 (*ante*, p. 1264) (which relates to the acting of any returning officer, or his partner or clerk, as agent for a candidate), shall apply to any returning officer or officer appointed by him in pursuance of this Act, and to his partner or clerk.

Sect. 10.

CORRUPT PRACTICES AND OTHER INDICTABLE OFFENCES AT MUNICIPAL AND CERTAIN OTHER ELECTIONS.

Common Law.

Bribery in municipal elections is a misdemeanor indictable at common law. *R.* v. *Plympton*, 2 *Ld. Raym.* 1377. So is payment or promise of payment for votes at the election of an assistant overseer of a parish. *R.* v. *Lancaster*, 16 *Cox*, 377, *Wills*, J.

Statutes.

47 *&* 48 *Vict. c.* 70, *s.* 1—*Short title.*]—This Act may be cited as the *Municipal Elections* (*Corrupt and Illegal Practices*) *Act*, 1884.

Sect. 34—*Definitions.*]—In this Act expressions have the same meaning as in the *Municipal Corporations Act*, 1882, and in the *Corrupt and Illegal Practices Prevention Act*, 1883 (*ante*, p. 1255); except that the words "borough," "election petition," "election court," and "candidate," shall, unless the context otherwise requires, have the meaning given by the *Municipal Corporations Act*, 1882 (45 *&* 46 *Vict. c.* 50), and not the meaning given by the *Corrupt and Illegal Practices Prevention Act*, 1883 (46 *&* 47 *Vict. c.* 51); and except that "election" shall, unless the context otherwise requires, mean a municipal election.

(*a*) This enactment is continued annually by the *Expiring Laws Continuance Act.*

Sect. 35—*Application of Act to city of London.*]—This Act and *Part IV.* of the *Municipal Corporations Act*, 1882, shall apply to a municipal election in the city of London, subject as follows . . . [*See now* 50 & 51 *Vict. c. xiii., as to elections in the city of London.*]

Sect. 36—*Application of Act to certain other elections.*]—(1) Subject as hereinafter mentioned, the provisions of this Act and of *Part IV.* of the *Municipal Corporations Act*, 1882, as amended by this Act, shall extend to elections for the offices mentioned in the first column (*post*, p. 1270) of the first schedule to this Act as if re-enacted herein and in terms made applicable thereto, and petitions may be presented and tried, and offences prosecuted and punished, and incapacities incurred in reference to each such election accordingly.

Sect. 2—*Definition and punishment of corrupt practices at municipal elections.*]—(1) The expression "corrupt practice" in this Act means any of the following offences, namely, treating, undue influence, bribery, and personation as defined by the enactments set forth in Part One of the third schedule to this Act [*post*, p. 1270], and aiding, abetting, counselling, and procuring the commission of the offence of personation. [*As to the common law, see ante*, p. 1266. *As to the law in Ireland, see R.* v. *Clarke* [1900] 2 *Ir. Rep.* 304.]

(2) A person who commits any corrupt practice in reference to a municipal election shall be guilty of the like offence, and shall on conviction be liable to the like punishment, and subject to the like incapacities, as if the corrupt practice had been committed in reference to a parliamentary election.

Sect. 21, *sub-s.* 5—*Candidate knowingly making false declaration respecting election expenses.*]—If the candidate without such authorized excuse as is mentioned in this Act fails to make the said return and declaration he shall be guilty of an illegal practice, and if he knowingly makes the said declaration [*respecting election expenses*] falsely he shall be guilty of an offence, and on conviction thereof on indictment shall be liable to the punishment for wilful and corrupt perjury, and such offence shall also be deemed to be a corrupt practice within the meaning of this Act.

Sect. 23—*Application of sections* 37 & 38 *of* 46 & 47 *Vict. c.* 51.]—So much of sections thirty-seven and thirty-eight of the *Corrupt and Illegal Practices Prevention Act*, 1883, as is set forth in Part Two of the third schedule to this Act [*post*, p. 1271] shall apply as part of this Act.

Sect. 26, *sub-s.* 4—*Fraudulent withdrawal of election petition.*]—If any person makes any agreement or terms, or enters into any undertaking, in relation to the withdrawal of an election petition, and such agreement, terms or undertaking is or are for the withdrawal of the election petition in consideration of any payment, or in consideration that the seat shall at any time be vacated, or in consideration of the withdrawal of any other election petition, or is or are (whether lawful or unlawful) not mentioned in the aforesaid affidavits [*i.e., the affidavits mentioned in the former part of this section*], he shall be guilty of a misdemeanor, and shall be liable on conviction on indictment to imprisonment for a term not exceeding twelve months, and to a fine not exceeding two hundred pounds.

Sect. 28—*Attendance by Director of Public Prosecutions on trial of election petition, and prosecution by him of offenders.*]—(1) On every trial of a

municipal election petition the Director of Public Prosecutions shall by himself or by his assistant, or by such representative as hereinafter mentioned, attend at the trial, and it shall be the duty of such director to obey any directions given to him by the election court with respect to the summoning and examination of any witness to give evidence on such trial, and with respect to the prosecution by him of offenders, and with respect to any person to whom notice is given to attend with a view to report him as guilty of any corrupt or illegal practice.

(2) It shall also be the duty of such director, without any direction from the election court, if it appears to him that any person is able to give material evidence as to the subject of the trial, to cause such person to attend the trial, and with the leave of the court to examine such person as a witness.

(3) It shall also be the duty of the said director, without any direction from the election court, if he thinks it expedient in the interests of justice so to do, to prosecute, either before the said court or before any other competent court, any person who has not received a certificate of indemnity, and who appears to him to have been guilty of a corrupt or illegal practice at a municipal election.

(4) Where a person is prosecuted before an election court for any corrupt or illegal practice, and such person appears before the court, the court shall proceed to try him summarily for the said offence, and such person, if convicted thereof upon such trial, shall be subject to the same incapacities as he is subject to under this or any other Act, upon conviction, whether on indictment or in any other proceeding for the said offence; and further, may be adjudged by the court, if the offence is a corrupt practice, to be imprisoned, with or without hard labour, for a term not exceeding six months, or to pay a fine not exceeding two hundred pounds, and if the offence is an illegal practice, to pay such fine as is fixed by this Act for the offence:

Provided that, in the case of a corrupt practice, the court, before proceeding to try summarily any person, shall give such person the option of being tried by jury.

(5) Where a person is so prosecuted for any such offence, and either he elects to be tried by a jury or he does not appear before the court, or the court thinks it in the interests of justice expedient that he should be tried before some other court, the court, if of opinion that the evidence is sufficient to put the said person upon his trial for the offence, shall order such person to be prosecuted on indictment or before a court of summary jurisdiction, as the case may require, for the said offence; and in either case may order him to be prosecuted before such court as may be named in the order; and for all purposes preliminary and of and incidental to such prosecution the offence shall be deemed to have been committed within the jurisdiction of the court so named.

(6) Upon such order being made,

(*a*) if the accused person is present before the court, and the offence is an indictable offence, the court shall commit him to take his trial, or cause him to give bail to appear and take his trial for the said offence; and

(*b*) if the accused person is present before the court, and the offence is not an indictable offence, the court shall order him to be brought before the court of summary jurisdiction before whom he is to be prosecuted, or cause him to give bail to appear before that court; and

(*c*) if the accused person is not present before the court, the court shall as circumstances require issue a summons for his attendance,

or a warrant to apprehend him and bring him before a court of summary jurisdiction, and that court, if the offence is an indictable offence, shall, on proof only of the summons or warrant and the identity of the accused, commit him to take his trial, or cause him to give bail to appear and take his trial for the said offence, or if the offence is punishable on summary conviction, shall proceed to hear the case, or if such court be not the court before whom he is directed to be prosecuted shall order him to be brought before that court.

(7) Any order or act of an election court under this section shall not be subject to be discharged or varied under sub-section six of section ninety-two of the *Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50).

(8) The Director of Public Prosecutions may nominate, with the approval of the attorney-general, any barristers or solicitors of not less than ten years' standing, one of whom shall, when required, act as the representative for the purposes of this section of such director, and when so acting shall receive such remuneration as the Treasury may approve. There shall be allowed to the director and his assistant or representative, for the purposes of this section, such allowance for expenses as the treasury may approve.

(9) The costs incurred in defraying the expenses of the Director of Public Prosecutions under this section (including the remuneration of his representatives) shall, in the first instance, be paid by the treasury, and so far as they are not in the case of any prosecution paid by the defendant, shall be deemed to be expenses of the election court, and shall be paid as the expenses of that court are directed by section one hundred and one of the *Municipal Corporations Act*, 1882, to be paid; but if for any reasonable cause it seems just to the court so to do, the court shall order all or part of the said costs to be repaid to the Treasury by the parties to the petition or such of them as the court may direct.

[*In the case of the trial of a petition against a municipal election, the election court may, under sub-s.* 5 *of s.* 28, *order a person against whom it directs a prosecution to be had in a county other than that in which the borough out of which the petition arises is situate, and the venue in the margin of the indictment is properly laid in the county in which the election court directs the trial to take place, and the mere fact that in the body of the indictment the offence is alleged to have been committed, as it actually was, in another county than that mentioned in the venue in the margin is immaterial. R. v. Ripley*, 17 *Cox*, 120 (*C. C. R.*). *The indictment in such a case is properly preferred before the grand jury of the county in which the election court orders the trial to take place, and it is unnecessary that it should set out on the face of it facts which conferred the power to indict and try in that county. Id. Where the order of the election court directs the prosecution of the defendant for "a corrupt practice," this is sufficient to authorize the charging of the defendant in several counts of the indictment with several separate and distinct corrupt practices. Id.*]

Sect. 30—*General provisions as to prosecution of offences under this Act.*]—Subject to the other provisions of this Act, the procedure for the prosecution of a corrupt or illegal practice or any illegal payment, employment, or hiring committed in reference to a municipal election, and the removal of any incapacity incurred by reason of a conviction or report relating to any such offence, and the duties of the Director of Public Prosecutions in relation to any such offence, and all other proceedings in relation thereto (including the grant to a witness of a certificate of indemnity), shall be the same as if such offence had been committed in

reference to a parliamentary election; and sections forty-five [*ante*, p. 1258] and forty-six and sections fifty to fifty-seven [*ante*, pp. 1258–1260] (both inclusive), and sections fifty-nine and sixty [*ante*, pp. 1260, 1261] of the *Corrupt and Illegal Practices Prevention Act*, 1883, shall apply accordingly as if they were re-enacted in this Act with the necessary modifications, and with the following additions:—

(*a*) Where the Director of Public Prosecutions considers that the circumstances of any case require him to institute a prosecution before any court other than an election court for any offence other than a corrupt practice committed in reference to a municipal election in any borough, he may, by himself or his assistant, institute such prosecution before any court of summary jurisdiction in the county in which the said borough is situate or to which it adjoins, and the offence shall be deemed for all purposes to have been committed within the jurisdiction of such court; and

(*b*) General rules for the purposes of Part Four of the *Municipal Corporations Act*, 1882, shall be made by the same authority as rules of court under the said sections; and

(*c*) The giving or refusal to give a certificate of indemnity to a witness by the election court shall be final and conclusive.

[*This section applies to prosecutions for a corrupt practice at a municipal election: the provisions as to costs of* 17 & 18 *Vict.* c. 102 (*ante*, p. 1262). *R.* v. *Law* [1900] 1 *Q. B.* 605; 69 *L. J.* (*Q. B.*) 348; 19 *Cox*, 452. *The rules referred to in sub-s.* (*b*) *were made April* 17, 1883, *and are printed in Statutory Rules and Orders Revised* (ed. 1904), *vol.* 12, *tit.* "*Supreme Court E.*," p. 656. *They were extended to elections under the Local Government Act*, 1894, *by rules of January* 14, 1895, *and applied to county council elections by* 51 & 52 *Vict.* c. 41, *s.* 75 (*post*, p. 1271); *and* 54 & 55 *Vict.* c. 68.]

Sect. 32, *sub-s.* 2—*Recovery of costs ordered to be paid by any person.*]—Where any costs or other sums are, under the order of an election court or otherwise under this Act, to be paid by any person, those costs shall be a simple contract debt due from such person to the person or persons to whom they are to be paid, and if payable to the Treasury shall be a debt to [his] Majesty, and in either case may be recovered accordingly.

First Schedule.—Column I.

Member of Local Board, as defined by the *Public Health Act*, 1875. [*See* 56 & 57 *Vict.* c. 73, *s.* 48, *post*, p. 1271.]

Member of Improvement Commissioners, as defined by the *Public Health Act*, 1875. [*See* 56 & 57 *Vict.* c. 73, *s.* 48, *post*, p. 1271.]

Guardian elected under the *Poor Law Amendment Act*, 1834 (4 & 5 *W.* 4, *c.* 76).

Member of School Board. [*School boards have been abolished by* 2 *Edw.* 7, *c.* 42, *and* 3 *Edw.* 7, *c.* 24.]

Third Schedule.—Part I.

Enactments defining Corrupt Practices—Enactments defining the offence of Bribery.

The *Corrupt Practices Prevention Act*, 1854 (17 & 18 *Vict.* c. 102), *ss.* 2 *and* 3 (*ante*, pp. 1261, 1262).

The *Representation of the People Act*, 1867 (30 & 31 *Vict.* c. 102), *s.* 49 (*ante*, p. 1262).

Enactment defining the offence of Personation.

The *Ballot Act*, 1872 (35 & 36 *Vict. c.* 33), *s.* 24 (*ante*, p. 1265).

Enactment defining the offences of Treating and Undue Influence.

The *Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 *Vict. c.* 51), *ss.* 1 *and* 2 (*ante*, p. 1255).

Enactment defining the offences of Bribery, Treating, Undue Influence, and Personation.

The Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 77.]—"Bribery," "treating," "undue influence," and "personation" include respectively anything done before, at, after, or with respect to a municipal election, which, if done before, at, after, or with respect to a parliamentary election, would make the person doing the same liable to any penalty, punishment, or disqualification for bribery, treating, undue influence, or personation, as the case may be, under any Act for the time being in force with respect to parliamentary elections. . . . [*The definition of corrupt practice was rep. by* 47 & 48 *Vict. c.* 70, *s.* 38. *For present definition, see ante*, p. 1255.]

THIRD SCHEDULE.—PART II.

46 & 47 *Vict. c.* 51, *s.* 38, *sub-s.* 8 (*ante*, p. 1256).

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35 & 36 *Vict. c.* 33 (*Ballot Act*), 1872), *s.* 3—*Offences in respect of nomination papers, ballot papers, and ballot boxes—Attempts to commit such offences—Provisions as to form of indictment.*]—*Ante*, p. 1265. [*This section occurs in Part I. of* 35 & 36 *Vict. c.* 33, *which bears the general heading of "Parliamentary Elections," but it seems to be applicable to municipal elections also, by virtue of s.* 20 *of the same statute.*]

County, District, and Parish Council Elections.

51 & 52 *Vict. c.* 41 (*Local Government Act*, 1888), *s.* 75.]—(1) For the purposes of this Act, with respect to county councils, and to the chairmen, members, committees, and officers of such councils, and otherwise for the purpose of carrying this Act into effect, the following portions of the *Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), namely, . . . Part 4, as amended by the *Municipal Elections Corrupt Practices Act*, 1884 (47 & 48 *Vict. c.* 70), . . . shall, so far as the same are unrepealed, apply as if they were herein re-enacted, with the enactments amending the same, in such terms and with such modifications as are necessary to make them applicable to the said councils and their chairmen, committees, and officers, and to the other provisions of this Act. [*This has the effect of applying* 47 & 48 *Vict. c.* 70, *to county council elections. Ex parte Walker*, 22 *Q. B. D.* 384; 58 *L. J.* (*Q. B.*) 190.]

56 & 57 *Vict. c.* 73 (*Local Government Act*, 1894), *s.* 48.]—(3) At every election regulated by rules framed under this Act the poll shall be taken by ballot, and the *Ballot Act*, 1872 (*ante*, p. 1265), and the *Municipal*

Elections (Corrupt and Illegal Practices) Act, 1884 (*ante*, p. 1266), and ss. 74 and 75 and Part IV. of the *Municipal Corporations Act*, 1882, as amended by the last-mentioned Act, including the penal provisions of these Acts, shall, subject to adaptations, alterations, and exceptions made by such rules, apply in like manner as in the case of a municipal election. [*Orders have been made under* 56 & 57 *Vict. c.* 73, *ss.* 3, 20, 23, 48, 74, *regulating the elections of parish councillors* (*January* 14, 1901, *Statutory Rules and Orders Revised* (ed. 1904), *vol.* 9, *tit.* "*Parish Council, E.,*" p. 77), *rural district councillors* (1898, *January* 1, *Id., vol.* 4, *tit.* "*District Council, E.,*" p. 46), *urban district councillors* (1898, *January* 1, *Id., vol.* 4, *tit.* "*District Council, E.,*" p. 8), *guardians of the poor in urban parishes and London* (1898, *January* 1, 21, *Id., vol.* 10, *tit.* "*Poor, E.,*" pp. 2, 41). *The orders apply certain provisions of the above Acts; but reference must be made to each order for the extent and mode of incorporation of the penal clauses. As to the portions of these Acts incorporated in the Irish County and District Councillors Election Orders, see R. v. Clarke* [1900] 2 *Ir. Rep.* 304.]

62 & 63 *Vict. c.* 14 (*London Government Act*, 1899), *s.* 2—*Municipal elections in London boroughs.*]—(5) Except as otherwise provided by or under this Act, the law relating to the constitution, election, and proceedings of administrative vestries, and to the electors and members thereof, shall apply in the case of the borough councils under this Act, and the electors and councillors thereof. . . . [*The elections under this Act are regulated by an order dated Feb.* 26, 1903, *and published in Statutory Rules and Orders Revised* (ed. 1904), *vol.* 8, *tit.* "*London County,*" p. 43.]

Sect. 11.

BRIBERY AND CORRUPTION OF OR BY MEMBERS AND SERVANTS OF CERTAIN PUBLIC BODIES.

Common Law.

As to the cases in which the bribery of public officials is punishable at common law, *see ante*, pp. 145, 1080.

Statute.

52 & 53 *Vict. c.* 69 (*Public Bodies Corrupt Practices Act*, 1889), *after reciting that it is expedient more effectually to provide for the prevention and punishment of bribery and corruption of and by members, officers, or servants of corporations, councils, boards, commissions, or other public bodies,* enacts that:—

Sect. 1—*Corruption of or by members or servants of public bodies a misdemeanor.*]—(1) Every person who shall by himself or by or in conjunction with any other person corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined (*see post*, p. 1274), doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanor.

(2) Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to or reward for or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanor. [*See Mayor, etc., of Salford* v. *Lever*, 25 *Q. B. D.* 363; [1891] 1 *Q. B.* 168; 60 *L. J.* (*Q. B.*) 39.]

Sect. 2—*Punishment of misdemeanors mentioned in s.* 1.]—Any person on conviction for offending as aforesaid shall, at the discretion of the court before which he is convicted, (*a*) be liable to be imprisoned for any period not exceeding two years, with or without hard labour, or to pay a fine not exceeding five hundred pounds, or to both such imprisonment and such fine; and (*b*) in addition be liable to be ordered to pay to such body, and in such manner as the court directs, the amount or value of any gift, loan, fee, or reward received by him or any part thereof; and (*c*) be liable to be adjudged incapable of being elected or appointed to any public office for seven years from the date of his conviction, and to forfeit any such office held by him at the time of his conviction; and (*d*) in the event of a second conviction for a like offence he shall, in addition to the foregoing penalties, be liable to be adjudged to be for ever incapable of holding any public office, and to be incapable for seven years of being registered as an elector, or voting at an election either of members to serve in parliament or of members of any public body, and the enactments for preventing the voting and registration of persons declared by reason of corrupt practices to be incapable of voting shall apply to a person adjudged in pursuance of this section to be incapable of voting; and (*e*) if such person is an officer or servant in the employ of any public body upon such conviction he shall, at the discretion of the court, be liable to forfeit his right and claim to any compensation or pension to which he would otherwise have been entitled.

Sect. 3—*Right to prosecute at common law or under any other enactment preserved—Invalidity of appointment to office no bar to prosecution.*]—(1) Where an offence under this Act is also punishable under any other enactment, or at common law, such offence may be prosecuted and punished either under this Act, or under the other enactment, or at common law, but so that no person shall be punished twice for the same offence [*cf.* 52 *&* 53 *Vict. c.* 63, *s.* 33, *ante*, p. 170]. (2) A person shall not be exempt from punishment under this Act by reason of the invalidity of the appointment or election of a person to a public office.

Sect. 4—*Attorney-general's consent necessary to institution of prosecution.*]—(1) A prosecution for an offence under this Act shall not be instituted except by or with the consent of the Attorney-General. (2) In this section the expression "Attorney-General" means the Attorney or Solicitor General for England, and as respects Scotland means the Lord Advocate, and as respects Ireland means the Attorney or Solicitor General for Ireland.

Sect. 5—*Expenses of prosecution.*]—The expenses of the prosecution of an offence against this Act shall be defrayed in like manner as in the case of a felony. [*See ante*, p. 246, *et seq.*]

Sect. 6—*Jurisdiction of quarter sessions.*]—A court of general or quarter sessions shall in England have jurisdiction to inquire of, hear, and determine an offence under this Act. [*See ante*, p. 126]

Sect. 7—*Interpretation.*]—In this Act—

The expression "*public body*" means any council of a county or county of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law, or otherwise to administer money raised by rates in pursuance of any public general Act [*including the Metropolitan Police Acts* (*R.* v. *Silberston* [1899] 129 *Cent. Crim. Ct. Sess. Pap.* 372; 34 *L. J. Newsp.* 232)], but does not include any public body as above defined existing elsewhere than in the United Kingdom:

The expression "*public office*" means any office or employment of a person as a member, officer, or servant of such public body:

The expression "*person*" includes a body of persons, corporate or unincorporate:

The expression "*advantage*" includes any office or dignity, and any forbearance to demand any money or money's worth or valuable thing, and includes any aid, vote, consent, or influence, or pretended aid, vote, consent, or influence, and also includes any promise or procurement of or agreement or endeavour to procure, or the holding out of any expectation of any gift, loan, fee, reward, or advantage, as before defined.

Indictments under 52 *&* 53 *Vict. c.* 69, *s.* 1 (*ante*, p. 1272).

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that A. B., on the —— day of ——, A.D. ——, and on divers days between that day and the —— day of ——, in the year aforesaid, in the parish of ——, in the county of ——, and within the jurisdiction of the said court, did unlawfully and corruptly solicit for himself from one —— and —— a gift, to wit, the sum of 3*l.* in money, as an inducement to and reward for an officer [to wit, a theatres and music-hall inspector of the London County Council], then being a public body as in the *Public Bodies Corrupt Practices Act*, 1889, defined, forbearing to give evidence in respect of a proposed matter in which the said [London County Council] was concerned, to wit [an application to the said London County Council for a music and dancing licence for premises known as the ——, No. ——, in the said parish]; against the form of the statute in such case made and provided, and against the peace, etc. *This precedent is framed from the indictment in R.* v. *Edwards* [1895] 121 *Cent. Crim. Court, Sess. Pap.* 332.

Commence as in the last precedent]—that heretofore, to wit, on the —— day of ——, A.D. ——, A. B. entered into a contract with a certain public body within the meaning of *Public Bodies Corrupt Practices Act*, 1889, to wit, with the receiver of the Metropolitan Police District, to supply from time to time to the said [*receiver, etc.*] helmets and other articles of uniform for the use of the Metropolitan Police Force, of a quality and as regards workmanship in all respects in accordance with the terms of the said contract, and that on the —— day of ——, A.D. ——, one C. D. was a servant of the said public body, to wit, the said [*receiver*], and employed by the said public body to examine helmets and other articles

of uniform delivered for the use of the said [*receiver*] by the said A. B. under and in pursuance of the said contract.

And the jurors, etc., further present, that the said A. B. and E. F., on the —— day of ——, A.D. ——, unlawfully and corruptly did give a certain gift, to wit, the sum of 10*s.*, to the said C. D., so being such officer and servant of the said public body, to wit, the said receiver as aforesaid, the said receiver being a public body within the meaning of the *Public Bodies Corrupt Practices Act*, 1889, as an inducement to the said C. D. to forbear to do something in respect of a certain matter in which the said public body was then concerned, to wit, as an inducement to the said C. D. to forbear to reject such of the helmets from time to time supplied by the said A. B. for the use of the Metropolitan Police Force under the said contract hereinbefore mentioned, as did not comply as regards their quality or workmanship with the terms of the said contract hereinbefore mentioned; contrary to the *Public Bodies Corrupt Practices Act*, 1889, and against the peace, etc. *Add counts charging the promises of gifts, etc., if the facts so warrant.* (*This precedent is framed from the indictment in R.* v. *Silberston*, 129 *Cent. Crim. Court, Sess. Pap.* 372; 34 *L. J. Newsp.* 232.)

PART III.

CONSPIRACY; ATTEMPT, AND INCITEMENT, TO COMMIT CRIME.

SECT. 1. *Conspiracy*, p. 1276.
2. *Soliciting or inciting to commit Crime*, p. 1293.
3. *Attempting to commit Crime*, p. 1295.

SECT. 1.

CONSPIRACY.

Statutes.

33 *Edw.* 1—*Ordinacio de Conspiratoribus.*]—Conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance that every of them shall aid and sustain the enterprise of the other, falsely and maliciously to indict or cause to be indicted or falsely to acquit people, or falsely to move or maintain pleas (*and also such as cause children within age to appeal men of felony whereby they are imprisoned and sore grieved*), and such as retain men in the country with liveries or fees for to maintain their malicious enterprises and to drown the truth: and this extendeth as well to the takers as to the givers, and stewards and bailiffs of great lords which by their seigniory, office or power undertake to maintain or support pleas or quarrels for parties other than such as touch the estate of their lords or themselves. This ordinance and final definition of conspirators was made and finally accorded by the King and his council in this parliament the 33rd year of his reign, and it was further ordained that justices assigned to the hearing and determining of felonies and trespasses in the several counties of England should have the transcript hereof. [*The definition of conspiracies in this ordinance is not exhaustive. R. v. Tibbits and Windust* [1902] 1 *K. B.* 77, 89; 71 *L. J.* (*K. B.*) 5: 20 *Cox*, 70, *Lord Alverstone*, C.J. *The ordinance was repealed by* 6 *G.* 4, *c.* 129, *s.* 2, *so far as it related to combinations to obtain and advance, or to fix the rate, of wages.*]

5 & 6 *Vict. c.* 38, *s.* 1—*Jurisdiction of quarter sessions over certain conspiracies.*]—*Ante*, p. 126.

7 & 8 *Vict. c.* 24, *s.* 1.]— . . . After the passing of this Act (4th July, 1844) the several offences of badgering, engrossing, forestalling, and regrating be utterly taken away and abolished, and . . . no information, indictment, suit, or prosecution shall lie either at common law or by virtue of any statute, or be commenced or prosecuted against any person for or by reason of any of the said offences or supposed offences.

Sect. 4.]—Provided always, and be it enacted, that nothing in this Act shall be construed to apply to the offence of knowingly spreading or conspiring to spread any false rumour with intent to enhance or decry the price of any goods or merchandise (*post*, pp. 1281, 1282), or to the offence of preventing or endeavouring to prevent by force or threats any goods, wares, or merchandise being brought to any fair or market, but that every such offence may be inquired of, tried and punished as if this Act had not been made.

[*These sections were repealed by* 55 *&* 56 *Vict. c.* 19 (*S. L. R.*), *but the repeal does not revive the offences or affect the proviso. See* 52 *&* 53 *Vict. c.* 63, *s.* 38 (2); 55 *&* 56 *Vict. c.* 19, *s.* 1.]

14 *&* 15 *Vict. c.* 55, *s.* 2—*Costs of prosecuting certain conspiracies.*]—*Ante*, p. 246.

14 *&* 15 *Vict. c.* 100, *s.* 29—*Imprisonment with hard labour for certain conspiracies.*]—*Ante*, p. 238.

22 *&* 23 *Vict. c.* 17—*Conspiracies to be within Vexatious Indictments Act, s.* 1.]—*Ante*, p. 7.

24 *&* 25 *Vict. c.* 100, *s.* 4—*Conspiracy to murder, felony.*]—*Ante*, p. 813.

34 *&* 35 *Vict. c.* 31, *s.* 2—*Trade unions.*]—*Ante*, p. 1158.

38 *&* 39 *Vict. c.* 86, *s.* 3—*Conspiracy in trade disputes.*]—*Ante*, p. 1159.

39 *&* 40 *Vict. c.* 22, *s.* 16—*Trade unions.*]—*Ante*, p. 1159.

Common Law.

Conspiracy is an indictable misdemeanor, consisting in the agreement of two or more persons (1 *Hawk. c.* 72, *s.* 8) to do an unlawful act, or to do a lawful act by unlawful means. Unless two persons are found to have combined there can be no conviction. *R.* v. *Thorp*, 5 *Mod.* 221; *Comb.* 458: *R.* v. *Plummer* [1902] 2 *K. B.* 339; 71 *L. J.* (*K. B.*) 805; 20 *Cox*, 269; 66 *J. P.* 647. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect the very plot is an act itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, is punishable if for a criminal object or the use of criminal means. *Willes, J., in Mulcahy* v. *R.*, *L. R.* 3 *H. L.* 306, 317; *and see R.* v. *Warburton*, *L. R.* 1 *C. C. R.* 274, *post*, p. 1279: *R.* v. *Tibbits and Windust* [1902] 1 *K. B.* 77, 89; 71 *L. J.* (*K. B.*) 5; 20 *Cox*, 70. The offence cannot exist without the consent of two or more persons (not being husband and wife, 1 *Hawk. c.* 72, *s.* 8), and their agreement is an advancement of the intention which each has conceived in his mind, which then passes from a *secret* intention to the *overt* act of mutual consultation and agreement. *R.* v. *Mulcahy*, *L. R.* 3 *H. L.* 326, *Lord Chelmsford.* Thus an engagement by two or more is conspiracy, even if the conspirators do nothing in pursuance of the engagement. *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1; 11 *Cl. & F.* 155; 8 *Eng. Rep.* 155; 1 *Cox*, 413.

Some forms of conspiracy were indictable as early as 1293 (*see* 1 *Rot. Parl.* 96). The origin of the offence is by some traced to the *Ordinacio de Conspiratoribus* (33 *Edw.* 1 *ante*, p. 1276), which deals with certain forms of combination to abuse or pervert justice, and forms the foundation of the action of malicious prosecution. The history of the offence is fully dealt with in *Wright on Conspiracies*; 3 *Steph. Hist. Cr. Law*, 201; *Encycl. Eng. Law, tit.* "*Conspiracy*;" *and see* 3 *Chit. Cr. Law*, 1138. The term

"unlawful" in the definition has been held to include civil wrongs as well as acts punishable criminally if done by one person. *R.* v. *Rowlands*, 17 *Q. B.*, 671: *R.* v. *Parnell*, 14 *Cox*, 508 (*Ir.*): *O'Connell* v. *R.*, *ubi supra*. But so far as this rule affected combinations in restraint of trade, it has been abrogated by 34 & 35 *Vict.* c. 31, and 38 & 39 *Vict.* c. 86 (*ante*, pp. 1158, 1159).

The forms of indictable conspiracy may be classified under the following heads:—

1. *Conspiracy to commit an offence punishable by law* (*infra*).
2. *Conspiracy to cheat and defraud* (*post*, p. 1278).
3. *Conspiracy to injure individuals by wrongful acts otherwise than by fraud* (*post*, p. 1280).
4. *Conspiracy to prevent, obstruct, pervert, or defeat justice* (*post*, p. 1231).
5. *Conspiracy or combination affecting trade* (*post*, p. 1281).

1. *Conspiracy to commit any offence punishable by law.*]—Every agreement between two or more persons to commit any offence is conspiracy, and indictable whether the offence is punishable on indictment or on summary conviction. *R.* v. *Pollman*, 2 *Camp.* 229; 11 *R. R.* 698: *R.* v. *Whitchurch*, 24 *Q. B. D.* 420; 59 *L. J.* (*M. C.*) 77; 16 *Cox*, 743. It is immaterial that the offence agreed on is one which one of the conspirators could not singly commit. Thus a woman who, believing herself but not being with child, conspires with other persons to administer drugs to herself, or to use instruments on herself, with intent to procure abortion, is liable to be convicted of conspiracy to procure abortion, although if she had merely done the acts to herself with like intent, and had not been party to any conspiracy, she could not have been convicted under 24 & 25 *Vict.* c. 100, *s.* 58, of the felony created by that section, she not being with child. *R.* v. *Whitchurch*, *ubi supra*. Conspiracy to commit treason is an *overt* act of treason, and may be tried as treason (*ante*, p. 923), or as treason felony under 11 & 12 *Vict.* c. 12 (*ante*, p. 948): *see Mulcahy* v. *R.*, *L. R.* 3 *H. L.* 306: *R.* v. *Stone*, 6 *T. R.* 527; 25 *St. Tr.* 1155; 3 *R. R.* 253: *R.* v. *O'Donnell*, 7 *St. Tr.*, *N. S.* 637: *R.* v. *Davitt*, 11 *Cox*, 676; but the fact that the overt acts of an offence charged as a conspiracy amount to treason does not make the indictment bad. *R.* v. *O'Donnell*, *ubi supra*: *R.* v. *Deasy*, 15 *Cox*, 334. As to seditious conspiracy, *see R.* v. *Cooper*, 4 *St. Tr.*, *N. S.* 1249: *O'Connell* v. *R.* (*ante*, p. 1277). As to conspiracy to commit a breach of the peace, *see R.* v. *Holberry*, 4 *St. Tr.*, *N. S.* 1347, and *ante*, pp. 998, 1098. Conspiracies to commit murder are now statutory offences. *See* 24 & 25 *Vict.* c. 100, *s.* 4 (*ante*, p. 813). As to conspiracy to kill an unborn child, *see R.* v. *Banks*, 12 *Cox*, 393. It is an indictable conspiracy to combine to violate the provisions of a statute or a bye-law made under statutory authority, or of a proclamation made under like authority (*R.* v. *O'Connell*, 2 *St. Tr.*, *N. S.* 629: *R.* v. *Thompson*, 16 *Q. B.* 832; 20 *L. J.* (*M. C.*) 183), if the violation of the statute or bye-law would be a misdemeanor at common law, or is criminally punishable in some specific manner. *See R.* v. *Bunn*, 12 *Cox*, 316: *R.* v. *Whitchurch* (*ubi supra*). In many cases it has been held indictable to conspire to do acts which at the time of the decision were probably offences at common law or under ecclesiastical law, but which are now offences by statute. (*See* 1 *Hawk. c.* 72, *s.* 2: *R.* v. *Best*, 2 *Ld. Raym.* 1167; 1 *Salk.* 174.) Thus it is indictable to conspire to obtain money by procuring an appointment to an office in the customs. *R.* v. *Pollman*, 2 *Camp.* 229; 11 *R. R.* 689: *and see R.* v. *Vaughan*, 4 *Burr.* 2494; 49 *G.* 3, *c.* 126 (*ante*, p. 1081); or to conspire by violence, threats, contrivances, or other sinister means to induce a pauper in one parish to marry a pauper

in another parish in order to saddle one of the parishes with the maintenance of both paupers. *R.* v. *Tarrant*, 4 *Burr.* 2106: *R.* v. *Seward*, 1 *A. & E.* 706; 3 *L. J.* (*M. C.*) 103: *R.* v. *Herbert*, 2 *Ld. Ken.* 466: *R.* v. *Watson*, 1 *Wils.* (*K. B.*) 41; *and see* 1 *East, P. C.* 461; 8 *Mod.* 320. As to other conspiracies to bring about a marriage, *see R.* v. *Wakefield*, 2 *Lewin* 1: *Wade* v. *Broughton*, 3 *V. & B.* 173. By 7 & 8 *Vict. c.* 101, *s.* 8, the endeavour, by any officer of any union, parish, or place, to induce any person to contract a marriage by threat or promise respecting any application to be made, or any order to be enforced, with respect to the maintenance of any bastard child, is in itself a misdemeanor.

Conspiracies to do acts against public morals or decency may be said to fall under this head, because the acts would at one time have been punishable in the ecclesiastical courts if not in the common law courts. Thus it has been held indictable to conspire to entice a woman under age from her father's house to live in fornication, or even to carry her off with her own approval for that purpose; *R.* v. *Lord Grey*, 9 *St. Tr.* 127; 1 *East P. C.* 460; or to conspire to induce a woman, whether chaste or not, to become a common prostitute; *R.* v. *Howell*, 4 *F. & F.* 160; or to defile a girl; *R.* v. *Mears*. 2 *Den.* 79; 20 *L. J.* (*M. C.*) 59; 4 *Cox*, 423; or to assign a female apprentice, even by her own consent, for purposes of prostitution. *R.* v. *Delaval*, 3 *Burr.* 1434; 1 *W. Bl.* 410, 439. Most, if not all, of these acts are offences by statute if done by one person. *See* 48 & 49 *Vict. c.* 69, *ss.* 2, 3 (*ante*, p. 920). Conspiracy to marry under a false name, with a view to obtaining property by personation, was held indictable at common law. *R.* v. *Robinson*, 1 *Leach*, 37; 2 *East, P. C.* 1010. Marriage under a false name is now criminal. 3 & 4 *Vict. c.* 72, *s.* 4; 19 & 20 *Vict. c.* 116, *s.* 18; 55 & 56 *Vict. c.* 23, *s.* 15.

2. *Conspiracy to cheat and defraud.*]—Many of the decisions that a conspiracy to cheat or defraud is indictable turn on facts which proved that the cheat or fraud was itself indictable at common law or by statute. Thus it has been held that although it may not be a criminal offence at common law for a person to cheat his partner, yet where one of two partners combines, during the continuance of the partnership, with a third party to enable the one partner to cheat the other with regard to the division of the partnership property on a contemplated dissolution of the partnership, this combination is a conspiracy. *R.* v. *Warburton*, *L. R.* 1 *C. C. R.* 274; 40 *L. J.* (*M. C.*) 22; 11 *Cox*, 584. And where two persons agreed that the one should purchase, and the other should aid him in purchasing, goods on credit, apparently as an ordinary purchaser, but the purchaser did not intend to pay for such goods, and the other person knew that he did not intend to pay for them, this was held to be a conspiracy, because buying goods with intention not to pay was an unlawful act, though possibly not (before the passing of 32 & 33 *Vict. c.* 62, *s.* 13 (1): *see R.* v. *Jones* [1898] 1 *Q. B.* 119, *ante*, p. 1149) criminally punishable. *R.* v. *Orman*, 14 *Cox*, 381, *Bramwell*, L.J.

And if the parties conspire to obtain money by false pretences of existing facts, it seems to be no objection to the indictment for conspiracy that the money was to be obtained through the medium of a *contract*. *R.* v. *Kenrick*, 5 *Q. B.* 49; *Dav. & M.* 208; 12 *L. J.* (*M. C.*) 135.

The following conspiracies to defraud have been held indictable:—A conspiracy to impose pretended wine upon a man, as and for true and good Portugal wine, in exchange for goods; *R.* v. *Mackarty*, 2 *Ld. Raym.* 1179; 3 *Id.*, 325; a conspiracy to defraud the public by means of a mock auction, that is, an auction with sham bidders, who pretend to be real bidders, for the purpose of selling goods at prices grossly above their

worth; *R.* v. *Lewis*, 11 *Cox*, 404, *Willes*, J. (in *Levi* v. *Levi*, 6 *C. & P.* 239, it was said by *Gurney*, B., that an agreement by several not to bid at an auction was an indictable offence; but in *Doolubdass* v. *Ramloll*, 5 *Moore Ind. App.* 109; 18 *Eng. Rep.* 836, this ruling was declared by the Judicial Committee (*per Parke*, B.), to be an unreliable *nisi prius* dictum); a conspiracy by false and fraudulent representations that a horse bought by one of the defendants from the prosecutor was unsound, to induce him to accept a less sum for the horse than the agreed price; *R.* v. *Carlisle*, *Dears.* 337; 23 *L. J.* (*M. C.*) 109; a conspiracy to raise the prices of the public funds (or of any vendible commodity; *see* the judgment of *Brett*, J.A., in *Aspinall* v. *R.*, 2 *Q. B. D.* 48, *at* 59; 46 *L. J.* (*M. C.*) *at* 150) by false rumours, as being a fraud upon the public; *R.* v. *De Berenger*, 3 *M. & Sel.* 67; 15 *R. R.* 415; an agreement to induce would-be buyers of shares to believe there is a market for the shares; *Scott* v. *Brown* [1892] 2 *Q. B.* 724; 61 *L. J.* (*Q. B.*) 738; a conspiracy by the promoters of a joint-stock company to cheat and defraud, by means of false pretences, those liege subjects who might buy shares in the company; *Aspinall* v. *R.*, 1 *Q. B. D.* 730; 45 *L. J.* (*M. C.*) 129; 2 *Q. B. D.* 48; 46 *L. J.* (*M. C.*) 145: *and see R.* v. *Gurney*, 11 *Cox*, 414; a conspiracy by persons to cause themselves to be reputed persons of property in order to defraud tradesmen and lodging-house keepers; *R.* v. *Roberts*, 1 *Camp.* 399: *R.* v. *Whitehouse*, 6 *Cox*, 38; a conspiracy to defraud by means of false representations of the solvency of a bank or other mercantile establishment; *R.* v. *Esdaile*, 1 *F. & F.* 213: *S. C. sub nom. R.* v. *Brown*, 7 *Cox*, 442; a conspiracy to make and put forth false statements as to the affairs of a bank; *R.* v. *Burch*, 4 *F. & F.* 407; a conspiracy to defraud the public by issuing and negotiating bills in the name of a fictitious and pretended banking firm; *R.* v. *Hevey*, 2 *East*, *P. C.* 858, *n.*; 1 *Leach*, 229; a conspiracy by traders to dispose of their goods in contemplation of bankruptcy, with intent to defraud their creditors; *R.* v. *Hall*, 1 *F. & F.* 33: *Heymann*, v. *R.*, *L. R.* 8 *Q. B.* 102; a conspiracy to fabricate shares in a company in addition to those lawfully issuable; *R.* v. *Mott*, 2 *C. & P.* 521; a conspiracy between a money-lender and a solicitor by abuse of legal process to enforce payment of a sum known not to be legally due, he was held to have been rightly convicted of conspiracy; *R.* v. *Taylor*, 15 *Cox*, 265, 268; a conspiracy to defeat a judgment creditor of the fruits of his judgment; *R.* v. *Richardson*, 1 *M. & Rob.* 402: *R.* v. *Cox and Railton*, 14 *Q. B. D.* 153; 15 *Cox*, 611 (*C. C. R.*); a conspiracy by false representations to induce a person to forego a legal claim, *R.* v. *Carlisle*, *Dears.* 337; 23 *L. J.* (*M. C.*) 109; 6 *Cox*, 366. As to conspiracies to deal fraudulently in railway tickets, *see R.* v. *Absolon*, 1 *F. & F.* 498. As to conspiracies to defraud of houses, *see R.* v. *Whitehouse*, 6 *Cox*, 129. As to conspiracy to diminish the King's revenue, *see R.* v. *Starling*, 1 *Sid.* 174; 1 *Lev.* 125.

3. *Conspiracy to injure individuals by wrongful acts otherwise than by fraud.*]—It has been held that an indictment will not lie for a conspiracy to commit a mere civil trespass; *R.* v. *Turner*, 13 *East*, 228; or for a conspiracy to deprive a man of an office under an illegal trading company. *R.* v. *Stratton*, 1 *Camp.* 549, *n.* In *R.* v. *Rowlands*, 17 *Q. B.* 671, Lord *Campbell*, said that *R.* v. *Turner* was wrongly decided, and it was held that a conspiracy to injure a man in his civil rights by wrongful as distinct from criminal means is indictable. *Id.*, at p. 706. It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which if done would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, *i.e.*

amount to a civil wrong. *R.* v. *Warburton, L. R.* 1 *C. C. R.* 274; 40 *L. J.* (*M. C.*) 22; 10 *Cox*, 584. The House of Lords in *Mogul Steamship Co.* v. *MacGregor, Gow & Co.* [1892] *App. Cas.* 25, and *Allen* v. *Flood* [1898] *App. Cas.* 1, decided that a man may do acts prejudicial to the civil rights of others so long as no unlawful act is done or unlawful means employed, and that the fact that he does the acts with actual malice does not subject him to any civil consequence. The effect of these two cases was fully considered in *Quinn* v. *Leathem* [1901] *App. Cas.* 495. *Allen* v. *Flood* was there stated by Lord *Halsbury*, L.C. (at p. 507), to have been decided upon the view of the facts that what was alleged to be done was the independent and single action of the defendant; and it would seem that the *Mogul case* and *Allen* v. *Flood* do not affect the law as to indictable conspiracy as laid down in *R.* v. *Rowlands, ubi supra*: *Mulcahy* v. *R.* (*ante*, p. 1277), and *R.* v. *Warburton* (*ubi supra*); *see per Lord Brampton, at* p. 529: *Glamorgan Coal Co.* v. *South Wales Miners Federation* [1903] 1 *K. B.* 545, now under appeal to the House of Lords.

4. *Conspiracy to prevent, obstruct, pervert, or defeat the course of public justice.*]—These conspiracies appear to some extent to have been made punishable by or in consequence of 33 *Edw.* 1, *ante*, p. 1276. They were recognized by parliament as existing by the provision as to imposing a sentence of hard labour for such conspiracies contained in 14 *& 15 Vict. c.* 100, *s.* 29 (*ante*, p. 238). They include conspiracies to charge a man falsely with any crime. *Poulterer's case*, 9 *Co. Rep.* 55 *b.*: *R.* v. *Spragg*, 2 *Burr.* 993, 1027: *R.* v. *Macdaniel, Fost.* 121, 130; 1 *Leach*, 44; 19 *St. Tr.* 745: *and see R.* v. *Rispal*, 3 *Burr.* 1320; 1 *W. Bl.* 368, which was a conspiracy to indict for robbery with a view to obtaining a statutory reward. It seems immaterial whether the conspiracy proceeds so far as actually indicting the person falsely accused; and if the object of the conspiracy is extortion, the truth or falsity of the charge is immaterial. *R.* v. *Hollingberry*, 4 *B. & C.* 329.

The publication of matter calculated to interfere with a fair trial being indictable (*R.* v. *Fisher*, 2 *Camp.* 563; *and see ante*, p. 1094), a combination to publish such matter is an indictable conspiracy. *R.* v. *Tibbits and Windust* [1902] 1 *K. B.* 77; 71 *L. J.* (*K. B.*) 5; 20 *Cox*, 70.

The following have also been held indictable: a conspiracy by justices of the peace to certify a highway to be in repair when they did not know it to be so; *R.* v. *Mawbey*, 6 *T. R.* 619; 3 *R. R.* 282; conspiracy to prevent a witness from giving evidence; *R.* v. *Steventon*, 2 *East*, 362: *cf.* 2 *Chit. Cr. L.* 235; 3 *Chit. Cr. L.* 1151; conspiracy by a witness bound over to attend a trial with others to absent himself from the trial. *R.* v. *Hamp*, 6 *Cox*, 167. If the necessary effect of the agreement is to defeat the ends of justice, that must be taken to be the object. *Id., per Lord Campbell*, C.J. As to conspiracy to indemnify bail, *see ante*, pp. 111, 1091.

As to conspiracy falsely to charge a man as a father of a bastard, *see* 1 *Hawk. c.* 72, *s.* 2.

5. *Conspiracy or combination affecting trade.*]—So far as these arise out of disputes between employer and workmen, they have been dealt with *ante*, p. 1158, *et seq.* Combinations to interfere with trade, while probably still unenforceable by civil remedies (*see Mogul SS. Co.* v. *MacGregor, Gow & Co.* [1892] *App. Cas.* 25: *Nordenfelt* v. *Maxim-Nordenfelt Co.* [1894] *App. Cas.* 535), appear no longer to be indictable, owing to the repeal by 7 *& 8 Vict. c.* 24, *s.* 1 (*ante*, p. 1276), of the old laws against forestalling, regrating, etc., except where they involve the use of fraud (7 *& 8 Vict. c.* 24, *s.* 4, *ante*, p. 1276) or of force or intimidation (*see ante*, p. 1160, *et seq.*).

A combination by two or more without justification or excuse to injure a man in his trade, by inducing his customers or servants to break their contracts with him, or not to deal with him, nor continue in his employment, is actionable if it results in damage to him. *Quinn* v. *Leathem* [1901] *App. Cas.* 495. *South Wales Miners Federation* v. *Glamorgan Coal Co. H. L.*, April 14, 1905. But as to criminal remedies, this statement of the law must be read subject to the provisions of the *Trade Union Act*, 1871, and the *Conspiracy and Law of Property Act*, 1875 (*ante*, p. 1158, *et seq.*): and it is not definitely settled in England whether such a combination as above stated is still indictable. *Id.*, 526, 527, *Ld. Brampton.* At common law it certainly was indictable. *See Re Heaphy*, 22 *L. R. Ir.* 500, 524, *Palles*, C.B.: *R.* v. *Rowlands* (*infra*): *R.* v. *Eccles*, 1 *Leach*, 274.

See precedents, of conspiracies to withdraw customers from a brewer, 4 *Went.* 106; *to injure gunmakers in their trade*, 4 *Went.* 439; *to ruin or injure a man in his trade or profession*, 6 *Went.* 443: *R.* v. *Eccles*, 1 *Leach*, 274.

Indictments for Conspiracy.

1. The indictment must in the first place charge the conspiracy. And in stating the object of the conspiracy, the same certainty is not required as in an indictment for the offence, etc., conspired to be committed; as, for instance, an indictment for conspiring to defraud a person of "divers goods," has been held sufficient. *Ante*, p. 70; *and see R.* v. *Rispal*, 3 *Burr.* 1320: 1 *W. Bl.* 368: *R.* v. *Blake*, 6 *Q. B.* 126; 13 *L. J.* (*M. C.*) 131: *Sydserff* v. *R.*, *Q. B.* 245. So, an indictment charging a conspiracy "by divers false pretences and indirect means to cheat and defraud A. of his monies," was held good; *R.* v. *Gompertz*, 9 *Q. B.* 824; 16 *L. J.* (*Q. B.*) 121; 2 *Cox*, 145: *R.* v. *Gill*, 2 *B. & Ald.* 204; 20 *R. R.* 407: *Aspinall* v. *R.*, 2 *Q. B. D.* 48, 60; and it is not necessary, in order to sustain such an indictment, to prove such a false pretence as would, if money had been obtained on it by one person alone, have been sufficient to sustain an indictment against him for obtaining money by false pretences. *R.* v. *Hudson*, *Bell*, 263; 29 *L. J.* (*M. C.*) 145; 8 *Cox*, 305. But a conspiracy to defraud the creditors of W. E. (not saying of what) is too general. *R.* v. *Fowle*, 4 *C. & P.* 592. In an indictment for a conspiracy at common law, to effect objects prohibited by a statute, it is sufficient to follow the words of the statute. Therefore, an indictment which charged a conspiracy to force workmen to depart from their employment, to raise the rate of wages, etc., by "molesting," by "threats," by "intimidating," by "obstructing," etc., in violation of 6 *G.* 4, *c.* 129 (*rep.*), was held sufficient, as it followed the words of the statute though it did not set out the *means* used to molest, intimidate, or obstruct, or the threats held out. *R.* v. *Rowlands*, 17 *Q. B.* 671; 2 *Den.* 364; 21 *L. J.* (*M. C.*) 81. The defendant and others were indicted for that they did "unlawfully and wickedly conspire and agree together, contrary to the provisions of the *Debtors Act*, 1869, and within four months next before the presentation of a bankruptcy petition against the defendant, fraudulently to remove part of the property of the defendant to the value of 10*l.*, that is to say [enumerating divers articles], defendant then being a trader and liable to become bankrupt." To this indictment there was a plea of not guilty; and a verdict of guilty, and judgment. Error having been brought, on the ground that there was no allegation that the defendant was adjudged bankrupt, it was held, that the fact of defendant having been adjudged bankrupt was not necessary to complete the offence of conspiracy; it was complete if the persons charged had agreed to remove the goods, *in*

contemplation of an adjudication being obtained, and that this, though not expressly alleged, must be taken, after verdict, to have been proved before the jury; and that the defect was therefore cured by verdict, although possibly it might have been taken advantage of by the defendant on demurrer. *Heymann* v. *R.*, *L. R.* 8 *Q. B.* 102; 12 *Cox*, 383. The second count of an indictment for conspiracy stated that defendants were promotors of the E. Company, Limited, and that application had been made on behalf of the company to the committee for general purposes of the Stock Exchange to order the quotation of the company in the official list of the Stock Exchange under a rule (129) duly issued by the committee, to the effect that the committee would order the quotation of a new company in the official list, provided that the company was of *bonâ fide* character, etc., that the requirements of rule 128 had been complied with, that two-thirds of the whole nominal capital proposed to be issued had been applied for and unconditionally allotted to the public, and that a member of the Stock Exchange is authorized by the company to give full information as to the formation of the undertaking, and able to satisfy the committee as to all particulars they may require. Averment, that defendants requested a firm of stockbrokers to give the information before mentioned, and to apply to the committee to order the quotation of the shares of the company in the official list, and employed the brokers to sell 5,000 shares of the company on behalf of alleged vendors of patents, and that defendants unlawfully conspired and agreed by divers false pretences to injure and deceive the committee, and to induce them, contrary to the true intent and meaning of the rules mentioned in this and the first count, to order a quotation of the shares of the company in the official list of the Stock Exchange, and thereby to induce and persuade divers of the Queen's liege subjects, who should thereafter buy and sell the shares of the company, to believe that the company was duly formed and constituted, and had in all respects complied with the rules of the Stock Exchange, so as to entitle the company to have their shares quoted in the official list. And the defendants, in pursuance of the conspiracy, falsely pretended to Z. and others, members of the committee, that the number of shares applied for by the public was 34,365, and that the amount received thereon, at 10*s.* per share, was 17,282*l.*, that 15,000 had been allotted to the patentee, and that no shares had been conditionally allotted; and thereby induced the committee to order the shares to be quoted in the official list. A verdict of guilty having been returned, and judgment entered thereon, it was held, on error affirming the judgment of the Queen's Bench Division, that the second count was good after verdict, and sufficiently alleged a criminal conspiracy; for that it contained allegations, some accurately and some inaccurately stated, which, assuming them to have been proved in a sense adverse to the defendants, showed that there was an agreement by them to cheat and defraud, by means of false pretences, those liege subjects who might buy shares in the company. *Aspinall* v. *R.*, 2 *Q. B. D.* 48; 46 *L. J.* (*M. C.*) 145: *and cf. R.* v. *De Berenger*, 3 *M. & Sel.* 67; 15 *R. R.* 415 (*post*, p. 1284): *Scott* v. *Brown* [1892] 2 *Q. B.* 724; 61 *L. J.* (*Q. B.*) 738.

2. *Overt acts—Particulars.*]—It is usual to set out the overt acts, that is to say, those acts which may have been done by any one or more of the conspirators, in order to effect the common purpose of the conspiracy. But this is not essentially necessary; the conspiracy itself is the offence; and whether anything have been done in pursuance of it or not is immaterial. *R.* v. *Gill*, 2 *B. & Ald.* 204; 20 *R. R.* 407: *R.* v. *Gompertz*, 9 *Q. B.* 824; 16 *L. J.* (*Q. B.*) 121; 2 *Cox*, 145: *R.* v. *Whitehouse*, 6 *Cox*,

38, 45, 47: *R.* v. *Seward*, 1 *A. & E.* 706; 3 *L. J.* (*M. C.*) 103: *R.* v. *Richardson*, 1 *M. & Rob.* 402: *R.* v. *Kenrick*, 5 *Q. B.* 49; *Dav. & M.* 208; 12 *L. J.* (*M. C.*) 135: *and see* 2 *Ld. Raym.* 1167: *R.* v. *Spragg*, 2 *Burr.* 993: *R.* v. *Rispal*, 3 *Burr.* 1320; 1 *W. Bl.* 368: *R.* v. *Eccles*, 1 *Leach*, 274; 1 *East*, 230, *n.*: *Wright* v. *R.*, 14 *Q. B.* 148; 16 *L. J.* (*Q. B.*) 10; 2 *Cox*, 91. On a general count not alleging any overt act the court can order particulars if satisfied by affidavit that the defendant will not without them have sufficient information for his defence (*see ante*, pp. 70, 71). The provisions of the *Vexatious Indictments Act*, 1859 (*ante*, p. 7), which apply to all conspiracies, render particulars unnecessary in most cases. As to the effect of the particulars in limiting the case for the prosecution, *see R.* v. *Stapylton*, *R.* v. *Esdaile*, *R.* v. *Brown*, 8 *Cox*, 69. Overt acts, which are laid and proved against some of the defendants, may be looked at as against all of them, to show the nature and objects of the conspiracy. *R.* v. *Esdaile*, *ubi supra*. But an indictment charging that the defendants unlawfully conspired to defraud divers persons, who should bargain with them for the sale of merchandise, of great quantities of such merchandise, without paying for the same, with intent to obtain to themselves money and other profit, was held bad for not showing by what means the parties were to be defrauded, nor the names of the parties. *R.* v. *Peck*, 9 *A. & E.* 686: *Peck* v. *R.*, 1 *Per. & D.* 508; 8 *L. J.* (*M. C.*) 22, *S. C.* So also a count charging that two of the defendants, being partners in trade, and indebted to divers persons, unlawfully conspired to defraud the said creditors of payment of their debts, and that they and the other defendant, in pursuance of the said conspiracy, falsely and wickedly made a fraudulent deed of bargain and sale of the stock in trade of the partnership, for fraudulent consideration, with intent thereby to obtain to themselves money and other emoluments to the great damage of the said creditors, was held bad for not alleging facts to show in what manner the deed was fraudulent. *Id.* But it was held that the indictment was not bad for not stating the names of the parties intended to be defrauded, since it could not be known who might fall into the snare. *Id.* In *R.* v. *De Berenger*, 3 *M. & Sel.* 67; 15 *R. R.* 415, it was held unnecessary to specify the purchasers of stocks as the persons intended to be injured by the conspiracy to raise their price. The class of persons intended to be defrauded must be distinctly stated in the indictment. But where the indictment charged that the defendants conspired to defraud *certain of her Majesty's subjects, being tradesmen*, of divers large quantities of their goods, and that one of the defendants, J. S., did, in pursuance of such conspiracy, fraudulently order and obtain on credit from A. and B., upholsterers in L., divers goods of great value, to wit, etc., of and belonging to the said A. and B., and from divers other tradesmen, whose names are to the jurors unknown, divers other goods of great value, to wit, etc., of and belonging to the said last-mentioned persons respectively; and in further pursuance of the said conspiracy, and in order that the said goods might be taken in execution and sold, did order and direct that the said goods should be delivered by the said tradesmen at the house of the said defendants; that no payment or satisfaction was made for the goods by the defendants, and that, in further pursuance of the conspiracy, the said goods were taken in execution at the suit of some of the defendants, to satisfy fictitious debts pretended to be due to them from the defendant J. S.; it was held that the statement of the conspiracy was defective, for not setting out the names or designating the class of persons defrauded, and that the defect was not aided by the allegation of the overt acts. *R.* v. *King*, 7 *Q. B.* 782; 14 *L. J.* (*M. C.*) 172 (*Ex. Ch.*). The defect on which the court acted in the above case was that the indictment

(which is set out in *R.* v. *Whitehouse*, 6 *Cox*, 46, *n.*) charged a conspiracy to defraud *certain of her Majesty's subjects, being tradesmen.* It was held, that such an allegation in such form in pleading meant *certain definite tradesmen alleged to be known to the defendants at the time of the criminal agreement*, and, therefore, that such definite tradesmen ought, in describing the conspiracy, to be named, or an excuse be averred for not naming them. If there had been added after the words, *being tradesmen*, the phrase *who should thereafter deal with the defendants*, the indictment would have been sufficient according to *R.* v. *Gill*, 2 *B. & Ald.* 204; 20 *R. R.* 407: *R.* v. *Gompertz*, 9 *Q. B.* 824: and *Sydserff* v. *R.*, 11 *Q. B.* 245. *See* judgment of *Brett*, J.A., in *Aspinall* v. *R.*, 2 *Q. B. D.* 48, 62, 63; 46 *L. J.* (*M. C.*) *at* p. 152. An indictment for a conspiracy to obtain goods by false pretences was held bad unless it stated whose property the goods were; *R.* v. *Bullock*, *Dears.* 653; 25 *L. J.* (*M. C.*) 92: *and see R.* v. *Parker*, 3 *Q. B.* 292; 11 *L. J.* (*M. C.*) 92: and it seems that 24 *&* 25 *Vict. c.* 96, *s.* 88 (*ante*, p. 593), does not alter the law as to an indictment for conspiracy to obtain by false pretences. *White* v. *R.*, 13 *Cox*, 318 (*C. C. R. Ir.*).

3. *Conspiracy to accuse of crime.*]—In an indictment for a conspiracy to indict or charge a man with an offence, it is not necessary to aver that the man is innocent of the offence; *R.* v. *Kinnersley*, 1 *Str.* 193; for he shall be presumed to be innocent until the contrary appear. *See R.* v. *Best*, 2 *Ld. Raym.* 1167; 1 *Salk.* 174: *R.* v. *Spragg*, 2 *Burr.* 993. According to *R.* v. *Best*, it is immaterial whether the offence to be charged is temporal or ecclesiastical. In an indictment for conspiring to pervert the course of justice, by producing a false certificate of justices of peace that a road indicted was in repair, in order to influence the judgment of the court, it is not necessary to allege that the defendants knew the certificate to be false; it is sufficient that they agreed to certify the fact as true without knowing it to be so. *R.* v. *Mawbey*, 6 *T. R.* 619; 3 *R. R.* 282; *and see ante*, p. 1050.

4. *Venue.*]—The venue may be laid in the county in which the conspiracy actually took place, or in any county in which any one of the defendants did an act in furtherance of the common object of the conspirators (*ante*, p. 43). A foreigner may be indicted in this country for conspiring here to cast away a foreign ship, provided that the conspiracy be not limited to doing the act abroad. *R.* v. *Kohn*, 4 *F. & F.* 68: *see R.* v. *Bernard*, 8 *St. Tr., N. S.* 887. As to trial of a conspiracy alleged to have been entered into on high seas, *see R.* v. *Brisac*, 4 *East*, 164; 7 *R. R.* 551 (*ante*, p. 44), and *R.* v. *Kohn*, 4 *F. & F.* 68 (*ante*, p. 41).

5. *Trial.*]—It has already been stated (*ante*, p. 1277) that a conspiracy must be between two persons at least. And where two persons are indicted for conspiring together, and they are tried together, both must be acquitted or both convicted; *R.* v. *Manning*, 12 *Q. B. D.* 241; 53 *L. J.* (*M. C.*) 85: *R.* v. *Plummer* [1902] 2 *K. B.* 339; unless they are also charged with conspiring with persons unknown, in which case the conspiracy must be alleged to be with a certain person (or persons) to the jurors unknown (*see ante*, p. 56; *and see* 3 *Chit. Cr. L.* 1141). And one person alone may be tried for a conspiracy, provided the indictment charged him with conspiring with others who have not appeared; *R.* v. *Kinnersley*, 1 *Str.* 193: *R.* v. *Plummer* (*ubi supra*); or who are since dead; *R.* v. *Nichols*, *or Niccolls*, 13 *East*, 412, *n.*; 2 *Str.* 1227; 12 *R. R.* 388; or whose names are to the jurors unknown; and persons jointly indicted may be severally tried; *R.* v. *Ahearne*, 6 *Cox*, 6 (*Ir.*) (*and see ante*, p. 186). The death of one

of two conspirators does not affect the right to try the other, whether the death happens before indictment or during trial. *R.* v. *Nichols*, 13 *East*, 412, *n.*; 12 *R. R.* 388: *R.* v. *Kenrick*, 5 *Q. B.* 49; 12 *L. J.* (*M. C.*) 135. Where the indictment charged that A., B. and C. conspired together, and with divers other persons to the jurors unknown, etc., and the jury found that A. had conspired with either B. or C., but they could not say which, and there was no evidence against any other persons than the three defendants, A. was held entitled to an acquittal. *R.* v. *Thompson*, 16 *Q. B.* 832; 20 *L. J.* (*M. C.*) 183; 5 *Cox*, 166. And where a count in an indictment charged eight defendants with one conspiracy to effect certain objects, a finding that three of the defendants were guilty generally, and that five of them were guilty of conspiracy to effect some of these objects, and not guilty as to the residue, was held bad and repugnant. *O'Connell* v. *R.*, 5 *St. Tr., N. S.* 1; 11 *Cl. & F.* 155; 8 *Eng. Rep.* 155; 1 *Cox*, 413. But where several persons are charged with conspiring together, a verdict is not repugnant which finds that some, but not all, conspired as alleged; *R.* v. *Quinn*, 19 *Cox*, 78 (*Ir.*), *FitzGibbon*, L.J.; the principle underlying that decision being that where there are two or more persons charged with conspiracy in the same count, the count is a single and complete count and cannot be separated into parts. *R.* v. *Manning*, 12 *Q. B. D.* 241; 53 *L. J.* (*M. C.*) 85, *Lord Coleridge*, C.J.; *and see R.* v. *Plummer* [1902] 2 *K. B.* 339.

Indictment for a Conspiracy to commit a Crime. (*Common Law.*)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S., J. W. and E. W., being evil-disposed persons, and wickedly devising and intending to defraud and prejudice certain persons hereinafter mentioned, on the first day of June, in the year of our Lord ——, and on divers other days and times thereafter and between that day and the —— day of ——, A.D. ——, in the parish, etc. (*as ante*, p. 1278), unlawfully did amongst themselves conspire, combine, confederate and agree together falsely and fraudulently to cheat and defraud certain underwriters hereinafter mentioned of divers large sums of money: And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., J. W. and E. W., afterwards, to wit, on the [*date of the policy*], in the year aforesaid, in pursuance of and according to the said conspiracy, combination, confederacy and agreement amongst themselves had as aforesaid, did cause and procure a certain ship called the ——, and certain goods in and on board the said ship, to be insured by certain underwriters, to wit, by A. B., C. D., E. F. and G. H., and the said underwriters then severally executed a certain policy of insurance upon the said ship, and upon the said goods so laden on board the said ship as aforesaid, upon and for a voyage from the port of London to the Island of St. Vincent in the West Indies: And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., J. W. and E. W., in further pursuance of and according to the said conspiracy, combination, confederacy and agreement among themselves, had as aforesaid, afterwards, and after the said ship sailed from the port of London aforesaid upon the voyage aforesaid, to wit, on the fourth day of September, in the year aforesaid, did remove and unlade from on board the said ship divers goods insured as aforesaid, of great value, to wit, of the value of four hundred pounds, before the said ship had reached the port or place of destination aforesaid: And the

jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of and according to the said conspiracy, combination, confederacy and agreement amongst themselves had as aforesaid, the said J. S., J. W. and E. W. afterwards, to wit, on the twentieth day of September, in the year aforesaid, on the high seas, did cut, bore and make, and did cause and procure to be cut, bored and made divers holes in the bottom and sides of the said ship or vessel, with intent thereby to sink, cast away and destroy the said ship, and the goods in and upon the said ship so laden as aforesaid, and with intent and design thereby then wilfully and maliciously to prejudice the said several persons who had so underwritten the said policy of insurance upon the said ship and upon the goods so laden on board the same as aforesaid: to the great damage of the said A. B., C. D., E. F. and G. H., who had so underwritten the said policy as aforesaid, and against the peace of our lord the King, his crown and dignity. *See the precedent*, 6 *Went.* 387. *A count for different conspiracies on different days or on the same day may be joined. R.* v. *Levy*, 2 *Stark.* (*N. P.*) 458. *And see the precedents*, 2 *Chit. Cr. L.* 494; 3 *Chit. Cr. L.* 660, 1145, *et seq., and the following:—of an indictment for a conspiracy to cheat a man out of money by pretending to secure to him an annuity*, 4 *Went.* 80, 89; *to get from a man his acceptances upon pretence of getting them discounted*, 6 *Went.* 378; *to defraud a man of money under pretence of procuring a place, Cro. Circ. Comp.* 127, 133; *to blow up the walls of a prison, Cro. Circ. Comp.* 422; *to escape out of prison*, 4 *Went.* 116; *to raise the price of victuals (salt), Cro. Circ. Comp.* 130 (*see R.* v. *Norris*, 2 *Ld. Ken.* 300, *and* 7 *&* 8 *Vict. c.* 24, *s.* 1 (*supra*); *to obtain a* nolle prosequi *to an indictment by fraud, Cro. Circ. Comp.* 138; *to give a false certificate of a road being in repair, R.* v. *Mawbey*, 6 *T. R.* 619; 3 *R. R.* 282; 4 *Went.* 125; *to throw a burthen upon the parish, by the parish officers of another parish, persuading a pauper of the former parish to marry a female pauper of their parish, Cro. Circ. Comp.* 128: *R.* v. *Seward*, 1 *A. & E.* 706; *see* 7 *&* 8 *Vict. c.* 101, *s.* 8 (*ante*, p. 1279); *to bring a pregnant pauper to settle in a parish*, 4 *Went.* 124; *to procure the defilement of a girl, R.* v. *Mears*, 2 *Den.* 79; *to accuse a woman of incontinence with defendant, in order to make her marry him*, 4 *Went.* 79; *to induce a girl to become a common prostitute, R.* v. *Howell*, 4 *F. & F.* 160 (*ante*, p. 1279).

Misdemeanor: fine or imprisonment, or both (*ante*, pp. 238, 240). *On conviction for a conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice, the court may sentence the offender to hard labour during the whole or any part of the imprisonment.* 14 *&* 15 *Vict. c.* 100, *s.* 29 (*ante*, p. 238). *Where a person is convicted of any agreement or combination by two or more persons to do or procure to be done any act which is punishable only on summary conviction in contemplation or furtherance of a trade dispute between employers and workmen, and is sentenced to imprisonment, the imprisonment shall not exceed three months, or such longer time, if any, as may have been prescribed by the statute for the punishment of the said act when committed by one person.* 38 *&* 39 *Vict. c.* 86, *s.* 3 (*ante*, p. 1159).

No indictment can be preferred for conspiracy unless one or other of the preliminary steps required by 22 *&* 23 *Vict. c.* 17, *as extended by* 30 *&* 31 *Vict. c.* 35 (*ante*, p. 7, *et seq.*), *has been taken.*

Venue: the county in which the conspiracy was formed or in which any act was done by the conspirators in furtherance of the common design. R. v. *Brisac*, 4 *East*, 164; 7 *R. R.* 551; *and see ante*, pp. 43, 1285.

Persons indicted together for conspiracy may be separately tried, and are not entitled to have judgment stayed on conviction till the others are tried.

R. v. *Ahearne*, 6 *Cox*, 6 (*Ir.*); *but see R.* v. *Plummer* [1902] 2 *K. B.* 339, 344.

A court of quarter sessions has no jurisdiction over the offence of illegal combination or conspiracy, except conspiracies or combinations to commit any offence which they have jurisdiction to try when committed by one person. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the conspiracy as described in the indictment, and that the defendants were engaged in it; or prove circumstances from which the jury may presume it. *See R.* v. *Parsons*, 1 *W. Bl.* 392: *R.* v. *Murphy*, 8 *C. & P.* 297. Proof of the existence of a conspiracy is generally a "matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them." *R.* v. *Brisac*, 4 *East*, 164, 171; 7 *R. R.* 551, *per Grose*, J., cited with approval by *Willes*, J., in delivering the opinion of the judges in *Mulcahy* v. *R.*, *L. R.* 3 *H. L.* 306, 317. In order to convict of conspiracy, it is not necessary that the defendants should have concocted the scheme the subject of the charge, nor that they should have originated it. If a conspiracy be formed, and a person join it afterwards, he is equally guilty with the original conspirators. *R.* v. *Murphy*, *ubi supra*, *at* p. 311, *Coleridge*, J. The prosecutor may go into general evidence of the nature of the conspiracy, before he gives evidence to connect the defendant with it. *R.* v. *Hammond*, 2 *Esp.* 719; *and see R.* v. *Salter*, 5 *Esp.* 125: *R.* v. *Brittain*, 3 *Cox*, 76: *Queen Caroline's case*, 2 *B. & B.* 284, 302; 22 *R. R.* 662; 1 *St. Tr.*, *N. S.* 1348.

The acts and declarations, also, of any of the conspirators *in furtherance of the common design*, may be given in evidence against all (*ante*, p. 306): *see R.* v. *Shellard*, 9 *C. & P.* 277; 4 *St. Tr.*, *N. S.* 1386: *R.* v. *Blake*, 6 *Q. B.* 126; 13 *L. J.* (*M. C.*) 131: and this principle applies when the charge is one of a crime committed in pursuance of a conspiracy. *Cf. R.* v. *Jessop*, 16 *Cox*, 204: *R.* v. *Charles*, 17 *Cox*, 499: *R.* v. *Desmond*, 11 *Cox*, 146. This rule extends to admit printed handbills or placards of speeches of co-conspirators and resolutions at their meetings. *R.* v. *Duffield*, 5 *Cox*, 404; *and see R.* v. *Hunt*, 1 *St. Tr.*, *N. S.* 171; 3 *B. & Ald.* 566; 22 *R. R.* 485: *R.* v. *Vincent*, 9 *C. & P.* 275. As to the use of correspondence between the defendants to exculpate one of them, *see R.* v. *Whitehead*, 1 *C. & P.* 67.

If any one overt act be proved in the county where the venue is laid, other overt acts, either of the same or others of the conspirators, may be given in evidence, although committed in other counties. (*Ante*, p. 44.) *R.* v. *Bowes*, 4 *East*, 171, *cit.*; 7 *R. R.* 557. In *R.* v. *Boulton*, 12 *Cox*, 87, *Cockburn*, C. J., refused to allow the acts of alleged conspirators in a foreign country (Scotland) to be given in evidence; *and see R.* v. *Ellis* [1899] 1 *Q. B.* 230; 68 *L. J.* (*Q. B.*) 105, *Wright*, J. But before you give in evidence the acts of one conspirator against another, you must prove the existence of the conspiracy, that the parties were members of the same conspiracy, and that the act in question was done in furtherance of the common design. (*Ante*, p. 306.)

In *R.* v. *Steel*, 2 *Mood. C. C.* 246; *C. & Mar.* 337, where the indictment charged the defendant with conspiracy with persons unknown to defraud *J. D. and others*, and laid as overt acts that he falsely pretended to J. D. that he was a merchant named G., and under colour of a pretended contract with J. D. for the purchase of certain goods of *the said* J. D. and others, obtained goods of the said J. D. and others with intent to defraud the said J. D. and others: it was held that the words "J. D.

and others" must throughout this indictment be taken to mean J. D. and others, *his partners;* and therefore that evidence was not admissible to show attempts by the defendant to defraud other persons wholly unconnected with J. D. But the decision in that case appears to have turned on the words "and others" in the indictment, there being no addition of such words as "who should thereafter deal with the defendants" (*see Aspinall* v. *R.*, 2 *Q. B. D.* 48, 62, *et seq.*): and it would seem to be clear that on an indictment for conspiracy to defraud certain persons named therein, evidence of attempts of a similar nature to defraud other persons not named is admissible, on the general principles stated *ante*, p. 310: and it has been so held in *R.* v. *Stenson*, 12 *Cox*, 111 (*C. C. R.*).

An indictment for conspiracy to defraud A. of bills accepted by him has been held to be proved where the evidence was that the bills were never delivered to A., but were always in the hands of the defendants, and merely presented to A. for signature. *R.* v. *Gompertz*, 9 *Q. B.* 824; 16 *L. J.* (*Q. B.*) 121; 2 *Cox*, 145. *See R.* v. *Gill*, 2 *B. & Ald.* 204 (*ante*, p. 1285).

On a conspiracy to cheat by false representations of the solvency of another, it is not necessary to prove a representation in writing. *R.* v. *Timothy*, 1 *F. & F.* 39.

Although the evidence in support of an indictment for a conspiracy shows the object of the conspiracy to have been felonious, and even that a felony was actually committed in the course of it, the defendants were not, even before 14 *&* 15 *Vict. c.* 100, *s.* 12 (*ante*, p. 218), entitled to be acquitted on the ground that the misdemeanor had merged in the felony; nor was or is it any ground for arresting the judgment that, on the face of the indictment itself, the object of the conspiracy amounts to a felony, the gist of the offence charged being a conspiracy. *R.* v. *Button*, 11 *Q. B.* 929; 18 *L. J.* (*M. C.*) 19; 3 *Cox*, 229: *see R.* v. *Neale*, 1 *Den.* 36; 1 *C. & K.* 591.

A count for conspiracy is not bad because one of the overt acts charged would support an indictment for treason. *R.* v. *O'Donnell*, 7 *St. Tr., N. S.* 637.

As to calling the defendants as witnesses for the defence, *see ante*, pp. 392–397.

Where two defendants are jointly indicted for conspiracy, and one of them pleads guilty and the other not guilty, the defendant who has pleaded guilty is admissible as a witness against the other defendant. *R.* v. *Gallagher*, 15 *Cox*, 291 (*C. C. R.*); *and see R.* v. *Plummer* [1902] 2 *K. B.* 339.

Indictment for Conspiracy to obtain Money by False Pretences, and to cheat and defraud.

Commencement as ante, p. 1286]—that A. B. and C. D., on the —— day of ——, A.D. ——, and on divers other days thereafter between the said last-mentioned day and the —— day of ——, A.D. —— [at the parish of, etc.], unlawfully, fraudulently and deceitfully did, amongst themselves, conspire, combine, confederate and agree together (and with divers other persons whose names are to the jurors aforesaid unknown, *see ante*, p. 56), by divers false pretences and unlawful and subtle ways, means, stratagems and devices to obtain and acquire to themselves of and from *E. F. the sum of —— pounds in money (*or* divers large sums of money) of the moneys of the said E. F. and to cheat and defraud him thereof*; against the peace (*as ante*, p. 1287).

If the conspiracy be to defraud the public generally, e.g., *by means of*

R. v. *Ahearne*, 6 *Cox*, 6 (*Ir.*); *but see R.* v. *Plummer* [1902] 2 *K. B.* 339, 344.

A court of quarter sessions has no jurisdiction over the offence of illegal combination or conspiracy, except conspiracies or combinations to commit any offence which they have jurisdiction to try when committed by one person. 5 & 6 *Vict. c.* 38, *s.* 1 (*ante*, p. 126).

Evidence.

Prove the conspiracy as described in the indictment, and that the defendants were engaged in it; or prove circumstances from which the jury may presume it. *See R.* v. *Parsons*, 1 *W. Bl.* 392: *R.* v. *Murphy*, 8 *C. & P.* 297. Proof of the existence of a conspiracy is generally a "matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them." *R.* v. *Brisac*, 4 *East*, 164, 171; 7 *R. R.* 551, *per Grose*, J., cited with approval by *Willes*, J., in delivering the opinion of the judges in *Mulcahy* v. *R.*, *L. R.* 3 *H. L.* 306, 317. In order to convict of conspiracy, it is not necessary that the defendants should have concocted the scheme the subject of the charge, nor that they should have originated it. If a conspiracy be formed, and a person join it afterwards, he is equally guilty with the original conspirators. *R.* v. *Murphy*, *ubi supra*, *at* p. 311, *Coleridge*, J. The prosecutor may go into general evidence of the nature of the conspiracy, before he gives evidence to connect the defendant with it. *R.* v. *Hammond*, 2 *Esp.* 719; *and see R.* v. *Salter*, 5 *Esp.* 125: *R.* v. *Brittain*, 3 *Cox*, 76: *Queen Caroline's case*, 2 *B. & B.* 284, 302; 22 *R. R.* 662; 1 *St. Tr., N. S.* 1348.

The acts and declarations, also, of any of the conspirators *in furtherance of the common design*, may be given in evidence against all (*ante*, p. 306): *see R.* v. *Shellard*, 9 *C. & P.* 277; 4 *St. Tr., N. S.* 1386: *R.* v. *Blake*, 6 *Q. B.* 126; 13 *L. J.* (*M. C.*) 131: and this principle applies when the charge is one of a crime committed in pursuance of a conspiracy. *Cf. R.* v. *Jessop*, 16 *Cox*, 204: *R.* v. *Charles*, 17 *Cox*, 499: *R.* v. *Desmond*, 11 *Cox*, 146. This rule extends to admit printed handbills or placards of speeches of co-conspirators and resolutions at their meetings. *R.* v. *Duffield*, 5 *Cox*, 404; *and see R.* v. *Hunt*, 1 *St. Tr., N. S.* 171; 3 *B. & Ald.* 566; 22 *R. R.* 485: *R.* v. *Vincent*, 9 *C. & P.* 275. As to the use of correspondence between the defendants to exculpate one of them, *see R.* v. *Whitehead*, 1 *C. & P.* 67.

If any one overt act be proved in the county where the venue is laid, other overt acts, either of the same or others of the conspirators, may be given in evidence, although committed in other counties. (*Ante*, p. 44.) *R.* v. *Bowes*, 4 *East*, 171, *cit.*; 7 *R. R.* 557. In *R.* v. *Boulton*, 12 *Cox*, 87, *Cockburn*, C. J., refused to allow the acts of alleged conspirators in a foreign country (Scotland) to be given in evidence; *and see R.* v. *Ellis* [1899] 1 *Q. B.* 230; 68 *L. J.* (*Q. B.*) 105, *Wright*, J. But before you give in evidence the acts of one conspirator against another, you must prove the existence of the conspiracy, that the parties were members of the same conspiracy, and that the act in question was done in furtherance of the common design. (*Ante*, p. 306.)

In *R.* v. *Steel*, 2 *Mood. C. C.* 246; *C. & Mar.* 337, where the indictment charged the defendant with conspiracy with persons unknown to defraud *J. D. and others*, and laid as overt acts that he falsely pretended to J. D. that he was a merchant named G., and under colour of a pretended contract with J. D. for the purchase of certain goods of *the said* J. D. and others, obtained goods of the said J. D. and others with intent to defraud the said J. D. and others: it was held that the words "J. D.

and the —— day of ——, A.D. ——), at the parish, etc. (*as ante*, p. 1168), unlawfully did amongst themselves conspire, combine, confederate, and agree together, falsely to charge and accuse the said J. N., that he, the said J. N., had then lately before feloniously ravished and carnally known the said A. violently and against her will and consent. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. and A. his wife, and J. W. and E. W., afterwards, to wit, on the day and year aforesaid, in pursuance of and according to the said conspiracy, combination, confederacy, and agreement amongst themselves had as aforesaid * [*here set out the overt acts, as in high treason (see ante*, p. 937), *introducing the second and each of the subsequent acts thus:*] And the jurors aforesaid, upon their oath aforesaid, do further present, that, in further pursuance of and according to the said conspiracy, combination, confederacy, and agreement amongst them, the said J. S. and A. his wife, and J. W. and E. W., had as aforesaid, they the said, etc., on, etc. [*continuing the indictment from the above asterisk, as thus:*] falsely and unlawfully, in the presence and hearing of divers persons, did charge and accuse the said J. N. with and of the rape aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of and according to the said conspiracy, combination, confederacy, and agreement amongst them the said J. S. and A. his wife, and J. W. and E. W., had as aforesaid, she the said A. afterwards, to wit, on the day and year aforesaid, did, upon her oath, falsely charge and accuse the said J. N. before A. C., esquire, then and yet being one of the justices of our said lord the King in and for the county of Middlesex, assigned to keep the peace, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, that he the said J. N. had then lately before feloniously ravished and carnally known her the said A., violently and against her will and consent. And the jurors aforesaid, upon their oath aforesaid, do further present, that in further pursuance of and according to the said conspiracy, combination, confederacy, and agreement amongst them the said J. S. and A. his wife, and J. W. and E. W. had as aforesaid, she the said A., by the name of A., the wife of J. S., afterwards, to wit, at the general quarter sessions of the peace of our said lord the King, holden at the Sessions House (*a*) in the city of Westminster, for the county of Middlesex (*now London, see* 51 & 52 *Vict. c.* 41, *s.* 42, *sub-s.* 12), and within the jurisdiction of the said court, on Monday, the —— day of June, in the year aforesaid, before A. B. and C. D., esquires, and others their associates, justices of our said lord the King, assigned to keep the peace of our said lord the King in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, did falsely exhibit a bill of indictment against the said J. N. to P. C., esquire [*here insert the names of the grand jurors to whom the indictment for rape* (*a*) *was exhibited*], good and lawful men of the said county, then there sworn and charged to inquire for our said lord the King, for the body of the said county: which said bill was, by the said jurors, then there returned into the said court, before the justices of our lord the King last aforesaid, and others their fellows aforesaid, thus indorsed:—"Not found:" which said bill is in these words, that is to say:—[*here set out the indictment verbatim; and you may then add,* with intent to obtain and acquire to them the said J. S. and A. his wife, and the said J. W. and E. W., of and from the said J. N. divers sums of money for compounding the said pretended felony and rape so falsely charged upon the said J. N. as aforesaid, *if this be the fact,*

(*a*) *This precedent is taken from an indictment preferred before* 5 & 6 *Vict. c.* 38, *s.* 1, *came into operation; rape is not now* triable *at quarter sessions.*

and there be no difficulty in proving it]: to the great damage, scandal, infamy, and disgrace of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. *See the following precedents:—a conspiracy to charge a man with forgery*, 4 *Went.* 86; *sodomy, Cro. Circ. Comp.* 126; *larceny, Cro. Circ. Comp.* 135: *R.* v. *Rispal*, 3 *Burr.* 1320; 1 *W. Bl.* 368; *highway robbery* (*see R.* v. *Macdaniel*, 19 *St. Tr.* 745, 803); *receiving stolen goods, Cro. Circ. Comp.* 125; *poisoning horses*, 4 *Went.* 98; *wrongfully to hold a man to bail*, 4 *Went.* 94; *and the precedents*, 3 *Chit. Cr. L.* 1181, *et seq. For cases on the form of indictment, see ante*, p. 1282, *et seq. As to court of trial, see ante*, p. 127, *and as to punishment, see ante*, p. 238.

Evidence.

Prove the sending up of the bill of indictment by calling an officer from the court to which it was preferred. Prove the conspiracy as directed, *ante*, p. 1288.

Indictment for Conspiracy to pervert Justice (by means of Perjury in an Action in the High Court).

Commencement as ante, p. 1286]—that on the —— day of ——, A.D. ——, a certain action was commenced (*allege commencement and trial of action, and continue as in the precedent of an indictment for perjury, ante*, p. 1057). And the jurors aforesaid, on their oath aforesaid, do further present, that, previously to the trial of the said action as aforesaid, to wit, on the —— day of ——, A.D. ——, and on divers other days thereafter between the said last-mentioned day and the —— day of ——, A.D. —— (at the parish, etc.), the said A. B. and the said C. D., being evilly disposed persons, unlawfully did amongst themselves conspire, combine, confederate, and agree together to pervert and defeat the due course of law and justice and wrongly and unjustly to obtain a judgment of the said High Court of Justice in favour of [the said E. F., the plaintiff in the said action]. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the —— day of ——, A.D. ——, at the said trial, the said A. B., in pursuance of and in furtherance of the said unlawful conspiracy, combination, confederation and agreement so had as aforesaid, did falsely swear that . . . and in so swearing as aforesaid unlawfully did commit wilful and corrupt perjury. And the jurors, etc. (*allege perjury or other overt act by C. D.*, e.g., *tampering with witnesses, ante*, p. 1078); to the manifest obstruction, hindrance, and perversion of justice and against the peace (*as ante*, p. 1287).

It is unnecessary in alleging perjury as an overt act in this indictment to proceed "whereas in truth and in fact," etc., as in an indictment for perjury, the gist of the offence being the conspiracy. Cf. R. v. *Gill*, 2 *B. & Ald.* 204; 20 *R. R.* 407; *and cases ante*, p. 1285.

As to conspiracy to pervert justice by the publication of matters calculated to prejudice persons upon their trial, see R. v. *Tibbits and Windust* [1902] 1 *K. B.* 77; 20 *Cox*, 70, *ante*, p. 1095.

Misdemeanor. Punishment: fine and (or) imprisonment, with or without hard labour. See 14 *& 15 Vict. c.* 100, *s.* 29 (*ante*, p. 238).

Evidence.

Prove the existence of the action as directed, *ante*, p. 1059. Prove the conspiracy as directed, *ante*, p. 1288, and if perjury was actually committed, prove it as directed, *ante*, p. 1059.

SECT. 2.

SOLICITING OR INCITING TO COMMIT A CRIME.

Common Law.

The solicitation to commit any crime, though nothing be done in pursuance of such solicitation, is a misdemeanor at common law. *R.* v. *Higgins*, 2 *East*, 5; 6 *R. R.* 615: *R.* v. *Scofield*, *Cald.* 397: *R.* v. *Gregory*, *L. R.* 1 *C. C. R.* 77; 36 *L. J.* (*M. C.*) 60; 10 *Cox*, 459; 3 *Chit. Cr. L.* 688; *Steph. Dig. Cr. L.* (6th ed.) 39.

Statutes.

37 *G.* 3, *c.* 70—*Inciting to mutiny, felony.*]—*Ante*, p. 1004.

7 *W.* 4 & 1 *Vict. c.* 36, *s.* 36—*Soliciting or endeavouring to procure commission of felony or misdemeanor against the Post Office Laws.*]—*Ante*, p. 504.

24 & 25 *Vict. c.* 100, *s.* 4—*Inciting to commit murder, felony.*]—*Ante*, p. 813.

52 & 53 *Vict. c.* 52—*Inciting, counselling, or attempting to procure another to commit an offence against the Official Secrets Act*, 1889.]—*Ante*, p. 1012.

Indictment for soliciting and inciting a Person to commit an Offence.
(*Common Law.*)

Commencement as ante, p. 434]—that J. S., on the first day of June, in the year of our Lord ——, [falsely], unlawfully, and wickedly did solicit and incite one J. W., a servant of one J. N., feloniously to steal, take and carry away a large quantity, to wit, one hundred pounds weight of cotton twist, of the goods and chattels of the said J. N. his master; to the great damage of the said J. N., to the evil example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity. [*A count may be added charging an attempt to solicit and incite, which is a misdemeanor at common law; R.* v. *Ransford*, 13 *Cox*, 9 (*post*, p. 1294); *or the defendant may be convicted of the attempt on the above indictment.*]

Misdemeanor at common law: fine or imprisonment without hard labour, or both (*see ante*, pp. 238, 240). *R.* v. *Higgins, ubi supra. In practice a longer term of imprisonment than two years is not awarded* (*ante*, p. 237). *The soliciting and inciting a person to commit a felony, where no felony is in fact committed by the person so solicited, still remains a misdemeanor only, notwithstanding* 24 & 25 *Vict. c.* 94, *s.* 2 (*post*, p. 1300). *R.* v. *Gregory*, *L. R.* 1 *C. C. R.* 77; 36 *L. J.* (*M. C.*) 60. *Where a defendant is indicted for a misdemeanor committed by the soliciting another to do an act, which, if done, would amount to a felony, and render the defendant, as an accessory before the fact, also guilty of felony, it is unnecessary to negative the doing of the act, for it cannot be intended that a felony has been committed where none is charged.* 1 *Stark. Cr. Pl.* 148, 149 (2nd ed.): *R.* v. *Higgins, ubi supra. See* 1 *Russ. Cr.* (6th ed), 170, 196. *For a form of count for soliciting to conspire to cheat and defraud, see R.* v. *De Kromme*, 17 *Cox*, 492; 56 *J. P.* 682 (*C. C. R.*).

Evidence.

Prove the soliciting or inciting as alleged in the indictment. Prove it in the same manner as you would prove the offence of accessory before the fact, except that this offence is committed, although the larceny was not in fact committed. It is no defence to the above indictment that the servant purposely submitted himself to the incitement with intent to betray his master. *R.* v. *Quail*, 4 *F. & F.* 1076.

Attempting to incite.]—The mere attempt to solicit a person to commit an offence, or to attempt or conspire to commit an offence, is also an indictable misdemeanor; *R.* v. *Ransford*, 13 *Cox*, 9 (*C. C. R.*): *R.* v. *De Kromme, ubi supra*; and therefore an indictment charging that J. S. unlawfully, wickedly, and indecently did write and send, and cause and procure to be written and sent to one J. N., a certain letter in the words and figures following, that is to say [*setting out the letter*], with intent thereby to move and incite the said J. N. to attempt and endeavour, feloniously and wickedly, to commit and perpetrate with him the said J. S. the detestable crime of buggery, and by the means aforesaid did unlawfully and wickedly *attempt* and endeavour to incite the said J. N. to attempt to commit and perpetrate with him the said J. S. the detestable, horrid, and abominable crime aforesaid,—was held to charge an indictable misdemeanor. *R.* v. *Ransford, ubi supra.*

Intercepted letters.]—Where a letter is sent soliciting and inciting the addressee to commit a crime, but is not proved to have reached the intended recipient, the sender may be properly convicted of an attempt to incite to the commission of the crime. *R.* v. *Banks*, 12 *Cox*, 393: *R.* v. *Ransford, ubi supra*: *R.* v. *Krause*, 66 *J. P.* 121. Where the crime the commission of which is so solicited is murder it was held that there must be some evidence of communication between the sender and recipient of the letter to render the sender guilty of the statutory offence of "soliciting to murder" under 24 & 25 *Vict. c.* 100, *s.* 4; and that in the absence of such evidence he is guilty only of the common law misdemeanor of attempting to commit that offence. *R.* v. *Krause, ubi supra*, *Lord Alverstone*, C.J.: *cf. R.* v. *Banks, ubi supra.*

Inciting a person to attempt to commit an offence.]—On an indictment charging the defendants that they "unlawfully did incite, counsel, procure, and aid one H. S., she the said H. S. then being a woman with child, to commit a certain misdemeanor, to wit, unlawfully to attempt feloniously and unlawfully to administer to herself certain noxious things, to wit, divers drugs, capable of procuring the abortion of pregnant women, the names of which drugs are to the jurors aforesaid unknown, with intent thereby to procure her own miscarriage" (*see* 24 & 25 *Vict. c.* 100, *s.* 58 (*ante*, p. 826)), and with conspiracy to incite her to attempt feloniously and unlawfully to administer, etc., it was held (*a*) that if the woman believing that she was taking a noxious thing within the meaning of the statute did, with intent to procure her own abortion, take a thing in fact harmless, she was guilty of an attempt to commit an offence against 24 & 25 *Vict. c.* 100, *s.* 58; but (*b*) that if the defendants in supplying the drugs to the woman, though they well knew that she would take it in the belief that it was a "noxious thing," and with intention of procuring her own abortion, did not themselves believe that it was capable of procuring abortion, they could not be convicted of *inciting* her to commit the said offence, although if they had so believed it would have been otherwise. *R.* v. *Brown and others, C. C. C.* 23*rd Nov.*

1899; 63 *J. P.* 790; 34 *L. J. Newsp.* 644, *Darling*, J.: *cf.* the fifth count in *R.* v. *Ransford, ubi supra; and see post*, p. 1296.

As to incitement to commit perjury or give false evidence, *see ante*, p. 1071.

Sect. 3.

ATTEMPT TO COMMIT CRIME.

It is a misdemeanor at common law to attempt to commit any felony or misdemeanor (*see ante*, p. 2). Attempts to commit certain crimes are also punishable by statute; *e.g.*, attempts to murder (24 & 25 *Vict. c.* 100, *ss.* 14, 15, *ante*, pp. 817, 822); to commit unnatural offences (*ante*, p. 925); or offences against girls under thirteen, or between thirteen and sixteen (*ante*, pp. 912, 913).

It is said that there cannot, *ex vi termini*, be an attempt to commit perjury: but an attempt to suborn perjury is indictable (*see ante*, p. 1071); so are certain attempts to bribe (*ante*, p. 1080).

Under 14 & 15 *Vict. c.* 100, *s.* 9 (*ante*, p. 219), any person indicted for felony or misdemeanor may be convicted of the attempt to commit the offence charged, if the jury is satisfied that the offence was not completed. *See R.* v. *McPherson, Dears. & B.* 197; 26 *L. J.* (*M. C.*) 134, 7 *Cox*, 281: *R.* v. *Hapgood, L. R.* 1 *C. C. R.* 221. It is therefore unusual to prefer an indictment for the attempt to commit an offence (*e.g.*, to obtain money by false pretences) where the full offence is charged.

In *R.* v. *Connell*, 6 *Cox*, 178, *Williams* and *Talfourd*, JJ., held that a previous acquittal for murder was no bar to a subsequent indictment for administering poison with intent to murder, on the ground that though by 14 & 15 *Vict. c.* 100, *s.* 9, the jury can on an indictment for felony or misdemeanor convict of the attempt to commit the offence charged, such attempt was a misdemeanor only. It is submitted that *R.* v. *Connell* is not, as stated in previous editions of this work, an authority for the proposition that the jury cannot convict under 14 & 15 *Vict. c.* 100, *s.* 9, of the attempt, when the attempt is made felony by statute.

Indictment for an Attempt to commit an Offence.

An indictment for the common law misdemeanor of an attempt to commit a felony or misdemeanor can as a general rule be framed on the precedents ante passim *by inserting the words "unlawfully did attempt and endeavour to feloniously" (or* unlawfully, *as the case may be), before the words charging the full offence.* (*a*)

An indictment for attempting to obtain money by false pretences must set out the pretences. R. v. *Marsh*, 1 *Den.* 505.

(*a*) In *R.* v. *Fuller*, 1 *B. & P.* 180; 2 *Leach*, 916; 1 *East*, *P. C.* 91, the judges held that in an indictment under 37 *G.* 3, *s.* 70, charging F. for that he "feloniously and maliciously did endeavour to seduce" L., a soldier, from his allegiance, it was not necessary to set out the means employed, on the ground that such an endeavour, though a conclusion from an infinite variety of facts and circumstances, is but a conclusion of fact, is itself a fact, which could only be expressed by the word "endeavour." *Cf.* 1 *Stark. Cr. Pl.* 146: *R.* v. *Lady Lawley, Fitzgibbon*, 263; 2 *Str.* 904. On the other hand, in the precedent for an attempt to commit burglary in 3 *Chit. Cr. L.* 1190 (*a*), the means are set out; and, at all events, in indictments for such offences as attempts to pervert the course of justice, the facts alleged as constituting the attempt should be set out. *Cf. R.* v. *Tibbits and Windust* [1902] 1 *K. B.* 77; 20 *Cox*, 70; *and see* the indictment in *R.* v. *Ransford*, 13 *Cox*, 9.

Evidence.

Mere intention to commit an offence does not constitute an attempt; some act must be proved to have been done by the defendant immediately connected with the offence. *R.* v. *Eagleton*, *Dears.* 515, 538; 24 *L. J.* (*M. C.*) 158; 6 *Cox*, 559 (*ante*, p. 617): *R.* v. *Roberts*, *Dears.* 539; 25 *L. J.* (*M. C.*) 17: *R.* v. *Cheeseman*, *L. & C.* 140, 145; 31 *L. J.* (*M. C.*) 89; 9 *Cox*, 100. It is no defence to an indictment for attempting to commit a crime to prove that it was physically impossible to commit the complete offence. *R.* v. *Brown*, 24 *Q. B. D.* 357: 59 *L. J.* (*M. C.*) 47; 16 *Cox*, 715 (*C. C. R.*): *R.* v. *Ring*, 61 *L. J.* (*M. C.*) 116; 17 *Cox*, 491. These decisions overrule *R.* v. *Collins*, *L. & C.* 471; 33 *L. J.* (*M. C.*) 177; 9 *Cox*, 497. (*a*) *See also* *R.* v. *Duckworth* [1892] 2 *Q. B.* 83; 17 *Cox*, 495; and the observations of *Hawkins* and *Cave*, JJ., in *R.* v. *Williams* [1893] 1 *Q. B.* 320; 62 *L. J.* (*M. C.*) 29. In the *Draft Criminal Code*, prepared by Lord *Blackburn*, and *Barry*, *Lush*, and *Stephen*, JJ., the following definition appears (*art.* 74):—"An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to complete the offence or by some other cause. *Every one who, believing that a certain state of facts exists, does or omits an act the doing or omitting of which would, if that state of facts existed, be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was by reason of the non-existence of that state of facts at the time of the act or omission impossible.* The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law." To this definition the commissioners appended a note to the effect that the passage between the asterisks "declares the law differently from *R.* v. *Collins*" (*ubi supra*), which at the date of the drafting of the code had not been overruled. *Cf. Steph. Dig. Crim. Law* (6th ed.), 39. As to what is "too remote," *see R.* v. *Eagleton*, *and the cases cited supra*, from which it would seem that it is material to consider on this point whether there is any further act *on the defendant's part* remaining to be done before the completion of the crime. *See R.* v. *Eagleton*, *Dears. at* p. 538: *R.* v. *Cheeseman*, *L. & C. at* p. 145: and the observations of *Alderson*, B., in *R.* v. *Roebuck*, *Dears. & B.* 24; 23 *L. J.* (*M. C.*) 101; 7 *Cox*, 126, 127; *and cf. R.* v. *Hensler*, 11 *Cox*, 570 (*C. C. R.*) (*ante*, p. 613). In accordance with the above definition, it was held that if a prognant woman believing she is taking a "noxious thing" within the meaning of 24 & 25 *Vict. c.* 100, *s.* 58, does with intent to procure her own abortion take a thing in fact harmless, she is guilty of attempt to commit an offence against the first part of that section. *R.* v. *Brown and others*, *Cent. Crim. Court*, 23*rd Nov.* 1899, *Darling*, J. (*ante*, p. 1294).

(*a*) Messrs. J. B. Matthews and V. G. Milward, editors of the second edition of *Pritchard's Quarter Sessions*, at pp. 900-908, contend that *R.* v. *Brown* and *R.* v. *Ring* have not completely overruled *R.* v. *Collins*.

BOOK II.

PART IV.

ACCESSORIES, ABETTORS, ETC.

PRINCIPALS IN THE SECOND DEGREE.

Common Law.

Principals in the second degree are those who are present, aiding and abetting, at the commission of the fact. The distinction between principals in the first and in the second degree is stated in detail *ante*, pp. 12–16; *and see* 1 *Chit. Cr. L.* 256; *Steph. Dig. Cr. L.* (6th ed.) 31.

Statutes.

37 *G.* 3, *c.* 123, *s.* 3—*Aiding and abetting the taking of unlawful oaths.*]—*Ante*, p. 999.

52 *G.* 3, *c.* 104, *s.* 4—*Aiding and abetting the taking of oaths to commit treason or felony.*]—*Ante*, p. 1003.

7 *W.* 4 *&* 1 *Vict. c.* 88 (*Piracy Act*, 1837), *s.* 4—*Punishment of principals in the second degree and accessories, for piracy.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall, on conviction, be liable to be imprisoned for any term not exceeding two years.

11 *&* 12 *Vict. c.* 12, *s.* 8—*Punishment of principals in the second degree in treason felony.*]—*Ante*, p. 949.

24 *&* 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 98—*Punishment of principals in the second degree, accessories and abettors.*]—In case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except only a receiver of stolen property) shall on conviction be liable, at the

discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour; . . . and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be indicted and punished as a principal offender. [*As to the origin of this and the following sections, see Greaves, Crim. Law Cons. Acts* (2nd ed.), p. 88.]

24 & 25 *Vict. c.* 97 (*Malicious Damage Act*, 1861), *s.* 56—*Punishment of principals in the second degree, accessories and abettors, etc.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour; . . . and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act shall be liable to be proceeded against, indicted and punished as a principal offender.

24 & 25 *Vict. c.* 98 (*Forgery Act*, 1861), *s.* 49—*Punishment of principals in the second degree, accessories and abettors.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour; . . . and every person who shall aid, abet, counsel or procure the commission of any misdemeanor punishable under this Act shall be liable to be proceeded against, indicted and punished as a principal offender.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 35—*Punishment of principals in the second degree and accessories.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour.

24 & 25 *Vict. c.* 100 (*Offences against the Person Act*, 1861), *s.* 67—*Punishment of principals in the second degree, accessories and abettors.*]—In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except murder) shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour; and every accessory after the fact to murder shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour; and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor punishable under this

Act shall be liable to be proceeded against, indicted and punished as a principal offender.

Indictment of Principal in the Second Degree.

After stating the offence of the principal in the first degree, and immediately before the conclusion of the indictment, charge the principal in the second degree, thus:]—And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., on the day and year aforesaid, feloniously was present aiding, abetting, and assisting the said J. S. the felony aforesaid to do and commit; against the peace, etc.

Punishment: apart from the statutes printed on pp. 1297, 1298, *and before abolition of benefit of clergy by the Criminal Law Act,* 1827 (7 & 8 *G.* 4, c. 28), *s.* 11, *the rule adopted seems to have been that where a statute created a felony and punished with death persons guilty thereof, or imposed the penalty of death for a specified common law felony, without making specific provisoes as to persons present aiding and abetting, they were liable to the death penalty, though not named in the statute. R.* v. *Midwinter, Fost. App.* 415: *The Coalheavers' case,* 1 *Leach,* 64; 1 *East, P. C.* 413: *and see* 1 *Hale,* 537; *Fost.* 359. *But a distinction was drawn where the penalty was imposed on the person committing the offence, and not on the offence by name (Fost.* 356, 357), *unless the accessory were expressly within the statute. R.* v. *Gogerly, R. & R.* 343. *By* 7 & 8 *G.* 4, c. 28, *s.* 7, "*no person convicted of felony shall suffer death unless it be for some offence which was excluded from the benefit of clergy before or on the first day of the present session of parliament, or which hath been or shall be made punishable by death by some statute passed after that day*" (*see ante,* p. 233). *The only case to which the old rule can now apply seems to be that of accessories under the Dockyards, etc., Protection Act,* 1772 (12 *G.* 3, *c.* 24), *s.* 1 (*ante,* p. 658).

Where, upon the construction of any statute, principals in the second degree are not punishable with death, and no punishment is prescribed by the statute, then principals in the second degree may be kept to penal servitude for not more than seven nor less than three years, or imprisoned for not exceeding two years, with or without hard labour for the whole or any part of the imprisonment. 7 & 8 *G.* 4, *c.* 28, *s.* 8 (*ante,* p. 234); 20 & 21 *Vict. c.* 3 (*ante,* p. 235); 54 & 55 *Vict. c.* 69, *s.* 1 (*ante,* p. 235).

In the case of a felony at common law not punishable with death, and in cases of felony at common law or by statute, where the principal in the first degree is expressly, and the principal in the second degree is by construction of law, punishable with death (vide supra), the pleader may charge the principal in the second degree either as principal in the first degree, for proof that he was present aiding and abetting will in such a case maintain an indictment charging him with having actually committed the offence; see Mackalley's case, 9 *Co. Rep.* 67 *b*; 1 *Hale,* 438: *R.* v. *Towle, R. & R.* 314 (*ante,* p. 16); *or as being present aiding and abetting, as in the form above given, at his option. R.* v. *Crisham, C. & Mar.* 187 (*ante,* p. 16): *R.* v. *Downing,* 1 *Den.* 52; 2 *C. & K.* 382 (*ante,* p. 16). *A., B. and C. were indicted for murder: in the first count, as principals in the first degree; and in the second, A. was indicted as a principal in the first degree; and B. and C. as principals in the second degree; the grand jury ignored the first count as to B. and C., and found a true bill on the second count against all; it seems that B. and C. might be convicted on the second count, though A. was acquitted. R.* v. *Phelps, C. & Mar.* 180. *It has never been necessary that the principal in the first degree should be joined in the indictment with the principal in the second degree or have been made amenable to justice. Plowd.* 97.

Evidence.

The commission of the principal felony must be proved. The defendant must be proved to have been present aiding and abetting in the commission of the offence (*see ante*, p. 12).

A person may be convicted as principal in the second degree even if from sex or age incapable of being a principal in the first degree. *Lord Baltimore's case*, 4 *Burr.* 2179: *R.* v. *Eldershaw*, 3 *C. & P.* 396: *R.* v. *Ram*, 17 *Cox*, 609, *Bowen*, L.J. The presence of the aider and abettor may be actual or constructive; *see ante*, pp. 12, 13. As to the crimes committed through innocent agents, *see ante*, pp. 12, 13. There must be not only presence, but guilty participation in the felony: *see ante*, p. 13; *and R.* v. *Fretwell*, *L. & C.* 161; 31 *L. J.* (*M. C.*) 145; 9 *Cox*, 152. The common purpose must be to commit a felony or to do an unlawful act at all hazards; *see ante*, pp. 13, 14; and the commission of the principal felony must directly result from the execution of the common purpose (*ante*, p. 14). As to the effect of the insanity of the principal felon on the liability of principals in the second degree, *see R.* v. *Tyler*, 8 *C. & P.* 616, *and ante*, p. 16.

ACCESSORIES BEFORE THE FACT.

Common Law.

An accessory before the fact to felony is he that being *absent* at the time of the actual perpetration of the felony, procures, counsels, commands, invites, or abets another to commit it. 1 *Chit. Cr. L.* 262; *and see Steph. Dig. Cr. L.* (6th ed.) 33, *and ante*, pp. 16–19, where the nature of the offence is fully dealt with. There are no accessories before the fact in treason or misdemeanor. *See R.* v. *Burton*, 13 *Cox*, 71 (*C. C. R.*), *and ante*, p. 16. As to such accessories to manslaughter, *see R.* v. *Smith*, 2 *Cox*, 233, *Parke*, B.: *R.* v. *Taylor*, *L. R.* 2 *C. C. R.* 147, *post*, p. 1903. There may be accessories before the fact in bigamy. *R.* v. *Brawn*, 1 *C. & K.* 144: *S. C. sub nom. R.* v. *Bawm*, 1 *Cox*, 33.

Where a felony is committed through an innocent agent, the person who thus effected it is a principal, and not an accessory before the fact. *See ante*, p. 12, *and* 1 *Russ. Cr.* (6th ed.) 165. So, if an unlawful act is done by a servant under his master's orders. *Wilson* v. *Stewart*, 32 *L. J.* (*M. C.*) 198.

Statutes.

24 & 25 *Vict. c.* 94 (*Accessories and Abettors Act*, 1861), *s.* 1—*Accessories before the fact, indictable as principals.*]—Whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law, or by virtue of any Act passed or to be passed, may be indicted, tried, convicted and punished in all respects as if he were a principal felon. [*This section re-enacts* 11 & 12 *Vict. c.* 46, *s.* 1, *as to which see R.* v. *Hughes*, 8 *Cox*, 278 (*C. C. R.*). *Where an offence is declared felony, it appears clear that such a common law incident as that of the liability of accessories is implied. R.* v. *Sadi*, 1 *Leach*, 468. *A similar provision is made by s.* 5 *of the Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *as to offences punishable on summary conviction.*]

Sect. 2—*Accessories before the fact may be indicted as such, or as substantive felons.*]—Whosoever shall counsel, procure, or command any other person

to commit any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished. [*This section re-enacts* 7 *G.* 4, *c.* 64, *s.* 9, *which altered the common law rule on the subject, stated ante*, p. 18. *It does not extend to a case where one person incites another to commit suicide; see R.* v. *Gregory* (*ante*, p. 1293): *R.* v. *Leddington*, 9 *C. & P.* 79; *and see ante*, p. 19. *The words* "not amenable to justice" *appear to overrule R.* v. *Ashmall*, 9 *C. & P.* 236, *where it was held that the principal not having appeared to take his trial the accessory was not compellable to plead.*]

Sect. 5—*Prosecution of accessory after principal has been convicted, but not attainted.*]—If any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be pardoned, or otherwise delivered before attainder; and every such accessory shall upon conviction suffer the same punishment as he would have suffered if the principal had been attainted. [*This section re-enacts* 7 *G.* 4, *c.* 64, *s.* 11. *Attainder was abolished in* 1870; *see ante*, p. 177.]

Sect. 6—*Trial of accessories.*]—Any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, *and may be tried together*, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice. [*This section re-enacts* 14 *&* 15 *Vict. c.* 100, *s.* 15, *with the additions italicized. As to receivers, see ante*, p. 546.]

Sect. 7—*Trial of accessories.*]—Where any felony shall have been wholly committed within England or Ireland, the offence of any person who shall be an accessory either before or after the fact to any such felony may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act by reason whereof such person shall have become such accessory shall have been committed; and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony may be dealt with, inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felony *or any felonies committed in any county or place in which such person shall be apprehended or be in custody*, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within [his] Majesty's dominions or without, or partly within [his] Majesty's dominions and partly without: provided that no person who shall be once duly tried either as an accessory before or after the fact, or for a substantive felony under the provisions hereinbefore contained, shall be liable to be

afterwards prosecuted for the same offence. [*This section is taken from* 7 *G.* 4, *c.* 64, *ss.* 9, 10; 11 *& 12 Vict. c.* 46, *s.* 2, *with the additions italicized; and see ante*, pp. 39–43, 46.]

Sect. 9—*Accessories to offences in admiralty jurisdiction—Venue.*]—Where any person shall, within the jurisdiction of the admiralty of England or Ireland, become an accessory to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be felony; and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed "on the high seas:" provided that nothing herein contained shall alter or affect any of the laws relating to the government of [his] Majesty's land or naval forces. [*This section was new in* 1861 *as a general provision, but was framed on similar clauses in* 9 *G.* 4, *c.* 69, *s.* 9, *and* 7 *& 8 Vict. c.* 2, *as to particular offences. As to the present law about offences in admiralty jurisdiction, see ante*, pp. 39–43, 46.]

37 *G.* 3, *c.* 123, *s.* 3—*Accessories to taking unlawful oaths.*]—*Ante*, p. 999.

52 *G.* 3, *c.* 104, *s.* 4—*Accessories to taking oaths to commit treason or felony.*]—*Ante*, p. 1003.

7 *W.* 4 *& 1 Vict. c.* 88, *s.* 4—*Punishment of accessories before the fact to felonies within the Piracy Act*, 1837.]—*Ante*, p. 1297.

11 *& 12 Vict. c.* 12, *s.* 8—*Punishment of accessories before the fact to treason felony.*]—*Ante*, p. 949.

24 *& 25 Vict. c.* 96, *s.* 98—*Punishment of accessories before the fact to felonies within the Larceny Act*, 1861.]—*Ante*, p. 1297.

24 *& 25 Vict. c.* 97, *s.* 56—*Punishment of accessories before the fact to felonies within the Malicious Damage Act*, 1861.]—*Ante*, p. 1298.

24 *& 25 Vict. c.* 98, *s.* 49—*Punishment of accessories before the fact to felonies within the Forgery Act*, 1861.]—*Ante*, p. 1298.

24 *& 25 Vict. c.* 99, *s.* 35—*Punishment of accessories before the fact to felonies within the Coinage Offences Act*, 1861.]—*Ante*, p. 1298.

24 *& 25 Vict. c.* 100, *s.* 67—*Punishment of accessories before the fact to felonies within the Offences against the Person Act*, 1861.]—*Ante*, p. 1298.

46 *& 47 Vict. c.* 3, *s.* 5—*Accessories to crimes under the Explosive Substances Act*, 1883.]—*Ante*, p. 665.

Indictment of Accessory before the Fact together with the Principal. (24 & 25 *Vict. c.* 94, *s.* 2, *ante*, p. 1300.)

After charging the principal with the offence, and immediately before the conclusion of the indictment, you may charge the accessory thus:—And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., before the said felony and larceny was committed in form aforesaid, to wit, on the first day of August, in the year aforesaid, feloniously did counsel, procure, [incite, move, aid, hire,] and command the said J. S. the said felony in manner and form aforesaid to do and commit; against the form, etc. [*as ante*, p. 465]. *The word* "maliciously" *appearing in the precedent in editions of this work prior to the 22nd has been omitted as unnecessary. The act of accessory before the fact is described in differing terms in many statutes creating new felonies, or imposing a statutory punishment for principals and accessories in felonies at common law. In s.* 2 *of the Accessories and Abettors Act the words used are "counsel, procure, or command," which, it is submitted, are by the terms of the section sufficient in most if not all cases. Where the statute dealing with the felony does not mention accessories, or in the case of a felony at common law, the words in brackets may be added. And even where the statute does expressly describe the offence of accessory in terms, it is not absolutely necessary to describe it in the same terms in the indictments, and a description in equivalent terms will be sufficient. Thus, where the words in the statute were "command, hire, or counsel," and in the indictment "excite, move, and procure," the indictment was held good: because the words were of the same legal import. R.* v. *Grevil*, 1 *Anderson*, 194. *A man may be indicted as accessory to one of several principals, or to all: and if he be indicted as accessory to all, he may be convicted on such indictment as accessory to one or some of them. Lord Sanchar's case*, 9 *Co. Rep.* 119; *Fost.* 361; 1 *Hale*, 624. (*See ante*, p. 19.) *An indictment charging that a* certain evil-disposed person *feloniously stole certain goods, and that A. B. feloniously incited the said evil-disposed person to commit the said felony, is bad for uncertainty against A. B. R.* v. *Caspar*, 2 *Mood. C. C.* 101; 9 *C. & P.* 289. *As to the venue, see ante*, pp. 43, 46.

The offence of accessory before the fact is felony, and such accessory now in all cases may be indicted, tried, convicted and punished in all respects as if he were a principal felon. 24 & 25 *Vict. c.* 94, *s.* 1 (*ante*, p. 1300). *See R.* v. *Chadwick, Stafford Sum. Ass.* 1850 (*ante*, p. 18): *R.* v. *James*, 24 *Q. B. D.* 439; 59 *L. J.* (*M. C.*) 96 (*ante*, p. 19). *Punishment: as directed by the statute if any specifically providing for the punishment, or where no specific punishment is provided, by penal servitude for not more than seven nor less than three years, or imprisonment not exceeding two years, with or without hard labour for the whole or any part of the imprisonment.* 7 & 8 *G.* 4, *c.* 28, *s.* 8 (*ante*, p. 224); 20 & 21 *Vict. c.* 3 (*ante*, p. 235); 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

Evidence.

Prove first the commission of the principal felony by J. S.; secondly, that J. W. had *previously* to its commission counselled, procured, [incited, moved, aided, hired,] or commanded J. S. to commit the principal felony: whether he did so directly or through a third person is immaterial. *See R.* v. *Macdaniel, Fost.* 121, 125; 19 *St. Tr.* 745, *and ante*, p. 16.

To support an indictment for being accessory before the fact to manslaughter (as to which *see R.* v. *Gaylor, Dears. & B.* 288, *and ante*, p. 17), as well as to other felonies, there must be an active proceeding on the part of the defendant; he must procure, incite, or some other way

encourage the act of the principal. Therefore, where the defendant acted as stakeholder on the occasion of a prize fight, which ended in the death of one of the fighters, but took no other part in the circumstances attending the fight, at which he was not present, than to hold the stakes and hand them over afterwards to the winner, it was held that he could not be convicted as accessory before the fact to the manslaughter. *R.* v. *Taylor*, *L. R.* 2 *C. C. R.* 147; 44 *L. J.* (*M. C.*) 67; 13 *Cox*, 68.

As it is essential to constitute the offence of accessory that the party should be absent at the time the offence was committed (1 *Hale*, 615, 616: *R.* v. *Macdaniel*, 19 *St. Tr.* 745; *Fost.* 121, 126; 1 *East*, *P. C.* 352, *ante*, p. 16), if it be proved that J. W. was present when the larceny in question was committed, he must, if indicted as an accessory, be acquitted. *R.* v. *Gordon*, 1 *Leach*, 515; 1 *East*, *P. C.* 352: *R.* v. *Brown*, 14 *Cox*, 144.

The accessory may controvert the guilt of his principal, and cannot be convicted on this indictment unless the principal is found guilty. *See* 1 *Hale*, 624; 2 *Co. Inst.* 184; *Fost.* 365. So, he may prove that, after he had so counselled, procured, incited, hired, or commanded J. S., he repented of it, and actually countermanded the order, etc. 1 *Hale*, 618. So, if it appear that the accessory ordered or advised one crime, and that the principal committed another; as, for instance, if he commanded J. S. to burn a house, and instead of doing so he commited a larceny, he must be acquitted. 1 *Hale*, 617. So, if J. W. ordered J. S. to commit a crime against A., and instead of doing so he wilfully committed the same crime against B., J. W. would not be answerable as accessory; but if J. S. had committed the offence against B. by mistake, instead of A., it seems it would be otherwise. *Fost.* 370, *et seq.*; *but see* 1 *Hale*, 617; 3 *Co. Inst.* 51: *R.* v. *Saunders*, *Plowd.* 475; *Steph. Dig. Cr. L.* (6th ed.) 35. But it is clear that the accessory is liable for all that ensues upon the execution of the unlawful act commanded; as for instance, if A. commanded B. to beat C., and he beat him so that he dies, A. is accessory to the murder. 4 *Bl. Com.* 37; 1 *Hale*, 617. Or if A. command B. to burn the house of C., and in doing so the house of D. is also burnt, A. is accessory to the burning of D.'s house. *R.* v. *Saunders*, *Plowd.* 473, 475. So if the offence commanded be effected, although by different means from those commanded; as, for instance, if J. W. hire J. S. to poison A., and instead of poisoning him he shoot him, J. W. is nevertheless liable as accessory. *Fost.* 369, 370. Where the procurement is through an intermediate agent, it is not necessary that the accessory should name the person to be procured to do the act. *R.* v. *Cooper*, 5 *C. & P.* 535.

It is said by *Coke* and *Hale* that where the principal and accessory are tried together, one being charged as principal and the other as accessory (which will now probably never occur), if the principal plead otherwise than the general issue, the accessory shall not be bound to answer until the principal's plea be first determined. 9 *H.* 7, 19; 1 *Hale*, 624; 2 *Co. Inst.* 184. Where three agreed to commit a burglary, and one informed the police, in order that they might arrest the other two, the informer, though present at the commission of the offence, was held not to be *particeps criminis*. *R.* v. *Dannelly*, *R. & R.* 310; 2 *Marsh.* 571. *See also* 24 & 25 *Vict. c.* 94, *s.* 6 (*ante*, p. 1301).

Indictment against an Accessory before the Fact, as for a Substantive Felony. (24 & 25 *Vict. c.* 94, *s.* 2, *ante*, p. 1300.)

Central Criminal Court, to wit:—The jurors for our lord the King upon their oath present, that J. S. [*or*, that some person or persons to

the jurors aforesaid unknown], on the first day of June, in the year [*etc., etc., stating the felony, exclusive of the conclusion,* "against the form," etc., or "against the peace," *etc.*]. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W. [X. Y. and A. B.], before the said felony was committed in form aforesaid, to wit, on the first day of May, in the year aforesaid, feloniously did counsel, procure, [move, incite, aid, hire], and command the said J. S. [*or* the said person or persons to the jurors aforesaid unknown] the said felony in manner and form aforesaid to do and commit; against the form [*as ante*, p. 465]. *Any number of accessories at different times may be charged together on this indictment.* 24 & 25 *Vict. c.* 94, *s.* 6 (*ante*, p. 1301). *An indictment is properly framed as for a substantive felony, which states in the first place that the principal committed the felony, and then that the defendant incited, moved, etc., him to commit it; although the principal has not been tried, and does not appear to be amenable to justice. R.* v. *Wallace, C. & Mar.* 200; 2 *Mood. C. C.* 200. *If the principal felon be known, the indictment should charge the felony, etc., to have been committed by him, and not by a person unknown. R.* v. *Walker*, 3 *Camp.* 264; *and see R.* v. *Caspar* (*ante*, p. 1303).

Evidence.

Prove the felony as already directed, *ante passim*; and then prove the defendant's guilt as accessory, as directed *ante*, p. 1303.

ACCESSORIES AFTER THE FACT.

Common Law.

An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. The elements of this offence have been dealt with, *ante*, pp. 19–21; *and see* 1 *Chit. Cr. L.* 264; *Steph. Dig. Cr. L.* (6th ed.) 36. There are at common law no accessories after the fact in treason or misdemeanor. *See ante*, p. 19, *and R.* v. *Smith, L. R.* 1 *C. C. R.* 266; 39 *L. J.* (*M. C.*) 112; 11 *Cox*, 511 (*ante*, p. 550); *and R.* v. *Green*, 8 *Cox*, 441. As to receiving goods stolen, etc., *see ante*, p. 546, *et seq.* Even in the case of misdemeanor it is indictable to rescue the offender (*ante*, p. 1038), or to obstruct an officer of justice (*ante*, p. 861), or to conspire to defeat justice, 2 *Hawk. c.* 29, *s.* 4, *and ante*, p. 1281.

Statutes.

24 & 25 *Vict. c.* 94 (*Accessories and Abettors Act*, 1861), *s.* 3—*Accessories after the fact may be indicted as such, or as substantive felons.*]—Whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished. [*This section re-enacts* 11 & 12 *Vict. c.* 46, *s.* 2.]

Sect. 4—*Punishment of accessories after the fact.*]—Every accessory after the fact to any felony (except where it is otherwise specially enacted), whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be liable, at the discretion of the court, to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labour, and it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to such punishment: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year. [*This section generalized the provisions in Peel's Acts as to punishment of accessories after the fact.*]

Sect. 5—*Prosecution after conviction of principal.*]—*Ante*, p. 1301.

Sect. 7—*Venue and trial.*]—*Ante*, p. 1301.

Sect. 9—*Accessories after the fact to offences in admiralty jurisdiction.*]—*Ante*, pp. 42, 1302.

7 *W.* 4 & 1 *Vict. c.* 88, *s.* 4—*Accessories after the fact to offences within the Piracy Act*, 1837.]—*Ante*, p. 1297.

11 & 12 *Vict. c.* 12, *s.* 8—*Accessories after the fact to treason felony.*]—*Ante*, p. 949.

24 & 25 *Vict. c.* 96, *s.* 98—*Accessories after the fact to felonies within the Larceny Act*, 1861.]—*Ante*, p. 1297.

24 & 25 *Vict. c.* 97, *s.* 56—*Accessories after the fact to felonies within the Malicious Damage Act*, 1861.]—*Ante*, p. 1298.

24 & 25 *Vict. c.* 98, *s.* 49—*Accessories after the fact to felonies within the Forgery Act*, 1861.]—*Ante*, p. 1298.

24 & 25 *Vict. c.* 99, *s.* 35—*Accessories after the fact to felonies within the Coinage Offences Act*, 1861.]—*Ante*, p. 1298.

24 & 25 *Vict. c.* 100, *s.* 67—*Accessories after the fact to felonies within the Offences against the Person Act*, 1861.]—*Ante*, p. 1298.

Indictment against an Accessory after the Fact with the Principal.
(24 & 25 *Vict. c.* 94, *s.* 3, *ante*, p. 1303.)

After stating the offence of the principal, and immediately before the conclusion of the indictment, charge the accessory after the fact thus:]—And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., [X. Y. and A. B.,] well knowing the said J. S. to have done and committed the said felony in form aforesaid, afterwards, to wit, on the day and year aforesaid, him the said J. S. did feloniously receive, harbour and maintain; against the form, etc. [*as ante*, p. 465]. *For indictments of receivers of goods stolen, see ante*, p. 546, *et seq. As to the venue, see ante*, pp. 42, 46, 1301. *On an indictment charging a man as a principal felon only, he cannot be convicted of being an accessory after the fact. R.* v. *Fallon, L. & C.* 217;

32 *L. J.* (*M. C.*) 66: *Richards* v. *R.*, 61 *J. P.* 389. *And where a man is charged in one count of the indictment as a principal felon, and in another count as an accessory after the fact to the same felony, the prosecution will not be compelled to elect upon which count they will proceed. R.* v. *Tuffin, Guildford Assizes, July*, 1903, *Darling*, J. (*ante*, p. 89). *Where several persons are tried upon one indictment, some as principals in murder, others as accessories after the fact to the murder, and the principals are convicted of manslaughter only, the prisoners charged as accessories may be convicted as accessories to the manslaughter. R.* v. *Richards*, 2 *Q. B. D.* 311; 46 *L. J.* (*M. C.*) 200; 13 *Cox*, 611 (*C. C. R.*).

The offence of the accessory after the fact is felony whether the principal offence is felony at common law or by statute. 24 *&* 25 *Vict. c.* 96, *s.* 3. *Accessories after the fact to murder may be kept to penal servitude for life or for not less than three years, or imprisoned, with or without hard labour, not exceeding two years.* 24 *&* 25 *Vict. c.* 100, *s.* 67; 54 *&* 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235). *Accessories after the fact to larceny, arson and malicious injuries, forgery, to coinage offences, to offences against the person, to post-office offences, to piracy, are liable to imprisonment, with or without hard labour, not exceeding two years. See the statutes, ante*, p. 1297. *So are accessories after the fact to any felony whether at common law or by statute, unless where it is otherwise specially enacted.* 24 *&* 25 *Vict. c.* 94, *s.* 4 (*ante*, p. 1306). *There seem now to be no cases in which an accessory after the fact can be punished capitally or in the same way as the principal offender. As to former law, see ante*, p. 20, *and* 3 *Co. Inst.* 59; 1 *Hale*, 235, 236, 328; 2 *Hawk. c.* 29, *s.* 14. *Accessories after the fact are now triable* (1) *as accessories after the fact to the principal felony together with the principal felon, or after his conviction; or* (2) *as for a substantive felony irrespective of the principal felon.* 24 *&* 25 *Vict. c.* 94, *s.* 3 (*ante*, p. 1303).

Any number of accessories to the same felony may be charged with substantive felonies in the same indictment. Id., s. 6; *see ante*, p. 19.

Evidence.

1. The prosecutor must prove the principal guilty of the felony charged against him by the indictment, as in ordinary cases.

2. He must prove that J. W. received, harboured or maintained the principal, after he had so committed the felony; as, for instance, that he concealed him in his house, *Dalt. c.* 161, or shut the door against his pursuers, until he should have an opportunity of escaping, 1 *Hale*, 619, or took money from him to allow him to escape, 9 *H.* 4, 1, or supplied him with money, a horse, or other necessaries, in order to enable him to escape, *Hale's Sum.* 218; 2 *Hawk. c.* 29, *ss.* 26, 30, or that the principal was in prison, and J. W. bribed the gaoler to let him escape; or conveyed instruments to him to enable him to break prison and escape. 1 *Hale*, 621. The felony must be completed at the time of the harbouring. 2 *Hawk. c.* 29, *s.* 26, *et seq.*

To justify conviction of an accessory after the fact he must be proved to have done some act to assist the felon personally (*R.* v. *Chapple*, 9 *C. & P.* 355), or to have employed another person to harbour or relieve the felon. *R.* v. *Greenacre*, 8 *C. & P.* 35: *R.* v. *Butterfield*, 1 *Cox*, 39: *R.* v. *Lee*, 6 *C. & P.* 536, *and ante*, p. 20: *R.* v. *Jarvis*, 2 *M. & Rob.* 40.

A wife is not punishable as accessory for receiving, harbouring, or maintaining her husband, although she know him to have committed felony; 1 *Hale*, 47, 621: *R.* v. *Manning*, 2 *C. & K.* 903, *n.*: *R.* v. *Good*, 1 *C. & K.* 185: *R.* v. *McClarens*, 3 *Cox*, 425; for in this respect she is presumed to act under his coercion. But she may be convicted as a

principal felon together with her husband, if in the part which she took in the commission of the felony she was acting independently of her husband. *R.* v. *Mary Baines*, 19 *Cox*, 524 (*C. C. R.*); *and see ante*, pp. 20, 30. But no other relationship of parties can excuse the wilful receipt or assistance of felons; a father cannot assist his child, a child his parent, a husband his wife, a brother his brother, a master his servant, or a servant his master. *Ante*, p. 20.

3. It must be proved that J. W., at the time he received or assisted the principal felon, knew that he had committed a felony. This knowledge may be proved either from the defendant's admissions, or the like, or by evidence of circumstances from which the jury may fairly presume it. (*See ante*, p. 340.) *R.* v. *Burridge*, 3 *P. Wms.* 439; 2 *Hawk. c.* 29, *ss.* 32, 33.

Indictment against an Accessory after the Fact, the Principal being convicted. (24 & 25 *Vict. c.* 94, *s.* 3, *ante*, p. 1305.)

After stating the offence of the principal and his conviction, charge the accessory after the fact, thus:]—And the jurors aforesaid, upon their oath aforesaid, do further present, that J. W., well knowing the said J. S. to have done and committed the felony aforesaid, after the same was so committed as aforesaid, to wit, on the day and year aforesaid, him the said J. S. did feloniously receive, harbour, and maintain; against the form, etc. [*as ante*, p. 465].

An indictment as for a substantive felony may be in the same terms. See R. v. *Wallace* (*ante*, p. 1305).

Felony: for punishment see last precedent.

Evidence.

Prove the previous conviction of the principal felon as directed *ante*, p. 360. Prove the offence of the accessory as directed *ante*, p. 1308.

MISPRISION OF TREASON OR FELONY.

Misprision of treason.]—Misprision of treason consists in the concealment or keeping secret of high treason (1 & 2 *Ph. & M. c.* 10, *s.* 6, *ante*, p. 931), or failing with due diligence to inform of treasons committed or threatened by others without the assent of the accused, or any active part in rescuing traitors from justice. *Fourth Report Crim. Law Commissioners*, 1848, p. 79. As to misprisions generally, *see Steph. Dig. Cr. L.* (6th ed.) pp. 121, 122, 401; *Encycl. Engl. Law, vol.* 8, pp. 430, 431; 1 *Hawk. c.* 20; 2 *Hawk. c.* 29, *s.* 23.

The offence is punishable by imprisonment for life, and forfeiture of the goods and the profits of the lands of the offender. The punishment is not affected by 33 & 34 *Vict. c.* 23, *s.* 1. The offence is not triable at quarter sessions (5 & 6 *Vict. c.* 38, *s.* 1, *ante*, p. 126).

The procedure on prosecution for misprision of treason is the same as for treason. *See* the statutes collected under that title, *ante*, pp. 928–937.

Misprision of felony.]—Misprision of felony consists in concealing or procuring the concealment of a felony known to have been committed.

1 *Hawk. cc.* 20, 59; 1 *Chit. Cr. L.* 3. The offence seems to be triable at quarter sessions, and is punishable by fine and imprisonment, the punishment under 8 *Edw.* 1, *c.* 9, having been repealed by 50 *&* 51 *Vict. c.* 55, *s.* 39. There do not appear to be any authorities as to what will constitute concealment; but the offence appears to be founded on a duty to inform the King's officers of the commission of a felony, and to differ from that of an accessory after the fact in that no actual assistance to the felon need be proved, and from that of an accessory before the fact in that no privity to the commission of the felony need be proved. *See* 3 *Co. Inst.* 140; 1 *Hale*, 373. Prosecutions for misprision of felony have not been instituted of recent years. *See Williams* v. *Bayley*, *L. R.* 1 *H. L.* 200, 220, *Lord Westbury*. There is no modern precedent of an indictment for the offence. For an old precedent, *see* 2 *Chit. Cr. L.* 232. As to compounding felonies, etc., *see ante*, p. 1088.

ABETTORS IN MISDEMEANOR.

Statutes.

24 *&* 25 *Vict. c.* 94 (*Accessories and Abettors Act*, 1861), *s.* 8.]—Whosoever shall aid, abet, counsel or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender. [*This section was framed from* 7 *&* 8 *G.* 4, *c.* 30, *s.* 26.]

24 *&* 25 *Vict. c.* 96, *s.* 98—*Aiders and abettors in misdemeanors under the Larceny Acts.*]—*Ante*, p. 1297.

24 *&* 25 *Vict. c.* 97, *s.* 56—*Aiders and abettors in misdemeanors under the Malicious Damage Act*, 1861.]—*Ante*, p. 1298.

24 *&* 25 *Vict. c.* 98, *s.* 49—*Aiders and abettors in misdemeanors under the Forgery Act*, 1861.]—*Ante*, p. 1298.

24 *&* 25 *Vict. c.* 99, *s.* 35—*Aiders and abettors in misdemeanors under the Coinage Offences Act*, 1861.]—*Ante*, p. 1298.

24 *&* 25 *Vict. c.* 100, *s.* 67—*Aiders and abettors in misdemeanors under the Offences against the Person Act*, 1861.]—*Ante*, p. 1298.

33 *&* 34 *Vict. c.* 90, *s.* 12—*Aiders and abettors in misdemeanors under the Foreign Enlistment Act*, 1870.]—*Ante*, p. 956.

Indictment.

After stating the offence of the principal and immediately before the conclusion of the indictment, continue:—And the jurors aforesaid, upon their oath aforesaid, do further present, that J. N., on the day and year aforesaid, unlawfully did aid, abet, counsel, and procure the said J. S. the misdemeanor aforesaid to do and commit; against the peace, etc. *It is now usual to indict aiders, etc., within* 24 *&* 25 *Vict. c.* 94, *s.* 8, *as principals. See*

Benford v. *Sims* [1898] 2 *Q. B.* 641, *decided on similar provisions contained in s.* 5 *of the Summary Jurisdiction Act*, 1848 (11 *& 12 Vict. c.* 43); *and cf. R.* v. *Clayton*, 1 *C. & K.* 128: *R.* v. *Moland*, 2 *Mood. C. C.* 276. *But in certain cases*, e.g., *where the principal offence is that of a bankrupt under s.* 11 *of the Debtors Act*, 1869 (*ante*, p. 1135), *it is still necessary to indict the abettor on the above form.*

Evidence.

Prove that the principal offence was committed, and that the defendant aided, abetted, counselled, or procured its commission (*as ante*, p. 1303).

BOOK II.

PART V.

OFFENCES COMMITTED AFTER PREVIOUS CONVICTION, AND OFFENCES BY CONVICTS ON LICENSE OR UNDER POLICE SUPERVISION.

Statutes.

7 & 8 *G.* 4, c. 28 (*Criminal Law Act*, 1827), s. 11—*Punishment of felony after a previous conviction for felony.*]—(*Whereas it is expedient to provide for the more exemplary punishment of offenders who commit felony after a previous conviction of felony, whether such conviction shall have taken place before or after the commencement of this Act* [1*st July*, 1827]: *be it therefore enacted, that* [*preamble rep. Statute Law Revision, No.* 2, 1888]) if any person shall be convicted of any felony, not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable . . . to be transported beyond the seas for life. . . . [*Now to penal servitude, see ante*, p. 235. *Words omitted rep. Statute Law Revision* (*No.* 2) *Act*, 1888.]

Indictment and trial.]—And in an indictment for any such felony committed after a previous conviction for felony, it shall be sufficient to state that the offender was at a certain time and place convicted of felony, without otherwise describing the previous felony; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of six shillings and eight pence, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same; and if any such clerk, officer, or deputy, shall utter a false certificate of any indictment and conviction for a previous felony, or if any person other than such clerk, officer, or deputy, shall sign any such certificate as such clerk, officer, or deputy, or shall utter any such certificate with a false or counterfeit signature thereto, every such offender shall be guilty of felony; and, being lawfully convicted thereof, shall be liable . . . to be transported beyond the seas for the term of seven years. . . . [*Now to penal servitude, see ante*, p. 235. *Words omitted rep. Statute Law Revision* (*No.* 2) *Act*, 1888.]

20 & 21 *Vict. c.* 3, *s.* 2—*Substitutes penal servitude for transportation.*]—*Ante* p. 235.

54 & 55 *Vict. c.* 69, *s.* 1—*Regulating length of sentences of penal servitude and authorizing imprisonment in lieu thereof.*]—*Ante*, p. 235.

6 & 7 *W.* 4, *c.* 111 (*Previous Conviction Act*, 1836)—*Course of proceedings at the trial on a charge of felony after a previous conviction of felony.*]—*After reciting that by* 7 & 8 *G.* 4, *c.* 28 (*supra*), *provision is made for the more exemplary punishment of offenders who shall commit any felony not punishable with death after a previous conviction for felony; and that since the passing of the said Act the practice had been on the trial of any person for any subsequent felony to charge the jury to inquire at the same time concerning such previous conviction: and that doubts might be reasonably entertained whether such practice was consistent with a fair and impartial inquiry as regarded the matter of such subsequent felony, and it was expedient that such practice should thenceforth be discontinued, enacts:*—That from and after the passing of this Act [*20th August*, 1836] it shall not be lawful on the trial of any person for any such subsequent felony to charge the jury to inquire concerning such previous conviction until after they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same; and whenever in any indictment such previous conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding as aforesaid: provided nevertheless, that if upon the trial of any person for any such subsequent felony as aforesaid, such person shall give evidence of his or her good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the indictment and conviction of such person for the previous felony before such verdict of guilty shall have been returned; and the jury shall inquire concerning such previous conviction for felony at the same time that they inquire concerning the subsequent felony.

24 & 25 *Vict. c.* 96 (*Larceny Act*, 1861), *s.* 7—*Punishment of simple larceny after a previous conviction of felony.*]—*Ante*, p. 428.

Sect. 8—*Punishment of simple larceny, or any offence by the Larceny Act made punishable like simple larceny after a previous conviction of any indictable misdemeanor punishable under the Larceny Act.*]—*Ante*, p. 428. *Obtaining money or goods by false pretences is not an offence "made punishable like simple larceny" within this section, and therefore the fact that in an indictment for that offence a previous conviction for an indictable misdemeanor under the Larceny Act is charged (and proved) does not authorize the court, on conviction of the subsequent offence, to pass a sentence of penal servitude for a longer term than five years. R. v. Horn*, 15 *Cox*, 205.

Sect. 9—*Punishment of simple larceny, or any offence by the Larceny Act made punishable like simple larceny after two summary convictions.*]—*Ante*, p. 429.

Sect. 116—*Form of indictment, and course of proceeding at trial, for an offence punishable under the Larceny Act committed after a previous conviction for any felony, misdemeanor or offence punishable upon summary conviction.*]—*Ante*, p. 430.

24 & 25 *Vict. c.* 99 (*Coinage Offences Act*, 1861), *s.* 12—*Uttering base coin after a previous conviction under ss.* 9-11.]—*Ante*, p. 973.

Sect. 37—*Form of indictment and course of proceedings at trial for an offence against the Coinage Act, after a previous conviction for an offence against that Act.*]—*Ante*, p. 961.

27 & 28 *Vict. c.* 47 (*Penal Servitude Act*, 1864) *s.* 9—*Remission of convict to undergo original sentence on revocation or forfeiture of licence.*]—Where any licence granted in the form set forth in the said schedule A. is forfeited by a conviction *on indictment of any offence*, or is revoked in pursuance of a summary conviction under this Act or any other Act of Parliament, the person whose licence is forfeited or revoked shall, after undergoing any other punishment to which he may be sentenced for the offence in consequence of which his licence is forfeited or revoked, further undergo a term of penal servitude equal to the portion of his term of penal servitude that remained unexpired at the time of his licence being granted, and shall for the purpose of his undergoing such last-mentioned punishment be removed from the prison of any county, borough, or place in which he may be confined, to any prison in which convicts under sentence of penal servitude may lawfully be confined by warrant under the hand and seal of any justice of the peace of the said county, borough, or place, and shall be liable to be there dealt with in all respects as if such term of penal servitude had formed part of his original sentence.

[*The words in italics were substituted for words originally in the enactment by* 54 & 55 *Vict. c.* 69, *s.* 3. *The section applies now to licences in any form.* 27 & 28 *Vict. c.* 47, *s.* 10; 54 & 55 *Vict. c.* 69, *s.* 5. *As to the effect of the section on the powers of the court, see R.* v. *King* [1897] 1 *Q. B.* 214; 66 *L. J.* (*Q. B.*) 87; 18 *Cox*, 447 (*C. C. R.*); *and ante*, p. 232.]

34 & 35 *Vict. c.* 112 (*Prevention of Crimes Act*, 1871), *s.* 5—*Convict under licence to notify residence to police.*]—Every holder of a licence granted under the *Penal Servitude Acts*, who is at large in Great Britain or Ireland, shall notify the place of his residence to the chief officer of police of the district in which his residence is situated, and shall whenever he changes such residence within the same police district, notify such change to the chief officer of police of that district, *and whenever he is about to leave a police district he shall notify such his intention to the chief officer of police of that district, stating the place to which he is going, and also, if required, and so far as is practicable, his address at that place; and whenever he arrives in any police district he shall forthwith notify his place of residence to the chief officer of police of such last-mentioned district*; moreover, every male holder of such a licence as aforesaid shall, once in each month, report himself at such time as may be prescribed by the chief officer of police of the district in which such holder may be, either to such chief officer himself or to such other person as that officer may direct, and such report may, according as such chief officer directs, be required to be made personally or by letter. *If any person to whom this section applies fails to comply with any of the requisitions of this section, he shall, in any such case, be guilty of an offence against this Act, unless he proves to the satisfaction of the court before whom he is tried, either that being on a journey he tarried no longer in the place, in respect of which he is charged with failing to notify his place of residence, than was reasonably necessary, or that otherwise he did his best to act in conformity with the law; and on conviction of such offence it shall be lawful for the court in its discretion either to forfeit his licence, or to sentence him to imprisonment, with or without hard*

labour, for a term not exceeding one year. [*The words in italics in this section were substituted for the original provisions of the section by s. 4 of the Penal Servitude Act*, 1891 (54 & 55 *Vict. c.* 69).]

42 & 43 *Vict. c.* 55 (*Prevention of Crime Act*, 1879), *s.* 2.]—*After reciting* 34 & 35 *Vict. c.* 112, *ss.* 5, 8, *enacts that*:—Any holder of a licence required under section five, and any person subject to the supervision of the police required under section eight of the *Prevention of Crimes Act*, 1871, to notify his residence or any change of his residence to a chief officer of police, shall comply with such requirement by personally presenting himself and declaring his place of residence to the constable or person who at the time when such notification is made is in charge of the police station or office of which notice has been given to such holder or person as the place for receiving his notification, or if no such notice has been given, in charge of the chief office of such chief officer of police.

The power of the chief officer of a police district to direct the reports required by sections five and eight of the *Prevention of Crimes Act*, 1871, to be made by holders of licences and persons subject to the supervision of the police shall be made to some other person, shall extend to authorize him to direct such reports to be made to the constable or person in charge of any particular police station or office without naming the individual person.

Any appointment, direction, or authority purporting to be signed by the chief officer of police, and to have been made or given for the purposes of this Act, or of sections five and eight of the *Prevention of Crimes Act*, 1871, or one of them, shall be evidence until the contrary is proved, that the appointment, direction, or authority thereby made or given was duly made or given by the chief officer of police, and evidence that it appears from the records kept by authority of the chief officer of police that a person required as above mentioned to notify his residence or change of residence, or make a report, has failed to comply with such requirement, shall be *primâ facie* evidence that the person has not complied with such requirement; but if the person charged alleges that he made such notification or report to any particular person or at any particular time, the court shall require the attendance of such persons as may be necessary to prove the truth or falsehood of such allegation.

34 & 35 *Vict. c.* 112, *s.* 7—*Special offences by persons twice convicted of crime.*]—Where any person is convicted on indictment of a crime [*defined s.* 20, *post*, p. 1317], and a previous conviction of a crime is proved against him, he shall, at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes, be guilty of an offence under this Act, and be liable to imprisonment, with or without hard labour, for a term not exceeding one year, under the following circumstances, or any of them:—

First.—If, on his being charged by a constable with getting his livelihood by dishonest means, and being brought before a court of summary jurisdiction, it appears to such court that there are reasonable grounds for believing that the person so charged is getting his livelihood by dishonest means: or,

Secondly.—If, on being charged with any offence punishable on indictment or summary conviction, and on being required by a court of summary jurisdiction to give his name and address, he refuses to do so, or gives a false name or a false address: or,

Thirdly.—If he is found in any place, whether public or private, under such circumstances as to satisfy the court before whom he is brought that he was about to commit or to aid in the commission of any offence

punishable on indictment or summary conviction; or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction: or,

Fourthly.—If he is found in or upon any dwelling-house, or any building, yard, or premises, being parcel of or attached to such dwelling-house, or in or upon any shop, warehouse, counting-house, or other place of business, or in any garden, orchard, pleasure-ground, or nursery-ground, or in any building or erection in any garden, orchard, pleasure-ground, or nursery-ground, without being able to account to the satisfaction of the court before whom he is brought for his being found on such premises.

Any person charged with being guilty of any offence against this Act mentioned in this section may be taken into custody as follows; (that is to say),

In the case of any such offence against this Act as is first in this section mentioned, by any constable without warrant, if such constable is authorized so to do by the chief officer of police of his district;

In the case of any such offence against this Act as is thirdly in this section mentioned, by any constable without warrant, although such constable is not specially authorized to take him into custody.

Also, where any person is charged with being guilty of an offence against this Act fourthly in this section mentioned, he may, without warrant, be apprehended by any constable, or by the owner or occupier of the property on which he is found, or by the servants of the owner or occupier, or by any other person authorized by the owner or occupier, and may be detained until he can be delivered into the custody of a constable.

[*The defendant can elect to be tried on indictment*, 42 & 43 *Vict. c.* 49, *s.* 17 (*ante*, p. 6), *and the election to be so tried need not be stated in the indictment, see ante*, p. 1152. *On such trial the court has the same power of amendment as in cases ordinarily indictable. R.* v. *Wilcox*, 5 *T. L. R.* 621; 37 *W. R.* 686 (*C. C. R.*).

Where such election is made, the indictment should charge the previous convictions, and they must be given in evidence to the jury on the trial for the subsequent offence, as their proof is essential to establish the complete offence. R. v. *Penfold* [1902] 1 *K. B.* 547; 71 *L. J.* (*K. B.*) 306; 20 *Cox*, 161; 66 *J. P.* 248, *overruling R.* v. *Brown*, 65 *J. P.* 136. *For precedent of indictment, see R.* v. *Penfold, ubi supra. The punishment under this section is altered by* 54 & 55 *Vict. c.* 69, *s.* 6, *post*, p. 1316. *It is submitted that counts charging offences under this section cannot properly be joined with counts charging any other offences. Faulkner* v. *R.*, 21 *T. L. R.* 417 (*K. B. D.*).]

Sect. 8—*Sentence of supervision of the police, when it may be passed.*] —Where any person is convicted on indictment of a "crime" [*as defined in s.* 20, *post*, p. 1317], and a previous conviction of a crime is proved against him, the court, having cognizance of such indictment, may, in addition to any other punishment which it may award to him, direct that he is to be subject to the supervision of the police for a period of seven years, or such less period as the court may direct, commencing immediately after the expiration of the sentence passed on him for the last of such crimes. Every person subject to the supervision of the police, who is at large in Great Britain or Ireland, shall notify the place of his residence to the chief officer of police of the district in which his residence is situated, and shall, whenever he changes such residence within the same police district, notify such change to the chief officer of police of that district, *and whenever he is about to leave a police district he shall notify such his intention to the chief officer of police of that district, stating the place to which he is going, and also, if required, and so far as is practicable, his address at*

that place, and whenever he arrives in any police district he shall forthwith notify his place of residence to the chief officer of police of such last-mentioned district; moreover, every person subject to the supervision of the police if a male shall once in each month report himself, at such time as may be prescribed by the chief officer of police of the district in which such holder may be, either to such chief officer himself, or to such other person as that officer may direct, and such report may, according as such chief officer directs, be required to be made personally or by letter. [*The words in italics were substituted for the former words by* 54 & 55 *Vict.* c. 69, *s.* 4 (1). *The penalty for non-compliance with this section is contained in the last paragraph printed under s.* 5 (*ante*, p. 1313), *which was by* 54 & 55 *Vict.* c. 69, *s.* 4, *substituted for the penalty clause of the present section.*]

54 & 55 *Vict.* c. 69 (*Penal Servitude Act*, 1891), *s.* 2.]—Any constable may take into custody without warrant any holder of a licence under the *Penal Servitude Acts* (16 & 17 *Vict.* c. 99; 20 & 21 *Vict.* c. 3 (*ante*, p. 235); and 27 & 28 *Vict.* c. 47, *see ante*, p. 1313, *and this Act*), or any person under the supervision of the police in pursuance of the *Prevention of Crimes Act*, 1871, whom he reasonably suspects of having committed any offence, and may take him before a court of summary jurisdiction to be dealt with according to law. Any convict may be convicted before a court of summary jurisdiction of an offence against section three of the *Prevention of Crimes Act*, 1871, although he was brought before the court on some other charge or not in manner provided by that section.

Sect. 4, *sub-sect.* 1.]—*Incorporated with* 34 & 35 *Vict.* c. 112, *ss.* 5 *and* 8 (*ante*, pp. 1313, 1315), *which it amends.*

Sub-sect. 2.]—[His] Majesty may by order under the hand of a secretary of state, remit any of the requirements of *ss.* 5 and 8 of the *Prevention of Crimes Act*, 1871, either generally or in the case of any holder of a licence or person subject to the supervision of the police.

Sect. 6—*Extension of* 34 & 35 *Vict.* c. 112, *s.* 7.]—A person who has been convicted on indictment of a crime within the meaning of the *Prevention of Crimes Act*, 1871 (*see s.* 20, *post*, p. 1317), and against whom a previous conviction of such a crime is proved shall, (*a*) if the second sentence is to a term of imprisonment, then at any time within seven years after the expiration of the sentence; and (*b*) if the second sentence is to a term of penal servitude then whilst at large on licence under that sentence, and also at any time within seven years after the expiration of the sentence, be guilty of an offence against the *Prevention of Crimes Act*, 1871, under the circumstances stated in section seven of that Act (*ante*, p. 1314), or any of them, and may be taken into custody in manner provided by that section. [*See R.* v. *Penfold* [1902] 1 *K. B.* 547, *supra*, p. 1315.]

34 & 35 *Vict.* c. 112, *s.* 9—*Form of, and proceedings upon, indictment charging previous conviction.*]—The rules contained in the one hundred and sixteenth section of the *Larceny Act*, 1861 (24 & 25 *Vict.* c. 96) (*ante*, p. 430), in relation to the form of and the proceedings upon an indictment for any offence punishable under that Act committed after previous conviction, shall, with the necessary variations, apply to any indictment for committing a crime as defined by this Act after previous conviction for a crime, whether the crime charged in such indictment or the crime to which such previous conviction relates be or be not punishable under the *Larceny Act*, 1861. [*This section does not apply to an indictment for an offence under s.* 7. *R.* v. *Penfold, ante*, p. 1315. *In Faulkner* v. *R.* (21 *T. L. R.* 417, *K. B. D.*), *where the provisions as to arraignment contained in*

s. 116 *of the Larceny Act*, 1861, *as extended by this section, were contravened, the conviction was quashed on writ of error.*]

Sect. 14—*Care of children of women convicted of crime after a previous conviction.*]—Where any woman is convicted of a crime, and a previous conviction of a crime is proved against her, any children of such woman under the age of fourteen years who may be under her care and control at the time of her conviction for the last of such crimes, and who have no visible means of subsistence, or are without proper guardianship, shall be deemed to be children to whom, in Great Britain, the provisions of the *Industrial Schools Act*, 1866 (29 & 30 *Vict. c.* 118), and in Ireland the provisions of the *Industrial Schools (Ireland) Act*, 1868 (31 & 32 *Vict. c.* 25), apply, and the court by whom such woman is convicted, or two justices or a magistrate, shall have the same power of ordering such children to be sent to a certified industrial school as is vested in two justices or a magistrate by the fourteenth section of the *Industrial Schools Act*, 1866, and by the eleventh section of the *Industrial Schools (Ireland) Act*, 1868, in respect of the children in the said sections described.

Sect. 18—*How previous convictions may be proved.*]—A previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted.

A record or extract of a conviction shall, in the case of an indictable offence, consist of a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction, and purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary conviction shall consist of a copy of such conviction, purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned.

A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same.

A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom; and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof.

A fee not exceeding five shillings may be charged for a record of a conviction given in pursuance of this section.

The mode of proving a previous conviction authorized by this section shall be in addition to and not in exclusion of any other authorized mode of proving such conviction. [*See ante*, pp. 360, 361; *and Commissioner of Metropolitan Police* v. *Donovan* [1903] 1 *K. B.* 895; 20 *Cox*, 435.]

Sect. 20—*Interpretation.*]—The expression "crime" means, in England and Ireland, any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanor under the fifty-eighth section of the *Larceny Act*, 1861 (24 & 25 *Vict. c.* 96, *ante*, p. 622); and in Scotland, any

of the pleas of the crown, any theft which, in respect of any aggravation, or of the amount in value of the money, goods, or thing stolen, may be punished with penal servitude, any forgery, and any uttering of any forged writing, falsehood, fraud and wilful imposition, uttering base coin, or the possession of such coin with intent to utter the same.

The expression "offence" means any act or omission which is not a crime as defined by this Act, and is punishable on indictment or summary conviction.

Indictment for Felony after a Previous Conviction for Felony.

Surrey, to wit:—The jurors for our lord the King upon their oath present, that J. S., on the first day of June, in the year of our Lord ——, one horse of the goods and chattels of J. N., feloniously, unlawfully and maliciously did kill [*see ante*, p. 693, *and describing some felony not punishable with death* (7 & 8 *G.* 4, c. 28, *s.* 11, *ante*, p. 1311), *as in the precedents, ante, passim*]; against the form of the statute in such case made and provided, and against the peace of our lord the King, his crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, and before the commission of the felony hereinbefore charged, to wit, at, etc. [*describe the court where the prisoner was tried and convicted*], on the —— day of ——, in the year of our Lord ——, the said J. S. was convicted of felony, which said conviction is still in full force, strength and effect, and not in the least reversed, annulled or made void. *Where the subsequent offence was not an offence punishable under the Larceny Act*, 1861 (24 & 25 *Vict.* c. 96), *nor an offence against the Coinage Offences Act*, 1861 (24 & 25 *Vict.* c. 99), *committed subsequently to a conviction for any offence against that Act, or any former Act relating to the coin, it was immaterial previously to* 34 & 35 *Vict.* c. 112, *s.* 9, *whether the previous conviction or subsequent offence was first charged in the indictment. R.* v. *M'Evin, Bell*, 20; *S. C. as R.* v. *Hilton*, 28 *L. J.* (*M. C.*) 28. *But the subsequent offence must now be* first *charged in any indictment for committing a crime as defined by* 34 & 35 *Vict.* c. 112, *s.* 20 (*ante*, p. 1317), *after previous conviction for a crime* (34 & 35 *Vict.* c. 112, *s.* 9, *ante*, p. 1316; *and see post*, p. 1321). *It is sufficient to state that the prisoner was at a certain time and place convicted of felony, without otherwise describing the previous felony*, 7 & 8 *G.* 4, c. 28, *s.* 11 (*ante*, p. 1311); 24 & 25 *Vict.* c. 96, *s.* 116 (*ante*, p. 430); 34 & 35 *Vict.* c. 112, *s.* 9 (*ante*, p. 1316); *and it is not necessary to state the judgment, R.* v. *Spencer*, 1 *C. & K.* 159. *But* 24 & 25 *Vict.* c. 99, *s.* 37, *requires a more specific statement of a previous coinage conviction in the case of a subsequent coinage offence* (*see ante*, p. 961). *Any number of previous convictions may be laid and proved. R.* v. *Clark, Dears.* 198; 22 *L. J.* (*M. C.*) 135; 6 *Cox*, 210.

Punishment.]—*Where the indictment is for a felony not punishable with death, and not being simple larceny, committed after a previous conviction for felony, the punishment is penal servitude for life or for not less than three years, or imprisonment for not exceeding two years, with or without hard labour for the whole or any part of the imprisonment.* 7 & 8 *G.* 4, c. 28, *s.* 11 (*ante*, p. 1311); 20 & 21 *Vict.* c. 3 (*ante*, p. 235); 54 & 55 *Vict.* c. 69, *s.* 1 (*ante*, p. 235).

Where the indictment is for simple larceny committed after a previous conviction for felony, the punishment under 24 & 25 *Vict.* c. 96, *s.* 7, *and* 54 & 55 *Vict.* c. 69, *s.* 1 (*ante*, p. 235), *is penal servitude for not exceeding ten years and not less than three years, or imprisonment for not exceeding two years, with or without hard labour; and, if a male under sixteen, with*

or without whipping, as limited by 24 & 25 *Vict. c.* 96, *s.* 119 (*ante*, p. 432); 24 & 25 *Vict. c.* 96, *s.* 7 (*ante*, p. 428); 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

Where the indictment is for simple larceny, or any offence by the Larceny Act, 1861, *made punishable like simple larceny, committed after a previous conviction of any indictable misdemeanor punishable under the Larceny Act, the punishment is penal servitude for not exceeding seven years and not less than three years, or imprisonment for not exceeding two years, with or without hard labour, and, if a male under sixteen, with or without whipping (as limited by* 24 & 25 *Vict. c.* 96, *s.* 119, *ante*, p. 432); 24 & 25 *Vict. c.* 96, *s.* 8 (*ante*, p. 428); 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

"*Any offence made punishable like simple larceny*" *is intended to apply to the offences referred to in ss.* 31, 32, 33, *and* 36 *of the Larceny Act,* 1861, *and does not include the offence of obtaining goods, etc., by false pretences. R. v. Horn,* 15 *Cox,* 205 (*C. C. R.*). *The only effect, therefore, of charging a previous conviction for an indictable misdemeanor punishable under the Larceny Act,* 1861, *in an indictment for obtaining goods, etc., by false pretences is to enable the court to pass a sentence of police supervision, obtaining goods, etc., by false pretences being a "crime" within s.* 20 *of the Prevention of Crimes Act,* 1871 (*ante*, p. 1317).

Where the indictment is for simple larceny, or any offence by the Larceny Act, 1861, *made punishable like simple larceny (see ante*, p. 428), *committed after two summary convictions of any offence punishable upon summary conviction under* 24 & 25 *Vict. c.* 96, *or* 24 & 25 *Vict. c.* 97, *the punishment is penal servitude for not exceeding seven years, and not less than three years, or imprisonment for not exceeding two years, with or without hard labour, and, if a male under sixteen, with or without whipping, as limited by* 24 & 25 *Vict. c.* 96, *s.* 119 (*ante*, p. 432); 24 & 25 *Vict. c.* 96, *s.* 9 (*ante*, p. 429); 54 & 55 *Vict. c.* 69, *s.* 1 (*ante*, p. 235).

The Prevention of Crimes Act, 1871 (34 & 35 *Vict. c.* 112), *s.* 8 (*ante*, p. 1315), *as explained by s.* 20 (*ante*, p. 1317), *prescribes as an addition to the sentence which may be passed in certain cases of subsequent conviction, the sentence of subjection to the supervision of the police. The circumstances under which that sentence may be passed, and its duration, are fully set out in the sections above referred to. As to the form of and the proceedings upon the indictment in such cases, see s.* 9 (*ante*, p. 1316).

As to the form of indictment and the punishment in the case of subsequent coinage offences, see ante, p. 977, *et seq.*

Evidence.

The allegations in the order in which they occur in the indictment are—1. The subsequent felony, which is proved as in other cases. *See the different titles.* 2. The previous conviction, which is proved by a certificate or, in the case of a summary conviction, by a copy (7 & 8 *G.* 4, *c.* 28, *s.* 11 (*ante*, p. 1311); 24 & 25 *Vict. c.* 96, *s.* 116 (*ante*, p. 430); 24 & 25 *Vict. c.* 99, *s.* 37 (*ante*, p. 961); 34 & 35 *Vict. c.* 112, *s.* 18 (*ante*, p. 361), with evidence of the identity of the defendant. And in order to prove the identity, it is not essential to call a witness who was present at the trial to which the certificate refers; it is sufficient to prove that the defendant is the person who underwent the sentence mentioned in the certificate. *R.* v. *Crofts,* 9 *C.* & *P.* 219: *R.* v. *Leng,* 1 *F.* & *F.* 77: *S. C., as R.* v. *Levy,* 8 *Cox,* 73. In *R.* v. *Ackroyd,* 1 *C.* & *K.* 158: *R.* v. *Stonnell,* 1 *Cox,* 142, it was held that the certificate *must* state that *judgment* was given for the previous felony; and that it was insufficient to state a conviction. But these decisions if not overruled do not apply

where a previous verdict or plea of guilty has been entered under the *Criminal Law Consolidation Acts* of 1861, even if not followed by a judgment. *R.* v. *Blaby* [1894] 2 *Q. B.* 170; 63 *L. J.* (*M. C.*) 133; 18 *Cox*, 5. As to what constitutes a conviction *at common law*, *see ante*, p. 290. (*a*) As to cross-examining prisoners with reference to previous convictions, *see the Criminal Evidence Act*, 1898 (61 & 62 *Vict.* c. 36), *ante*, p. 392, *et seq.*

Offences by Habitual Drunkards.

Statutes.

42 & 43 *Vict.* c. 19 (*Inebriates Act*, 1879), *s.* 3—*Definition of habitual drunkard.*]— . . . "Habitual drunkard" means a person who *not being amenable to any jurisdiction in lunacy* is, notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others, or incapable of managing himself or herself and his or her affairs. [*As to who are amenable to jurisdiction in lunacy, see* 53 & 54 *Vict.* c. 5, *s.* 116; *Wood-Renton on Lunacy*, 392, 954.]

4 *Edw.* 7, c. 15 (*Prevention of Cruelty to Children Act*, 1904), *s.* 11.—*Detention of habitual drunkards convicted of offences as to children.*]—Where it appears to the court by or before which any person is convicted of the offence of cruelty within the meaning of this Act (*s.* 1, *ante*, p. 877), or of any of the offences mentioned in the first schedule to this Act (*ante*, p. 887), that that person is a parent of the child in respect of whom the

(*a*) Considerable difficulty for some time existed as to the course to be pursued under *s.* 11 of the *Criminal Law Act*, 1828 (7 & 8 *G.* 4, c. 28, *ante*, p. 1311). In strictness it was necessary to arraign the prisoner on the whole indictment, which had the effect of prejudicing the jurors by informing them of the previous convictions charged therein, though in the cases of *R.* v. *M'Evin*, *Bell*, 20: *R.* v. *Hilton*, 28 *L. J.* (*M. C.*) 28, it seems to have been considered that on the request of the prisoner's counsel the prisoner might be first arraigned and tried for the subsequent felony, and afterwards be arraigned and tried on the charge of previous conviction. Under 6 & 7 *W.* 4, c. 111 (*ante*, p. 1312), the jury must have been charged, and the evidence must have proceeded as if the indictment did not contain the averment of a previous conviction; and this allegation must not have been opened to the jury, or their verdict taken upon it, until after they had found the prisoner guilty of the subsequent felony, and then the prosecutor must have proved the previous conviction and identity of the defendant, and upon this likewise the jury must have delivered their verdict. *R.* v. *Key*, 2 *Den.* 347; 21 *L. J.* (*M. C.*) 35: *R.* v. *Shuttleworth*, 2 *Den.* 351; 21 *L. J.* (*M. C.*) 36. If, however, the defendant called witnesses to character (or if, by the cross-examination of the witnesses for the prosecution evidence to character was elicited, *R.* v. *Gadbury*, 8 *C.* & *P.* 676: *R.* v. *Shrimpton*, 2 *Den.* 319; 21 *L. J.* (*M. C.*) 37), the previous conviction might be proved in reply, and the compound question would, in that case, be left to the jury in the first instance.

6 & 7 *W.* 4, c. 111, did not effectually secure the object for which it was passed; since the jurors, if they were present at the arraignment of the prisoner, probably would obtain a knowledge of his previous conviction, of which it would be difficult for them to divest their minds, when they had to decide on his guilt or innocence as to the subsequent offence charged against him by the indictment. *Sect.* 116 (*ante*, p. 430) of the *Larceny Act*, 1861, was passed in order to remedy this defect in the law (*see Greaves, Crim. Law Cons. Acts* (2nd ed.), 199), and to regulate the form of indictment and the course of proceedings, "in any indictment for any offence punishable under that Act, and committed after a previous conviction or convictions for any felony, misdemeanor, or offence or offences, punishable upon summary conviction;" and by *s.* 37 (*ante*, p. 961) of the *Coinage Offences Act*, 1861, similar provision was made with respect to offences against the coin. In cases falling within these sections, the indictment *must* first charge the subsequent offence and

offence was committed, or is living with the parent of the child, and is a habitual drunkard within the meaning of the *Inebriates Acts*, 1879 (42 & 43 *Vict. c.* 19), and 1888 (51 & 52 *Vict. c.* 19), the court, in lieu of sentencing such person to imprisonment, may, if it thinks fit, make an order for his detention for any period named in the order, not exceeding twelve months, in a retreat under the said Acts, the licensee of which is willing to receive him, and the said order shall have the like effect, and copies thereof shall be sent to the local authority and secretary of state in like manner, as if it were an application duly made by such person and duly attested by two justices under the said Acts; and the court may order an officer of the court or constable to remove such person to the retreat, and on his reception the said Acts shall have effect as if he had been admitted in pursuance of an application so made and attested as aforesaid: Provided that—

(*a*) an order for the detention of a person in a retreat shall not be made under this section unless that person, having had such notice as the court deems sufficient of the intention to allege habitual drunkenness, consents to the order being made; and

(*b*) if the wife or husband of such person, being present at the hearing of the charge, objects to the order being made, the court shall, before making the order, take into consideration any representation made to it by the wife or husband; and

(*c*) before making the order the court shall, to such extent as it may deem reasonably sufficient, be satisfied that provision will be made for defraying the expenses of such person during detention in a retreat.

[*This section is a re-enactment of* 57 & 58 *Vict. c.* 41, *s.* 11.]

afterwards the previous conviction, and the prisoner (instead of being arraigned at once on the whole indictment, as was the practice in cases falling under 7 & 8 *G.* 4, *c.* 28, *s.* 11, and 6 & 7 *W.* 4, *c.* 111) is, in the first instance, arraigned upon so much only of the indictment as charges the subsequent offence, and it is not until he has been convicted of the subsequent offence, either by his plea of guilty or by verdict, that the fact of the indictment containing a charge of a previous conviction is divulged, unless, indeed, during the trial for the subsequent offence, the prisoner should give evidence of his good character (or should elicit such evidence by cross-examination of the witnesses for the prosecution, *R.* v. *Gadbury*, *R.* v. *Shrimpton*, *supra*), in which case the previous conviction may be proved in reply, and the compound question will, in that case, be left to the jury in the first instance. 24 & 25 *Vict. c.* 96, *s.* 116; *c.* 99, *s.* 37. Two learned writers upon criminal law, Mr. Welsby (*see* the 15th ed. of this work, pp. 831, 832), and Mr. Davis (*see Greaves, Crim. Law Cons. Acts* (2nd ed.), p. 203), were of opinion that 24 & 25 *Vict. c.* 96, *s.* 116, as to proceedings upon an indictment, applied to the proceedings on the trial of *all* indictments containing a charge of a previous conviction, on the ground that the words used in that section are "the proceedings upon *any* indictment for committing *any* offence after a previous conviction or convictions shall be as follows," etc. Mr. Greaves, however, was of a contrary opinion, and maintained that 7 & 8 *G.* 4, *c.* 28, *s.* 11, and 6 & 7 *W.* 4, *c.* 111, continued to govern the proceedings in all cases of felony, committed after a previous conviction for felony, except larceny and coinage offences. *See* 2 *Russ. Cr. by Greaves*, 849 (4th ed.).

The controversy was settled by 34 & 35 *Vict. c.* 112, *s.* 9 (*ante*, p. 1316), which applies the rules contained in 24 & 25 *Vict. c.* 96, *s.* 116, in relation to the form of *and the proceedings upon* an indictment for any offence punishable under that Act committed after previous conviction, with the necessary variations, to any indictment for committing a "crime" (as defined by *s.* 20, viz., any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanor under 24 & 25 *Vict. c.* 96, *s.* 58), after previous conviction for a "crime," whether the "crime" charged in such indictment or the "crime" to which such previous conviction relates be or be not punishable under the *Larceny Act*, 1861. *See Faulkner* v. *R.*, *ante*, pp. 1315, 1316.

61 & 62 *Vict. c.* 60 (*Inebriates Act*, 1898), *s.* 1—(1) *Power where a habitual drunkard is convicted on indictment for an offence to which drunkenness is a contributory cause, to order detention in an inebriate reformatory.*]—Where a person is convicted on indictment of an offence punishable with imprisonment or penal servitude, if the court is satisfied from the evidence that the offence was committed under the influence of drink, or that drunkenness was a contributing cause of the offence, and the offender admits that he is, or is found by the jury to be, a habitual drunkard [*ante*, p. 1320], the court may, *in addition to or in substitution for* any other sentence, order that he be detained for a term not exceeding three years in any state inebriate reformatory, or in any certified inebriate reformatory the managers of which are willing to receive him.

(2) In any indictment under this section it shall be sufficient, after charging the offence, to state that the offender is a habitual drunkard. In the proceedings on the indictment the offender shall, in the first instance, be arraigned on so much only of the indictment as charges the said offence, and if on arraignment he pleads guilty or is found guilty by the jury, the jury shall, unless the offender admits that he is a habitual drunkard, be charged to inquire whether he is a habitual drunkard, and in that case it shall not be necessary to swear the jury again. Provided that, unless evidence that the offender is a habitual drunkard has been given before he is committed for trial, not less than seven days' notice shall be given to the proper officer of the court by which the offender is to be tried, and to the offender, that it is intended to charge habitual drunkenness in the indictment. [*The use of the word "given" seems to mean that the notice need not be in writing. See R.* v. *Shurmer*, 17 *Q. B. D.* 323; 55 *L. J.* (*M. C.*) 153 (*ante*, p. 374), *where a distinction was drawn between the words "served upon" and "given to."*]

Sect. 2—*Power to detain in an inebriate reformatory a habitual drunkard four times convicted of drunkenness, etc.*]—(1) Any person who commits any of the offences mentioned in the first schedule to this Act, and who within the twelve months preceding the date of the commission of the offence has been convicted summarily at least three times of any offences so mentioned, and who is a habitual drunkard, shall be liable on conviction on indictment, or if he consents to be dealt with summarily [*see* 42 & 43 *Vict. c.* 49, *s.* 12], on summary conviction, to be detained for a term not exceeding three years in any certified reformatory the managers of which are willing to receive him. [*The consent of the defendant to be tried summarily under this section is necessary before a magistrate can make an order under s.* 6, *sub-s.* 1, *of the Licensing Act*, 1902. *Commissioner of Metropolitan Police* v. *Donovan* [1903] 1 *K. B.* 895; 20 *Cox*, 435.]

(2) The *Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), shall apply to proceedings under this section as if the offence charged were specified in the second column of the first schedule to the Act [*which relates to indictable offences by adults who consent to be summarily tried. Under this clause the offender must be informed of his right to be tried on indictment: see* 42 & 43 *Vict. c.* 49, *s.* 17, *and R.* v. *Cockshott* [1898] 1 *Q. B.* 582; 67 *L. J.* (*Q. B.*) 467.]

Sect. 3—*Power of secretary of state to establish state inebriate reformatories.*]—*Two such reformatories have been established, at Aylesbury Prison for women, and at Warwick Prison for men. See Parl. Pap.* 1904 (*C.* 2285), p. 91.

Sect. 4—*Power of secretary of state to make rules and regulations for the*

management of state inebriate reformatories.]—*Exercised as to England* 21*st June*, 1901, 8*th June*, 1902, 29*th Dec.*, 1903, *and* 29*th April*, 1904. *See Stat. Rules and Orders Revised* (ed. 1904), *vol.* 6, *tit.* "*Inebriate*," p. 51, *and Stat. Rules and Orders*, 1904, p. 261.

Sects. 5, 6, 21—*Power of secretary of state to certify inebriate reformatories and to make regulations for certified inebriate reformatories.*]—*Up to the end of* 1903 *nine such institutions had been certified and others were being founded. See Parl. Pap.* 1904 (*c.* 2285), pp. 5, 13. *Model regulations have been framed for such institutions* (*Id.*, p. 51), *but the regulations for each institution are separately certified, and are printed as statutory rules. Regulations have also been made* (6*th Dec.*, 1900) *as to the absence of inmates on leave and* (4*th June*, 1902) *as to the transfer of inmates from one such reformatory to another and from such reformatories and state inebriate reformatories.*

Sect. 8—*Power of treasury to contribute to the expenses of persons detained in certified inebriate reformatories.*]—*Such contributions are made.*

Sect. 9—*Power of county or borough councils to contribute to or maintain certified inebriate reformatories.*]—*As to the extent to which this power has been exercised, see Parl. Pap.* 1904 (*C.* 2285), pp. 8, 33.

Sect. 29—*Short title and construction.*]—This Act may be cited as the *Inebriates Act*, 1898, and shall be construed as one with the *Inebriates Acts*, 1879 and 1888.

62 *&* 63 *Vict. c.* 35 (*Inebriates Act*, 1899), *s.* 1—*Costs.*]—The expenses of any prosecution on indictment under *s.* 2 of the *Inebriates Act*, 1898, shall be payable as in cases of indictment for felony (*see ante*, p. 246), and where any case under that section is dealt with summarily, the expenses of the prosecution shall be payable in manner provided by *s.* 28 of the *Summary Jurisdiction Act*, 1879 (42 *&* 43 *Vict. c.* 49).

FIRST SCHEDULE TO 61 & 62 VICT. C. 60.

Being found drunk in a highway or other public place, whether a building or not, or on licensed premises.	*Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 12.
Being guilty while drunk of riotous or disorderly behaviour in a highway or other public place, whether a building or not.	
Being drunk while in charge, on any highway or other public place, of any carriage, horse, cattle, or steam-engine.	
Being drunk while in possession of any loaded firearms.	
Refusing or failing when drunk to quit licensed premises when requested.	*Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 18.

FIRST SCHEDULE—*continued.*

Refusing or failing when drunk to quit any premises or place licensed under the *Refreshment Houses Act*, 1860, when requested.	*Refreshment Houses Act*, 1860 (23 & 24 *Vict.* c. 2), s. 41.
Being found drunk in any street or public thoroughfare within the metropolitan police district, and being guilty while drunk of any riotous or indecent behaviour.	*Metropolitan Police Act*, 1839 (2 & 3 *Vict.* c. 47), s. 58.
Being drunk in any street and being guilty of riotous or indecent behaviour therein.	*Town Police Clauses Act*, 1847 (10 & 11 *Vict.* c. 89), s. 29.
Being intoxicated while driving a hackney carriage.	*Town Police Clauses Act*, 1847 (10 & 11 *Vict.* c. 89), s. 61.
Being drunk during employment as a driver of a hackney carriage, or as a driver or conductor of a stage carriage in the metropolitan police district.	*London Hackney Carriages Act*, 1843 (6 & 7 *Vict.* c. 86), s. 28.
Being drunk and persisting, after being refused admission on that account, in attempting to enter a passenger steamer. Being drunk on board a passenger steamer, and refusing to leave such steamer when requested.	*Merchant Shipping Act*, 1894 (57 & 58 *Vict.* c. 60), s. 287.
[Being found drunk on any highway or other public place, whether a building or not, or on any licensed premises, while having the charge of a child under the age of seven years.	*Licensing Act*, 1902 (2 *Edw.* 7, c. 28), s. 2, *sub-s.* 3 (E).]
Being found in a state of intoxication and incapable of taking care of himself and not under the care or protection of some suitable person, in any street, thoroughfare, or public place.	*Public Houses Acts Amendment (Scotland) Act*, 1862 (25 & 26 *Vict.* c. 35), s. 23.
Being in any street drunk and incapable and not under the care and protection of some suitable person.	*Burgh Police (Scotland) Act*, 1892 (55 & 56 *Vict.* c. 55), s. 381.
Being drunk while in charge in any street or other place of any carriage, horse, cattle, or steam-engine, or when in possession of any loaded firearms.	*Burgh Police (Scotland) Act*, 1892 (55 & 56 *Vict.* c. 55), s. 380.
[Behaving while drunk in a riotous or disorderly manner in any street, road, or public place, or in any building to which the public have access.	*Inebriates Amendment (Scotland) Act*, 1900 (63 & 64 *Vict.* c. 28), s. 2; *but see* s. 3.]

FIRST SCHEDULE—*continued.*

Being found in any shebeen drunk.	*Public Houses Acts Amendment (Scotland) Act*, 1862 (25 & 26 *Vict.* c. 35), s. 19.
Refusing or neglecting when drunk to quit any premises or place licensed under the *Refreshment Houses (Ireland) Act*, 1860, when requested.	*Refreshment Houses (Ireland) Act*, 1860 (23 & 24 *Vict.* c. 107), s. 42.
Being drunk in any street or public thoroughfare within the Dublin police district, or being guilty while drunk of any riotous or indecent behaviour.	*Dublin Police Act*, 1842 (5 & 6 *Vict.* c. 24), s. 15.
Being found drunk in any street, square, lane, road, way, or other public thoroughfare or place.	*Licensing (Ireland) Act*, 1836 (6 & 7 *W.* 4, c. 88), s. 12.
All similar offences in local Acts.	

Indictment under 61 & 62 *Vict.* c. 60, s. 1 (*ante*, p. 1322).

After the charging of an offence by A. B., punishable with penal servitude or imprisonment in accordance with previous precedents, continue:]—And the jurors aforesaid, on their oath aforesaid, do further present, that the said A. B. is a habitual drunkard within the meaning of the first section of the *Inebriates Act*, 1898.

Evidence.

As to proof of the offence charged, *see ante, passim.* Prove also that the offence was committed under the influence of drink, or that drunkenness was a contributing cause of the offence (*see ante*, p. 29). To prove that the offender is a habitual drunkard, call evidence to show that he is addicted to the intemperate use of intoxicants (*see ante*, p. 30), and that he has consequently on specified occasions been dangerous to himself or others, or incapable of managing his affairs, and that he has not been certified as insane, nor otherwise rendered amenable to jurisdiction in lunacy. Previous convictions of offences within the first schedule seem to be admissible. Seven days' notice prior to the trial (*see ante*, p. 1322) of the intention to charge habitual drunkenness must be given to the accused person and to the proper officer of the court of trial, unless evidence of habitual drunkenness has been given before the magistrates.

Indictment under 61 & 62 *Vict.* c. 60, s. 2 (*ante*, p. 1322).

Commencement as ante, p. 434]—that A. B. on the —— day of —— was found drunk on certain premises licensed for the sale of intoxicating liquors, to wit, at the ——; against the form of the statutes in such case made and provided. And the jurors aforesaid, on their oath aforesaid,

do further present, that the said A. B. within the twelve months next preceding the commission of the offence hereinbefore charged and stated was summarily convicted three (*"three or more"*) times of certain offences mentioned in the first schedule of the *Inebriates Act*, 1898, to wit, on the —— day of —— before a court of summary jurisdiction sitting at —— for —— of (*specify an offence within the schedule*) and (——, *state the other previous convictions in similar manner to the first*). And the jurors aforesaid, on their oath aforesaid, do further present, that the said A. B. is a habitual drunkard within the meaning of the second section of the *Inebriates Act*, 1898. (*Cf. the precedents, ante*, pp. 977, 1246.)

Evidence.

Prove the commission of the subsequent offence. *See Stone, Justices' Manual* (37th ed.). Prove the previous convictions by producing a record or abstract, with evidence to identify the defendant with the person convicted. *See* 34 & 35 *Vict. c.* 112, *s.* 18 (*ante*, p. 361). Convictions in Scotland or Ireland appear to be admissible. The register of the court of summary jurisdiction is not sufficient proof on a trial on indictment. *See* 42 & 43 *Vict. c.* 49, *s.* 29 (2): *Commissioner of Metropolitan Police* v. *Donovan* [1903] 1 *K. B.* 895; 20 *Cox*, 435. Prove that the accused is a habitual drunkard as directed under the last precedent.

APPENDIX.

CLASSIFICATION OF PRISONERS.

NOTE.—*The rules printed below (which are extracts from the prison rules now in force) are included in this work for the information of courts whose duty it is to sentence prisoners; but the classification provided by the rules is a matter for the prison authorities and not for the court.*

I.—CONVICT PRISONS.

RULES, DATED JANUARY 21, 1905, AS TO DIVISION AND CLASSIFICATION, MADE BY THE SECRETARY OF STATE UNDER THE PRISON ACT, 1898. [STAT. RULES AND ORDERS, 1905, No. 75].

1. There shall be two divisions of penal servitude, viz.:—
"A."—The Ordinary Division.
"B."—The Long-Sentence Division, for selected convicts who are sentenced to terms of more than ten years, and who have served more than seven and a half years.

2. The case of every convict in the Ordinary Division whose sentence is in excess of ten years shall be submitted by the Directors to the Secretary of State, as soon as he has earned the marks representing that period, for the purpose of decision whether he shall be placed in the Long-Sentence Division. In deciding whether a convict shall be placed in this division, regard will be had to his offence, his general character and antecedents, and his conduct and industry in prison.

"A."—Ordinary Division.

3. All convicts in the Ordinary Division shall be classified by the Directors immediately after conviction as follows, viz.:—(*a*) The Star Class; (*b*) the Intermediate Class; and (*c*) the Recidivist Class. Convicts of each class shall, as far as practicable, be kept apart by themselves, and not be allowed to associate with convicts of the other classes.

4. *The Star Class.*—Any convict shall be eligible for this class who has never been previously convicted, or who is not habitually criminal or of corrupt habits. Convicts in this class shall be liable to be removed to the Intermediate Class if found to exercise a bad influence over other convicts.

5. *The Intermediate Class.*—Any convict may be placed in this class—
(*a*) who has not been previously convicted, but who, owing to his general character and antecedents, is not considered by the Directors to be suitable for the Star Class; or
(*b*) whose record shows that he has been previously convicted, but not of such grave or persistent crime as would bring him within the Recidivist Class.

6. *The Recidivist Class.*—Any convict may be placed in this class—
(*a*) who has been previously sentenced to penal servitude or whose record shows that he has been guilty of grave or persistent crime; or
(*b*) whose licence, under a sentence of penal servitude, has been revoked or forfeited.

7. Convicts in the Intermediate Class may be promoted to the Star Class on their showing proofs of a reformed character, or they may be reduced to the Recidivist Class if they are known to be exercising a bad influence over their fellow-convicts.

8. (*a*) Every male convict shall pass the first part of his sentence in separate confinement for the following periods, according to the class in which he is placed, viz.—Those in the Star Class for not more than the first three months of their sentence; those in the Intermediate Class for not more than the first six months; and those in the Recidivist Class for not more than the first nine months; unless, in any case, the convict's mental or physical condition is, in the opinion of the medical officer, such as to render a reduction of the prescribed term of separate confinement advisable.

(*b*) Subject to the last-mentioned condition, every female convict shall pass the first three months of her sentence in separate confinement.

"*B.*"—*Long-Sentence Division.*

9. Convicts in the Long-Sentence Division shall, when practicable, be kept in a prison or part of a prison set apart for them.

10. They shall wear a special dress different from that worn by convicts of the Ordinary Division.

11. They shall be allowed to earn, by special industry with good conduct, gratuity continuously throughout their sentence, according to a prescribed scale, and a portion of such gratuity may be used for the purchase of certain articles of comfort or relaxation, prescribed by the Directors from time to time, which articles will be supplied from a prison store. The remainder of each convict's gratuity will be applied for his benefit in such manner as may be prescribed by the Directors, after careful inquiry into each case.

12. They may be allowed to have their meals in association.

13. They may be allowed to converse with each other at exercise and at meals, but not during hours of labour.

14. A convict who abuses any of the privileges conferred by these Special Rules will be liable to be deprived of them, in addition to being punished under the ordinary prison rules.

15. Any convict in the Long-Sentence Division who behaves badly shall be liable to be degraded to the Ordinary Division.

16. Convicts of the Long-Sentence Division shall be subject to the General Rules for the Government of Convict Prisons, except so far as they are inconsistent with these Special Rules.

17. The rules numbered 29, 30, and 31 (1) and (3), made by the Secretary of State on April 21, 1899, are hereby revoked.

18. The above rules shall come into force on April 1, 1905.

RULES, DATED JANUARY 21, 1905, AS TO JUVENILE-ADULT CONVICTS, MADE BY THE SECRETARY OF STATE UNDER THE PRISON ACT, 1898. [STAT. RULES AND ORDERS, 1905, NO. 74.]

1. There shall be a separate classification of selected convicts sentenced to penal servitude, who, on conviction, are under the age of twenty-one years.

2. The classification shall be made by the Directors as soon as possible after conviction, and after full inquiry into the general character and antecedents of the convicts.

3. The classification shall be as follows:—

(*a*) Selected convicts under the age of eighteen who may be sent by order of the Secretary of State to a specially selected prison for treatment under the Rules for Juvenile-Adult Prisoners, as approved for Local Prisons.

(*b*) Convicts who have never been previously convicted, or who are not habitually criminal or of corrupt habits, and who are considered to be eligible for the Star Class.

(*c*) Ordinary convicts not so eligible.

4. Provision will be made, as far as practicable, for keeping each class apart from the others and from the older convicts; and it will be the duty of the governor and chaplain to devote special attention to these cases with a view to acquiring a personal influence over them.

5. Special attention shall be given to their education by instruction in the ordinary subjects of the Elementary Education Code, by lectures and addresses, and by their being provided with library books and useful literature, which they shall be encouraged to read.

6. They shall be employed in association in workshops or in outdoor work, such as farming, etc., and they shall be specially instructed in useful trades and industries, which may fit them to earn their livelihood on release.

7. Should it appear to the governor or chaplain that the habit and character of any convict of this class are not suitable for this special treatment, the fact will be reported to the Directors, who may remove him from the class.

8. Special arrangements shall be made with Discharged Prisoners' Aid Societies, or other philanthropic societies, for the supervision of these cases on discharge, and with a view to provision being made for the convict's future welfare.

9. Juvenile-adult convicts will be subject to the General Rules for the Government of Convict Prisons, except so far as they are inconsistent with these Special Rules.

10. The above rules shall come into force on April 1, 1905.

PRISON RULES, DATED APRIL 21, 1899, MADE BY THE SECRETARY OF STATE UNDER THE PRISON ACT, 1898. [STAT. RULES AND ORDERS, 1899, No. 821].

Classification and Remission.

Rules 29, 30, 31 (1), (3), as to classification, are revoked and superseded by the rules printed *ante*, p. 1328.

31. (2) He (every male prisoner) shall also, if eligible, receive school instruction daily, and shall be frequently visited by the governor, chaplain, and medical officer.

32. *Progressive stages.*]—(1) A system of progressive stages shall be established with specific privileges attached to each stage, and every prisoner shall have the opportunity of profiting by this system.

(2) A prisoner while in any stage shall be entitled to every privilege attached to that stage, unless he forfeits any privilege as provided by this rule.

(3) The promotion of a prisoner from one stage to another shall be gained by industry, but it may be postponed for idleness or misconduct, or he may be removed to a lower stage, or he may forfeit any of the privileges of his stage.

33. *Remission.*]—By hard labour and industry with good conduct a male prisoner may render himself eligible for a licence when one-fourth of his sentence has yet to run. In like manner a female prisoner may render herself eligible for a licence when one-third of her sentence has yet to run. The case of a prisoner under sentence of penal servitude for life will be specially considered at the end of twenty years.

34. *Refuge.*]—A female prisoner may be allowed, on such conditions as may be laid down, to pass the last nine months of her imprisonment in an improved refuge.

35. *Record of industry.*]—(1) A daily record of the industry of every prisoner shall be kept in marks, the award of which shall be carefully supervised by the governor and deputy governor, and every prisoner shall be required to earn, as a condition of becoming eligible for a licence as above mentioned, the number of marks assigned to his sentence, and, in addition, any marks he may have forfeited for misconduct.

(2) Every prisoner shall also be required to earn, as a condition of obtaining promotion to a higher stage, the number of marks assigned to his existing stage, and, in addition, any marks forfeited for misconduct.

(3) Marks for remission of sentence, not earned by industry, in consequence of physical or mental weakness, or illness, shall be granted in every case where it is certified by the medical officer that the illness was actual, and not feigned, or was not the result of misconduct.

Employment.

86. *Restrictions on employment of prisoners.*]—A prisoner may be employed in the service of the prison, but shall not be employed in the discipline thereof, or in the service of any officer or servant thereof, or in the service or education of any other prisoner.

87. *Hours of work.*]—Every prisoner, whether in separate confinement or on public works, shall, unless prevented by sickness, be employed every day in such work as the governor may appoint. The hours of work in each day shall not exceed ten, exclusive of the time allowed for meals.

88. *Certificate as to fitness for labour.*]—(1) No prisoner shall be required to perform any labour of any description unless certified by the medical officer to be fit for such labour.

(2) *Employment of aged and weak prisoners.*]—An aged prisoner in weak health, or any prisoner suffering from physical or mental infirmity shall be employed on such work only and in such way as the medical officer may direct.

89. *Employment on Sunday, etc.*]—(1) On Sunday, Christmas Day, Good Friday, and General Fast or Thanksgiving Days, the employment of a prisoner shall be confined to what is strictly necessary for the service of the prison.

(2) A prisoner who is a Jew shall not be compelled to labour on his Sabbath or on such days of Festival as may be prescribed.

II.—LOCAL PRISONS.

PRISON RULES, DATED APRIL 21, 1899, MADE BY THE SECRETARY OF STATE UNDER THE PRISON ACT, 1898. [STAT. RULES AND ORDERS, 1899, No. 322.]

PART. I.

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Classification and Remission.

34. *Classification of prisoners.*]—All convicted prisoners, except offenders of the first and second divisons, shall be classified as follows:—

(*a*) Star Class, to consist of prisoners who have not been previously convicted of serious crime, or who are not habitually criminal or of corrupt habits.

(*b*) Ordinary Class, to consist of prisoners who have been previously convicted of serious crime, or who are habitual criminals or of corrupt habits.

(*c*) Juvenile offenders. . . . (*a*)

35. *Progressive stages.*]—(1) A system of progressive stages shall be established with specific privileges attached to each stage, and every prisoner shall have the opportunity of profiting by this system.

(2) A prisoner while in any stage shall be entitled to every privilege attached to that stage, unless he forfeits any privilege as provided by this rule.

(3) The promotion of a prisoner from one stage to another shall be gained by industry, but it may be postponed for idleness or misconduct, or he may be removed to a lower stage, or he may forfeit any of the privileges of his stage.

36. *Record of industry.*]—(1) A daily record of the industry of every prisoner shall be kept in marks, the award of which shall be carefully supervised by the governor and deputy governor, and every prisoner shall, as a condition of becoming eligible for remission, earn the required number of marks, and, in addition, any marks he may have forfeited for misconduct.

(*a*) As to juvenile-adult prisoners, *see post*, p. 1338.

(2) Every prisoner shall also be required to earn, as a condition of obtaining promotion to a higher stage, the number of marks assigned to his existing stage, and, in addition, any marks forfeited for stage.

(3) Marks for remission of sentence, not earned by industry, in consequence of physical or mental weakness, or illness, shall be granted in every case where it is certified by the medical officer that the illness was actual and not feigned, or was not the result of misconduct.

37. *Remission of sentence.*]—A convicted prisoner sentenced to imprisonment, whether by one sentence or cumulative sentences, for a period exceeding six calendar months, shall be eligible, by special industry and good conduct, to earn a remission of a portion of his imprisonment not exceeding one-fourth of the period remaining after he has served six calendar months, and on his discharge he shall be furnished with a certificate by the governor that he has been released under *s.* 8 of the *Prison Act*, 1898.

Employment.

38. *Restrictions on employment of prisoners.*]—A prisoner may be employed in the service of the prison, but shall not be employed in the discipline thereof, or in the service of any officer or servant thereof, or in the service or education of any other prisoner.

39. *Hard labour.*]—(1) Every male prisoner, not being a juvenile offender, if sentenced to hard labour, shall, for 28 days, or for the whole of his sentence, if it is less than 28 days, be employed in strict separation on hard bodily or hard manual labour, provided that no prisoner shall be so employed for more than ten or less than six hours per diem, exclusive of meals. If his sentence is more than 28 days, he shall, after that period, provided his conduct and industry are good, be employed on labour of a less hard description in association if practicable, and shall be eligible for all the privileges of the Progressive Stage System. Provided that no prisoner shall be required to perform any labour of any description unless certified by the medical officer to be fit for such labour.

(2) An aged prisoner in weak health, or any prisoner suffering from physical or mental infirmity, likely to be aggravated by cellular isolation shall be employed on such work and in such way as the medical officer may direct.

40. *Imprisonment without hard labour.*]—A prisoner sentenced to imprisonment without hard labour shall be required to work, during such number of hours, not more than ten or less than six (exclusive of meals) in each day, as may be prescribed, unless the medical officer certifies that he is unfit for such labour; and shall be liable to punishment for neglect of work. He shall from the beginning of his sentence be employed on some useful industry for the purpose of which he may, if necessary, be associated, and he shall be entitled to such privileges as can be gained by industry with good conduct under the Progressive Stage System.

41. *All labour, if possible, to be productive.*]—The labour of all prisoners shall, if possible, be productive, and the trades and industries taught and carried on shall, if practicable, be such as may fit the prisoner to earn his livelihood on release.

42. *Labour for females.*]—Every female prisoner sentenced to hard labour shall be kept at labour during such number of hours, not more than ten or less than six (exclusive of meals) in each day, as may be prescribed, unless the medical officer certifies that she is unfit for such labour, regard being had to any advice or suggestions that members of the visiting committee or Discharged Prisoners' Aid Society are able to offer on the subject.

43. *Employment on Sundays, etc.*]—(1) On Sunday, Christmas Day, Good Friday, and General Fast or Thanksgiving Days, the employment of a prisoner shall be confined to what is strictly necessary for the service of the prison.

(2) A prisoner who is a Jew shall not be compelled to labour on his Sabbath or on such days of Festival as may be prescribed.

44. *Medical examination of hard labour prisoners.*]—The medical officer shall from time to time examine the prisoners sentenced to hard labour during the time of their being so employed, and shall enter in his journal the name of any prisoner whose health he thinks to be endangered by a continuance at labour, and thereupon that

prisoner shall not again be employed at such labour until the medical officer certifies that he is fit for such employment.

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Part II.

Prisoners awaiting Trial.

Admission, Discharge, and Removal.

185. *Application of rules.*]—The following rules shall apply to any person committed to prison for safe custody in any of the following circumstances:—

(*a*) On his commitment for trial for any indictable offence.

(*b*) Pending the preliminary hearing before justices of a charge against him of an indictable offence, or pending the hearing of an information or complaint against him.

(*c*) Awaiting sentence.

186. *Bath.*]—A prisoner awaiting trial shall not be required to take a bath on reception, if, on the application of the prisoner, the governor decides that it is unnecessary, or the medical officer states that it is for medical reasons unadvisable.

187. *Separation from each other.*]—In order to prevent prisoners awaiting trial from being contaminated by each other, or endeavouring to defeat the ends of justice, they shall be kept separate, and shall not be permitted to communicate together.

188. *Separation from convicted prisoners.*]—Prisoners awaiting trial shall be kept apart from convicted prisoners and, while attending chapel and at other times shall, if possible, be placed so that they may not be in view of the convicted prisoners.

189. *Privileges which may be allowed by visiting committee.*]—The visiting committee shall, on the application of any prisoner awaiting trial, if, having regard to his ordinary habits and condition of life, they think such special provision should be made in his case, permit him—

(1) To occupy, on payment of a small sum fixed by the Commissioners, a suitable room or cell specially fitted for such prisoners, and furnished with suitable bedding and other articles in addition to or different from those furnished for ordinary cells;

(2) To take exercise separately or with selected untried prisoners, if the arrangements and construction of the prison permit it;

(3) To have at his own cost the use of private furniture and utensils suitable to his ordinary habits, to be approved by the governor;

(4) To have, on payment of a small sum fixed by the Commissioners, the assistance of some person to be appointed by the governor, relieving him from the performance of any unaccustomed tasks or offices.

190. *Power to modify routine.*]—The visiting committee may also permit the governor to modify the routine of the prison in regard to any prisoner awaiting trial so far as to dispense with any practice which, in the opinion of the governor, is clearly unnecessary in the case of that particular prisoner.

191. *Application of prisoner's money.*]—Any money in the hands of the governor belonging to any prisoner awaiting trial may be applied to the purpose of making special provision for him in cases where the prisoner is, by these rules, required to make any payment in respect of such special provision.

192. *Use of books or papers.*]—The governor shall, on the application of any prisoner awaiting trial, permit him to have any books, papers, documents, or other articles, in his possession at the time of his arrest which may not be required for evidence against him, and are not reasonably suspected of forming part of property improperly acquired by him, or are not for some special reason required to be taken from him for the purposes of justice or of prison discipline.

Food, Clothing, and Bedding.

193. *Power to procure food, clothing, or bedding.*]—A prisoner awaiting trial may procure for himself, or receive at proper hours, food and malt liquor, clothing, bedding,

or other necessaries, subject to examination and to such rules as may be approved by the Commissioners; and any articles so procured may be paid for out of the money belonging to the prisoner in the hands of the governor. If a prisoner awaiting trial does not provide himself with food, he shall receive the allowance of food allotted to prisoners awaiting trial by the rules of the prison.

194. *Prison dress.*]—A prisoner awaiting trial may, if he desires it, wear the prison dress, and he shall be required to do so if his own clothes are insufficient or unfit for use, or necessary to be preserved for the purposes of justice. The prison dress for a prisoner awaiting trial shall be of a different colour from that of convicted prisoners.

195. *Disinfection.*]—When a prisoner awaiting trial is allowed by the rules to wear his own clothing in prison, the medical officer may, for the purpose of preventing the introduction or spread of infectious disease, order that the clothing be disinfected; and thereupon the clothing shall be disinfected as speedily as possible, and during the process of disinfection the prisoner may be required to wear the prison clothing prescribed for the class of prisoners to which he belongs.

196. *Notice as to provision of food.*]—If a prisoner awaiting trial prefers to provide his own food for any meal he shall give notice thereof beforehand at the time required; but the governor shall not permit any such prisoner to receive any prison allowance of food for the meal for which he procures or receives food at his own expense.

197. *Restrictions on provision of food.*]—Articles of food shall be received by a prisoner awaiting trial only at such hours as may be laid down from time to time. They shall be inspected by the officers of the prison, and shall be subject to such restrictions as may be necessary to prevent luxury or waste.

198. *Restrictions as to articles of drink.*]—A prisoner awaiting trial shall not during any period of twenty-four hours receive or purchase more than one pint of malt liquor, fermented liquor, or cider, or, if an adult, half a pint (8 ozs.) of wine.

199. *Prohibition of sale.*]—No prisoner awaiting trial shall sell or transfer any article whatsoever allowed to be introduced for his use to any other person; and any prisoner transgressing this rule shall be prohibited from procuring any such article for such period as the Commissioners deem proper.

Cleanliness.

200. *Hair-cutting.*]—A prisoner awaiting trial shall not be compelled either to have his hair cut or (if he usually wears his beard, etc.) to shave, except on account of vermin or dirt, or when the medical officer deems it necessary on the ground of health and cleanliness, and the hair of the prisoner shall not be cut closer than may be necessary for the purpose of health and cleanliness.

201. *Cleaning of rooms.*]—The beds of prisoners awaiting trial shall be made, and the rooms and yards in their occupation shall be swept and cleaned every morning. The furniture and utensils appropriated to their use shall be kept clean and neatly arranged. Should any such prisoner object to perform any of these duties, they may be performed for him by an assistant provided under these rules.

Health.

202. *Medical attendance.*]—If any prisoner awaiting trial who is out of health desires the attendance of his usual medical attendant, the visiting committee shall, if they are satisfied that the application is *bonâ fide*, permit him to be visited by that medical attendant at his own expense, and to be supplied with medicine by him, proper precautions being in all cases observed to prevent abuse of these privileges.

Books, etc.

203. *Books, newspapers, etc.*]—A prisoner awaiting trial shall be permitted to have supplied to him, at his own expense, such books, newspapers, or other means of occupation, other than those furnished by the prison, as are not, in the opinion of the visiting committee, or in their absence, and pending their approval, in the opinion of the governor, of an objectionable kind.

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189. *Privileges which may be allowed by visiting committee.*]—The visiting committee shall, on the application of any prisoner awaiting trial, if, having regard to his ordinary habits and condition of life, they think such special provision should be made in his case, permit him—

(1) To occupy, on payment of a small sum fixed by the Commissioners, a suitable room or cell specially fitted for such prisoners, and furnished with suitable bedding and other articles in addition to or different from those furnished for ordinary cells;

(2) To take exercise separately or with selected untried prisoners, if the arrangements and construction of the prison permit it;

(3) To have at his own cost the use of private furniture and utensils suitable to his ordinary habits, to be approved by the governor;

(4) To have, on payment of a small sum fixed by the Commissioners, the assistance of some person to be appointed by the governor, relieving him from the performance of any unaccustomed tasks or offices.

190. *Power to modify routine.*]—The visiting committee may also permit the governor to modify the routine of the prison in regard to any prisoner awaiting trial so far as to dispense with any practice which, in the opinion of the governor, is clearly unnecessary in the case of that particular prisoner.

191. *Application of prisoner's money.*]—Any money in the hands of the governor belonging to any prisoner awaiting trial may be applied to the purpose of making special provision for him in cases where the prisoner is, by these rules, required to make any payment in respect of such special provision.

192. *Use of books or papers.*]—The governor shall, on the application of any prisoner awaiting trial, permit him to have any books, papers, documents, or other articles, in his possession at the time of his arrest which may not be required for evidence against him, and are not reasonably suspected of forming part of property improperly acquired by him, or are not for some special reason required to be taken from him for the purposes of justice or of prison discipline.

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or other necessaries, subject to examination and to such rules as may be approved by the Commissioners; and any articles so procured may be paid for out of the money belonging to the prisoner in the hands of the governor. If a prisoner awaiting trial does not provide himself with food, he shall receive the allowance of food allotted to prisoners awaiting trial by the rules of the prison.

194. *Prison dress.*]—A prisoner awaiting trial may, if he desires it, wear the prison dress, and he shall be required to do so if his own clothes are insufficient or unfit for use, or necessary to be preserved for the purposes of justice. The prison dress for a prisoner awaiting trial shall be of a different colour from that of convicted prisoners.

195. *Disinfection.*]—When a prisoner awaiting trial is allowed by the rules to wear his own clothing in prison, the medical officer may, for the purpose of preventing the introduction or spread of infectious disease, order that the clothing be disinfected; and thereupon the clothing shall be disinfected as speedily as possible, and during the process of disinfection the prisoner may be required to wear the prison clothing prescribed for the class of prisoners to which he belongs.

196. *Notice as to provision of food.*]—If a prisoner awaiting trial prefers to provide his own food for any meal he shall give notice thereof beforehand at the time required; but the governor shall not permit any such prisoner to receive any prison allowance of food for the meal for which he procures or receives food at his own expense.

197. *Restrictions on provision of food.*]—Articles of food shall be received by a prisoner awaiting trial only at such hours as may be laid down from time to time. They shall be inspected by the officers of the prison, and shall be subject to such restrictions as may be necessary to prevent luxury or waste.

198. *Restrictions as to articles of drink.*]—A prisoner awaiting trial shall not during any period of twenty-four hours receive or purchase more than one pint of malt liquor, fermented liquor, or cider, or, if an adult, half a pint (8 ozs.) of wine.

199. *Prohibition of sale.*]—No prisoner awaiting trial shall sell or transfer any article whatsoever allowed to be introduced for his use to any other person; and any prisoner transgressing this rule shall be prohibited from procuring any such article for such period as the Commissioners deem proper.

Cleanliness.

200. *Hair-cutting.*]—A prisoner awaiting trial shall not be compelled either to have his hair cut or (if he usually wears his beard, etc.) to shave, except on account of vermin or dirt, or when the medical officer deems it necessary on the ground of health and cleanliness, and the hair of the prisoner shall not be cut closer than may be necessary for the purpose of health and cleanliness.

201. *Cleaning of rooms.*]—The beds of prisoners awaiting trial shall be made, and the rooms and yards in their occupation shall be swept and cleaned every morning. The furniture and utensils appropriated to their use shall be kept clean and neatly arranged. Should any such prisoner object to perform any of these duties, they may be performed for him by an assistant provided under these rules.

Health.

202. *Medical attendance.*]—If any prisoner awaiting trial who is out of health desires the attendance of his usual medical attendant, the visiting committee shall, if they are satisfied that the application is *bonâ fide*, permit him to be visited by that medical attendant at his own expense, and to be supplied with medicine by him, proper precautions being in all cases observed to prevent abuse of these privileges.

Books, etc.

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Employment.

204. *Employment.*]—A prisoner awaiting trial shall have the option of employment, but shall not be compelled to perform any labour.

205. *Allowance for earnings.*]—If any such prisoner is acquitted, or no bill of indictment is found against him, such an allowance on account of his earnings, if any, shall be paid to the prisoner on his discharge as the Commissioners think reasonable.

206. *Facilities for carrying on usual employment.*]—So far as prison arrangements admit, facilities shall be given to prisoners awaiting trial to work and follow their trades and employments, and all earnings of any such prisoner, after payment thereout of such sum as the Commissioners may determine on account of the cost of his maintenance in the prison, or on account of the use of implements lent to him, shall belong to him.

Visits and Communications.

207. *Visits.*]—(1) Due provision shall be made for the admission at proper times and under proper restrictions, of persons with whom prisoners awaiting trial desire to communicate, care being taken that, so far as is consistent with the interests of justice, the prisoners shall see their legal advisers alone.

(2) Every prisoner awaiting trial shall be permitted to be visited by one person, or (if circumstances permit) by two persons at the same time, for a quarter of an hour on any week day, during such hours as may be appointed.

(3) The visiting committee may, in any special case for special reasons, prolong the period of the visit allowed to any prisoner awaiting trial, or allow him to be visited by more than two persons at the same time.

(4) Every endeavour shall be made to provide that prisoners awaiting trial be not, when being visited, exposed to the view of the friends of other prisoners, and to prevent the friends of one prisoner from coming in contact with the friends of another while in the prison.

208. *Communication with legal adviser.*]—A prisoner awaiting trial shall at his request be allowed to see his legal adviser (by which is to be understood a certificated solicitor or his clerk, if the clerk has written authority from his principal), on any week day, at any reasonable hour, and, if required, in the sight but not in the hearing of an officer.

209. *Communication for the purpose of bail.*]—A prisoner awaiting trial who is in prison in default of bail shall be permitted to see any of his friends, on any week day, at any reasonable hour, for the *bonâ fide* purpose of providing bail.

210. *Written communications.*]—Paper and all other writing materials to such extent as may appear reasonable to the governor shall be furnished to any prisoner awaiting trial who requires to be so supplied for the purposes of communicating with friends or preparing a defence. Any confidential written communication prepared as instructions for a solicitor may be delivered personally to him or his authorized clerk, without being previously examined by any officer of the prison; but all other written communications are to be considered as letters, and are not to be sent out of the prison without being previously inspected by the governor.

Part III.

Offenders of the First Division. (*See ante*, p. 289.)

Admission and Treatment.

213. *Separation from other classes of prisoners.*]—An offender of the first division shall be kept apart from other classes of prisoners.

214. *Bath.*]—An offender of the first division shall not be required to take a bath on reception if, on the application of the prisoner, the governor decides that it is unnecessary, or the medical officer states that it is, for medical reasons, unadvisable.

215. *Search.*]—Every offender of the first division shall be searched only by an officer specially appointed for the purpose.

216. *Special cells.*]—(1) An offender of the first division shall be placed, as soon as possible after reception, in a room or cell appropriated to prisoners of his class, unless there is reason to believe that he is suffering from some infectious disease, in which case he shall be detained in a reception cell till he can be seen by the medical officer.

(2) An offender of the first division shall at all times, except when at chapel or exercise, occupy the room or cell assigned to him.

217. *Privileges which may be allowed by visiting committee.*]—The visiting committee shall, on the application of any offender of the first division, if, having regard to his ordinary habits and conditions of life, they think such special provision should be made in respect to him, permit any such prisoner—

(1) To occupy, on payment of a small sum fixed by the Commissioners, a room or cell specially fitted for such prisoners, and furnished with suitable bedding and other articles in addition to or different from those furnished for ordinary cells;

(2) To have at his own cost the use of private furniture and utensils suitable to his ordinary habits, to be approved by the governor;

(3) To have, on payment of a small sum fixed by the Commissioners, the assistance of some person to be appointed by the governor, relieving him from the performance of any unaccustomed tasks or offices.

218. *Application of prisoner's money.*]—Any money in the hands of the governor, belonging to any offender of the first division, may be applied for making special provision for him in respect of which payment is by these rules required to be made.

Food and Clothing.

219. *Supply of food.*]—An offender of the first division shall be permitted by the visiting committee to supply his own food on giving due notice beforehand, at the time required; but the governor shall not permit him to receive any prison allowance of food at any meal for which he procures or receives food at his own expense.

220. *Restrictions on supply of food.*]—Articles of food shall be received for offenders of the first division only at such hours as are fixed for the purpose. They shall be inspected by the officers of the prison, and shall be subject to such restrictions as may be necessary to prevent luxury or waste.

221. *Restrictions as to articles of drink.*]—An offender of the first division shall not during the 24 hours receive or purchase more than one pint of malt liquor, fermented liquor, or cider, or, if an adult, half a pint (8 ozs.) of wine.

222. *Clothing.*]—An offender of the first division shall be permitted by the visiting committee to wear his own clothing, provided that it is sufficient and is fit for use. The prison dress for an offender of the first division who does not wear his own clothing shall be of a different colour from that of other classes of prisoners.

223. *Disinfection.*]—When an offender of the first division is allowed to wear his own clothing in prison, the medical officer may, for the purpose of preventing the introduction or spread of infectious disease, order that the clothing be disinfected; and thereupon the clothing shall be disinfected as speedily as possible, and during the process of disinfection the prisoner may be required to wear the prison clothing prescribed for the class of prisoners to which he belongs.

224. *Prohibition of sale of property.*]—No offender of the first division shall be allowed to sell or transfer any article whatsoever allowed to be introduced for his use to any other person.

Cleanliness.

225. *Hair-cutting.*]—An offender of the first division shall not be compelled either to have his hair cut, or (if he usually wears his beard, etc.) to shave, except on account of vermin or dirt, or when the medical officer deems it necessary on the ground of health and cleanliness, and the hair of the prisoner shall not be cut closer than may be necessary for the purposes of health and cleanliness.

226. *Cleaning of rooms.*]—The beds of offenders of the first division shall be made and the rooms and yards in their occupation shall be swept and cleaned every morning. The furniture and utensils appropriated to their use shall be kept clean and neatly arranged. Should any such prisoner object to perform any of these duties, they may be performed for him by an assistant provided under these rules.

Books, newspapers, etc.

227. An offender of the first division shall be permitted to have supplied to him, at his own expense, such books, newspapers, or other means of occupation, other than those furnished by the prison, as are not, in the opinion of the visiting committee, or in their absence, and pending their approval, in the opinion of the governor, of an objectionable kind.

Employment.

228. Offenders of the first division shall not be required to work, but they may be permitted (*a*) to follow their trades and professions, if practicable, (*b*) by their consent to be employed on the industries of the prison. In the former case, if they find their own implements, and are not maintained at the expense of the prison, they shall be allowed to receive the whole of their earnings, but the earnings of those who are furnished with implements or are maintained at the expense of the prison shall be subject to a deduction, to be determined by the Commissioners, for the use of implements and the cost of maintenance. In the latter case, they shall be entitled to earn such remission of sentence and gratuity as the rules allow.

Visits and Communications.

229. *Visits and letters.*]—(1) An offender of the first division shall be permitted to be visited once a fortnight by not more than three friends or relations at the same time, for a period of a quarter of an hour during such hours as may be appointed. He shall also be allowed to write one letter and to receive one letter in each fortnight.

(2) The visiting committee may, by permission in any special case for special reasons, prolong the period of the visit allowed to any offender of the first division, or allow additional visits or letters to such reasonable extent as they deem advisable.

(3) The place in which offenders of the first division receive their visits shall not be the same as that in which other prisoners receive their visits, if any other suitable place can conveniently be provided.

230. *Religious services.*]—An offender of the first division who is attended or visited by a minister of a church or persuasion differing from the Established Church shall not be compelled to attend any religious services, except those of the said church or persuasion; but subject to the foregoing provision, the prisoners shall attend divine service on Sundays and on other days when such service is performed, unless they are prevented by illness, or their attendance is dispensed with by the governor or visiting committee for any other reason.

231. *Application of general rules.*]—Offenders of the first division shall also be subject to any general prison rules, except so far as they are inconsistent with the special rules relating to offenders of the first division.

Part IV.

Offenders of the Second Division. (*See ante*, p. 239.)

232. *Separation from other classes of prisoners.*]—An offender of the second division shall, as far as possible, be kept apart from other classes of prisoners.

233. *Bath.*]—An offender of the second division shall, on reception, be required to take a bath, unless, on application, the governor decides that it is unnecessary, or unless the medical officer states that it is, for medical reasons, unadvisable.

234. *Cell.*]—An offender of the second division shall at all times, except when at chapel or exercise, or in associated labour, occupy the cell assigned to him.

235. *Food.*]—An offender of the second division shall receive the allowance of food prescribed for offenders of the first division who do not maintain themselves.

236. *Hair-cutting.*]—An offender of the second division shall not be compelled either to have his hair cut or (if he usually wears his beard, etc.) to shave, except on account of vermin or dirt, or when the medical officer deems it necessary on the ground of health and cleanliness; and his hair shall not be cut closer than may be necessary for the purposes of health and cleanliness.

237. *Cleaning of rooms.*]—The beds of offenders of the second division shall be made, and the rooms and yards in their occupation shall be swept and cleaned, by them every morning. The furniture and utensils appropriated to their use shall be kept clean and neatly arranged by them.

238. *Dress.*]—An offender of the second division shall wear a prison dress of a different colour from that worn by other classes of prisoners.

239. *Mattress.*]—An offender of the second division shall not be deprived of his mattress during any part of his sentence except for misconduct.

240. *Employment.*]—An offender of the second division shall be employed at work of an industrial or manufacturing nature, and thus be afforded facilities for earning, by industry, such remission of sentence and gratuity as the rules allow.

241. *Visits.*]—An offender of the second division shall be permitted to be visited once a month by not more than three friends or relations at the same time, for a period of a quarter of an hour during such hours as may be appointed. He shall also be allowed to write one letter, and to receive one letter in each month.

242. *Application of general prison rules.*]—An offender of the second division shall also be subject to any general prison rules, except so far as they are inconsistent with the special rules relating to offenders of the second division.

Part V.

Offenders of the Third Division.

243. *Treatment under general rules.*]—Offenders of the third division will be treated under the general rules for the government of prisons.

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Part VII.

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Juvenile Offenders under Conviction.

266. *Classification.*]—(1) Every prisoner under the age of 16 shall be classed as a juvenile offender.

(2) Prisoners who have not been in prison before and who are well conducted in prison shall be kept separate from those who have been in prison before or who misbehave in prison.

(3) Any prisoner who declares himself to be more than 16 years of age, but who, in the opinion of the governor, chaplain, and medical officer of the prison, should not, having regard to his character, constitution, and antecedents, properly be classed with adult prisoners, shall also be classed as a juvenile offender.

267. *Prisons for juvenile offenders.*]—If the sentence is for one month or upwards a juvenile offender shall be located in a prison in the district in which accommodation is set apart for juvenile offenders. If the sentence is for less than one month, he shall be retained in the prison to which he has been committed, but be lodged in a part of the prison where he will be completely separated from the adult prisoners.

268. *Separation from adult prisoners.*]—A juvenile offender shall take exercise, receive school instruction, and be seated in chapel, apart from, and, if possible, out of

sight of, adult prisoners, with whom he shall not, on any occasion, be permitted to come into contact.

269. *Mitigation of prison discipline.*]—In the case of a juvenile offender the ordinary prison discipline shall be mitigated in the following manner:—

(*a*) He shall not be required to sleep without a mattress;

(*b*) He shall be allowed special library books as well as books of instruction, from the time of his reception and throughout his sentence;

(*c*) He may be employed in association with other juvenile offenders in workshops, or in outdoor work such as gardening, etc.;

(*d*) He shall, as far as possible, be instructed in a trade which may be useful to him on release; and

(*e*) He shall, if medically fit, be exercised daily at physical drill in lieu of, or in addition to, walking exercise, with a view to his physical development.

270. *Visits.*]—A juvenile offender may be allowed by the visiting committee to receive extra visits, if, in their opinion, such visits are desirable and calculated to improve his moral welfare and future career.

271. *Report to Home Office as to children under* 14.]—Whenever a child under 14 years of age is committed to prison, the governor shall report his reception direct to the Under Secretary of State, Home Office, the same day that the child is first received into custody or again received after having been brought before the court on remand or otherwise, unless by the warrant of commitment the child is ordered to be detained in a reformatory or industrial school.

272. *Duty of chaplain as to juvenile offenders.*]—It shall be the duty of the chaplain to devote individual attention and care to the juvenile offenders, and in co-operation with the visiting committee and the Discharged Prisoners' Aid Society, to make every possible provision for their protection and care on discharge.

273. *Discharge of juvenile offender.*]—Before a juvenile offender is discharged the governor shall inform his relatives and friends on what day and at what time he will be discharged, that they may have the opportunity of attending to receive him; but if such relatives or friends are known to be bringing the young prisoner up in evil courses, then the governor may, with the consent of the visiting committee, abstain from informing his relatives, if some other respectable person, to be approved by the visiting committee, is willing to take care of him, and the prisoner consents.

274. *Application of general prison rules.*]—Convicted juvenile offenders shall also be subject to any general prison rules except so far as they are inconsistent with the special rules for juvenile offenders under conviction.

SPECIAL RULES, DATED JANUARY 24, 1902, MADE BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT UNDER THE PRISON ACT, 1898, WITH REGARD TO PRISONERS BETWEEN THE AGES OF 16 AND 21. [STAT. RULES AND ORDERS, 1902, No. 502.]

Prisoners between the ages of 16 and 21 may be collected in a prison set apart for the purpose, and be subjected to the following Special Rules:—

(1) They shall be strictly classified, regard being had to their character and antecedents.

(2) Each class shall be kept apart from the other.

(3) They shall be divided into three grades: 1st, penal; 2nd, ordinary; and 3rd, special; with special privileges attached to the 3rd or special grade. Each grade shall wear a distinctive dress. On reception a prisoner shall be placed in the 2nd or ordinary grade, and his promotion from the 2nd to the 3rd grade shall be gained by industry with good conduct; but it may be postponed for idleness or misconduct, or he may be removed to the penal grade, or he may forfeit any of the privileges of his grade.

(4) They shall be employed in association in workshops or in outdoor work such as farming, etc., and they shall be specially instructed in useful trades and industries which may fit them to earn their livelihood on release.

(5) They shall, if medically fit, be exercised daily at physical drill in lieu of, or in addition to, walking exercise.

(6) Special attention shall be given to their education by instruction in the ordinary subjects of the Elementary Education Code, by lectures and moral addresses, and by their being provided with library books and useful literature, which they shall be encouraged to read.

(7) At a reasonable time before the discharge of any prisoner, arrangements shall be made with Discharged Prisoners' Aid, or other philanthropic societies or benevolent persons, for the prisoner's future welfare.

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